IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(I) 15

Originating Summons No 7 of 2021

Between

CLQ

… Plaintiff

And

CLR

… Defendant

JUDGMENT

[Arbitration] — [Arbitral tribunal] — [Jurisdiction]

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CLQ
v
CLR

[2021] SGHC(I) 15

Singapore International Commercial Law — Originating Summons No 7 of 2021
Kannan Ramesh J, Sir Henry Bernard Eder IJ, Anselmo Reyes IJ
3 September 2021

26 November 2021 Judgment reserved

Kannan Ramesh J (delivering the judgment of the court):

Introduction

1 Originating Summons No 7 of 2021 is the plaintiff's application under s 10(3) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") to challenge a ruling by the arbitral tribunal ("the Tribunal") that it has jurisdiction in an arbitration commenced by the defendant against the plaintiff.

2 Pursuant to an order of court dated 8 June 2021, there is to be no publication of: (a) the identity of the parties, and (b) any matter that would enable any member of the public to deduce their identity. To give effect to this order, we have anonymised the names of the parties and any related persons or entities. We also use "Ruritania" to refer to the country where the events which are the focus of the present dispute took place.

3 Before the Tribunal, the plaintiff raised, as a preliminary question, the plea that the Tribunal did not have jurisdiction. The plea was on the basis that the defendant repudiated the arbitration agreement between the parties by commencing and continuing legal proceedings ("the Ruritanian Proceedings") in the civil court of Ruritania ("the Ruritanian court") on a dispute that fell within the arbitration agreement, and that the repudiation was accepted by the plaintiff participating in the Ruritanian Proceedings.

4 The Tribunal rejected the plea resulting in the present application. The principal question before the court is whether, objectively assessed, the defendant evinced an intention to abandon the arbitration agreement by commencing and continuing the Ruritanian Proceedings, that is, was there repudiation on the plaintiff's part? This question requires consideration of the context and the manner in which the Ruritanian Proceedings were commenced and pursued.

Facts

5 The plaintiff, CLQ, is the Government of Ruritania ("the Government"). The defendant, CLR, is a company incorporated under the laws of the British Virgin Islands ("the Developer"). At present, the two are involved in arbitration proceedings before the Tribunal in the Singapore International Arbitration Centre ("the SIAC"). The facts leading to the plea before the Tribunal are relatively uncontroversial. The characterisation of the facts is, however, hotly disputed.

The Joint Venture Agreement

6 The Government and the Developer signed a Joint Venture Agreement dated 18 January 2013 ("the JVA"). It was signed on behalf of the Government

by Ruritania's finance minister ("the Minister") as its authorised representative, and Ms [S], the authorised representative of the Developer. The JVA's broad objective was for the Developer to reclaim and develop a site ("the Site") in Ruritania. In furtherance of this, two critical initial steps were to be undertaken under the JVA:

(a) Pursuant to clause 2.1 of the JVA, as soon as practicable, and in any event not later than two weeks from the date of the JVA, the parties were to cause a joint venture company ("the JVC") to be incorporated under Ruritanian law. The clause provided that the Government was obliged to procure all approvals required for the incorporation of the JVC. Under clause 6.2, the Developer and the Government were respectively to subscribe for 75% and 25% of the paid up capital of the JVC.

(b) Pursuant to clause 5.1 of the JVA, the Government would enter into a "Master Lease Agreement" ("the MLA") with the JVC for the lease of the Site to the JVC for an initial period of 50 years. Notably, while the JVA defined the MLA, it did not annex a draft of the MLA to be signed.

The JVC and to a lesser extent the MLA were the subject of the Ruritanian Proceedings.

7 Two more clauses in the JVA are relevant:

(a) Under clause 20.1, the JVA was to be governed, construed and interpreted in accordance with the laws of England. Further, by clause 20.2, the parties mutually undertook that, in the event of any dispute between them, they would in good faith try to resolve the dispute

amicably. Failing this, under clause 20.3, they agreed to refer the dispute to arbitration under SIAC arbitration rules, with the seat and venue of the arbitration being Singapore, and English being the language of the arbitration ("the Arbitration Agreement").

(b) Clause 19.4 *inter alia* provided that any communication from the Developer to the Government concerning the JVA shall be sent to the Minister.

Application to register the JVC

8 On the day that the JVA was signed, the Developer applied to a Ruritanian ministry to register the JVC; it is common ground that this Ministry ("the MOC") is the Ministry to which applications to register companies in Ruritania are submitted. The application was not accepted. It was returned to the Developer without explanation. On 11 February 2013, the Developer filed another application to the MOC. This too was returned without explanation.

9 Not having received an explanation from the MOC for the return of its applications, the Developer was in the difficult position of being unsure whether the applications had been rejected by the MOC and, if so, the reasons why. The Developer therefore wrote to the MOC on 20 March 2013 for clarification. It requested the MOC to state in writing whether (a) the applications had been rejected and (b) the reasons for the rejection if that were the case. Before us, the Developer maintained that it did not receive a reply to its letter. The Government, on the other hand, alleged that by a letter dated 3 April 2013 it replied to the Developer explaining why the applications had been rejected.

10 This letter was adduced before us and provided as follows:

> … I wish to bring to your kind information that, *as per requirements and procedures for the registration of a company with shares held by the Government, a letter from a competent Governmental authority authorizing the Government to hold shares in that company, is required to be submitted* along with company registration documentation. Furthermore, *a letter from a competent Governmental authority authorizing the appointment of members representing Government shareholding to the Board of Directors of the proposed company is also required to be submitted to [the MOC]*, in compliance with applicable laws, regulations and procedural requirements.
>
> Please kindly be informed that, *the application you submitted for the registration of the aforementioned company lacked the documents mentioned above* …
>
> [emphasis added]

11 The Government further alleged that a member of the MOC telephoned Ms [S] to request that she collect the letter, although the Developer disputes this. Save for observing that it is unusual (a) for the Developer not to have collected the letter when it had written to the MOC seeking an explanation only three days prior, and (b) for the MOC not to send the letter through the usual channels when the Developer failed to collect it, we say no more on this issue.

12 What is undisputed is that the letter was never collected by the Developer's representative nor delivered by the MOC to the Developer. Accordingly, prior to the commencement of the Ruritanian Proceedings, the Developer was unaware of the MOC's position on the application to register the JVC, in particular whether it had been rejected and, if so, why. From the Developer's perspective, there was a wall of silence from the MOC.

13 Two points should be noted:

(a) Up to the commencement of the Ruritanian Proceedings, the Developer's interactions were solely with the MOC. It did not contact Ruritania's finance ministry ("the MOF") or the Minister

pursuant to clause 19.4 of the JVA on the basis that there was an issue concerning the JVA, namely, the difficulties faced with the MOC over registration of the JVC.

(b) The day before the Developer's letter to the MOC dated 20 March 2013 was sent, a letter dated 19 March 2013 ("the 19 March Letter") was sent to the MOC by the Office of the President of Ruritania ("the President's Office"). In the letter, the President's Office informed the MOC of new procedures for incorporating and registering a company whose shares were held by the Government. Specifically, approval from the President's Office was required for the incorporation and registration of a private company in which the Government and a private enterprise were shareholders. Further, a letter showing such approval had to be submitted with the application for registration of the company to the MOC.

14 The Developer's failure to procure the requisite letter of approval from the President's Office was relied upon by the Government in the Ruritanian Proceedings as the key reason why the JVC was not registered. It is, however, apparent that: (a) the requirement for the President's approval (and the submission of the resultant letter of approval to the MOC) only came into force after the JVA had been signed, and after the two applications had been rejected; and (b) the Developer learnt of the 19 March Letter's existence and the need for the President's approval letter only after the commencement of the Ruritanian Proceedings.

The Ruritanian Proceedings

15 As a result of the impasse with the MOC over the registration of the JVC and the consequence that the MLA was not entered into between the JVC and

the Government, the Developer initiated the Ruritanian Proceedings some nine months after the JVA was executed, on 19 September 2013. The proceedings were brought against the MOC, Ruritania's tourism ministry ("the MOT") and the MOF, rather than against the Government through the Minister. Neither party raised the Arbitration Agreement in the Ruritanian Proceedings, and the parties proceeded on the basis that Ruritanian law applied to the substantive issues in the litigation.

16 Several documents were filed in the Ruritanian Proceedings, all in the Ruritanian language. English translations were, however, made available to us. These documents were as follows:

(a) On 19 September 2013, Ms [S], on behalf of the Developer, filed a "Plaint form" in the Ruritanian courts ("the Plaint"), which commenced the Ruritanian Proceedings.

(b) On 25 December 2013, the Government filed a response to the Plaint ("the Government's Response").

(c) On 29 December 2013, the Developer filed their first statement ("the Developer's First Statement").

(d) On 5 January 2014, the Government issued its first statement ("the Government's First Statement").

(e) On 9 March 2014, the Government issued another statement ("the Government's Second Statement").

(f) On 11 March 2014, the Developer filed a second statement in response to the Government's Second Statement ("the Developer's Second Statement").

(g) On 20 May 2014, the Government filed its third statement in response to the Developer's Second Statement ("the Government's Third Statement").

The first two documents are pleadings. The other documents are described as "Statements," but appear to be summaries of oral arguments presented by the parties to the Ruritanian court on the date of the document.

17 Aside from these key documents, on 5 March 2014, the Developer tendered a draft of the MLA ("the draft MLA") in the Ruritanian Proceedings. The draft MLA was the subject of the final statements in the Ruritanian Proceedings (the documents listed at (e) to (g) above). The Developer alleged that the draft MLA had been agreed by Ms [S] and the Ruritania's tourism minister at a meeting on 16 January 2013. The occurrence of this meeting was not challenged by the Government in the Ruritanian Proceedings (and indeed in the present application).

18 Judgment in the Ruritanian Proceedings was delivered on 15 July 2014 ("the Ruritanian Judgment"). The Ruritanian court ordered the Government to fulfil all of its obligations under the JVA, including registering the JVC and executing the MLA within five days of registering the JVC. The court directed the Government to sign an MLA in the terms of the draft MLA. While the Ruritanian court did not expressly find that the draft MLA had been agreed as alleged by the Developer, by directing the Government to execute it, the Ruritanian court appeared to accept that it had been agreed.

Events after the Ruritanian Judgment

19 Following the Ruritanian Judgment, the JVC was registered on 10 August 2014. However, for various reasons, the MLA was not executed and

the project under the JVA never took off. Instead, the Government purported to terminate the offer of the MLA and listed the Site for lease in a closed-bid auction. By letters to the MOT and the President's Office on 7 November 2016 and a letter to Ruritania's Attorney General's Office on 28 November 2016, the Developer demanded that the Site be excluded from the auction. The Government did not reply to these letters and the Developer thereafter commenced the arbitration. It is not clear whether there was an attempt to mediate per the terms of the Arbitration Agreement. This point was not pursued before us nor the Tribunal.

The Arbitration and the Tribunal's Decision

20 On 18 December 2019 the Developer filed its Notice of Arbitration against the Government pursuant to the Arbitration Agreement. In the Notice of Arbitration, it alleged that the Government had repudiated the JVA by failing to lease the Site to the JVC under the MLA. The Developer claimed its lost profits and wasted expenses from the Government's repudiation as damages. In its Response to the Notice of Arbitration, the Government raised a jurisdictional challenge. This was that the Developer had repudiated the Arbitration Agreement by commencing the Ruritanian Proceedings in 2013 and the Government had accepted the repudiation by participating in the Ruritanian Proceedings. The Government contended that the Arbitration Agreement had been rescinded as a result. By Procedural Order No 1 issued on 21 July 2020, the Tribunal bifurcated the jurisdictional challenge from the merits of the claim. On 11 September 2020, the Government filed the jurisdictional challenge and it was heard on 4 January 2021.

21 In written grounds of decision dated 22 March 2021 ("the Tribunal's Decision"), the Tribunal determined that the Developer's conduct leading up to

the Ruritanian Judgment could not objectively be viewed as evincing a clear intention to abandon the Arbitration Agreement. Thus, the Arbitration Agreement remained in effect and the Tribunal had jurisdiction. Costs of the jurisdictional challenge were reserved until the Final Award. The Tribunal reasoned as follows:

(a) The law applicable to the question of repudiation was English law since the governing law of the JVA was English law. The question of repudiation was a matter of fact which had to be assessed objectively, with the purported breach of the Arbitration Agreement forming only one element of the factual matrix to be considered. Thus, whether the commencement of legal proceedings constituted a repudiation needed to be analysed in the context in which such conduct had occurred. Ultimately, the question was whether a party had unequivocally abandoned its right and obligation to arbitrate.

(b) The relief sought in the Plaint was "administrative in nature". Moreover, in the "context of [the JVA]", the Arbitration Agreement was a "key protection" for the Developer, as it afforded it a "neutral venue for the resolution of disputes … in the context of a 50-year agreement". Both parties would have been aware of this. That knowledge would be an important part of the context against which an objective bystander had to assess the Developer's actions and its intention in commencing the Ruritanian Proceedings.

(c) The Ruritanian Proceedings were brought against the backdrop of the Developer's efforts to register the JVC and its applications for registration not being approved by the MOC without explanation. The Government had two distinct personae. It was a party to the JVA and, through the MOC, it was "the regulator responsible for the registration

of" the JVC. On the face of the Plaint, it was unclear to which of these twin personae the Ruritanian Proceedings were directed. It would have been unnecessary for the Developer to have joined the three Ministries as parties to the Ruritanian Proceedings, if its purpose was to sue the Government under the JVA. To a reasonable observer, the fact that the three Ministries were named would have made it ambiguous as to whether the Developer intended "to litigate the subject matter of the JVA in a manner demonstrating an abandonment of the Arbitration Agreement".

(d) There was no dispute in the Ruritanian Proceedings on whether the Government was obliged to enter into the MLA under the JVA, the dispute being only on whether the draft MLA had been agreed. As this issue had been raised by the Government in its Second Statement and not the Developer, it could not evidence repudiatory conduct on the Developer's part. Therefore the Developer's response to the issue in the Developer's Second Statement would not be construed by a reasonable observer as an abandonment of the Arbitration Agreement.

(e) The contents of the Ruritanian Judgment were immaterial to the question of repudiation, since its contents reflected the thinking of the Ruritanian court and not the Developer's.

The parties' cases

22 The Government's position is that the commencement of the Ruritanian Proceedings constituted a repudiatory breach of the Arbitration Agreement. It argued that the Ruritanian Proceedings concerned contractual disputes arising under the JVA which fell within the scope of the Arbitration Agreement. The Government noted the reliefs which the Developer was asking for in the

Plaint were in effect for specific performance of the Government's contractual obligations under clauses 2.1 and 5.1 of the JVA. It submitted that, as a result, the Developer must be treated as having unequivocally repudiated the Arbitration Agreement and the Developer's repudiation ought to be regarded as having been accepted by the Government's participation in the Ruritanian Proceedings.

23 The Developer's position is that no dispute under the JVA had been submitted to the Ruritanian court, as the claim in the Ruritanian Proceedings was not for breach of the JVA. Instead, the claim "was a matter of administrative law arising from the failure of local authorities to carry out their statutory functions", and the Developer was merely seeking a "facilitative procedural direction". The Developer contended that the Ruritanian Proceedings were of a "limited nature". In the context of the JVA and the Arbitration Agreement, a reasonable person in the Government's shoes would not have regarded the Developer as intending to repudiate the Arbitration Agreement by commencing the Ruritanian Proceedings.

24 In support of their positions, the parties adduced expert evidence on Ruritanian law. The Government's expert "Dr X" opined that the Ruritanian Proceedings could not be characterised as an administrative action, but were in substance a contractual action to enforce the obligations under the JVA to register the JVC and execute the MLA. The Developer's expert "Mr Y" opined to the contrary that the Ruritanian Proceedings were not a contractual claim for specific performance, but ought to be characterised as an administrative matter. The Developer also challenged the admissibility of certain portions of Dr X's expert opinion.

Issues

25 Two issues arise for consideration. The first is whether Dr X's expert evidence is admissible. The second is whether the Developer's commencement and continuation of the Ruritanian Proceedings amounted to a repudiatory breach of the Arbitration Agreement. The latter is the principal issue and requires consideration of the context in which the Ruritanian Proceedings were commenced and pursued.

Admissibility of Dr X's report

26 The Developer disputes the admissibility of certain portions of Dr X's expert opinion dated 20 May 2021. Those portions contain his opinion on two questions: (a) the significance of naming the three Ministries as parties to the Ruritanian Proceedings and (b) the nature of the Ruritanian Proceedings. The Developer's complaint is that these matters were not raised before the Tribunal. The Developer cites the decision of the High Court in *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322. It refers to [44] of the judgment for the proposition that "a party does not … have a full unconditional power to adduce fresh evidence at will".

27 In response, the Government cites the decision of the High Court in *AQZ v ARA* [2015] 2 SLR 972, where Judith Prakash J, as she then was, stated that there was nothing that restricted parties from adducing new material not before an arbitrator: at [59]. The Developer argues that this position should be preferred, as the present application is a *de novo* review and there should be no limit on the evidence that might be adduced before a reviewing court.

28 We agree with the Government's position. While s 10 of the IAA is titled "Appeal on ruling of jurisdiction", it is trite that the court reviews an arbitral tribunal's jurisdictional ruling on a *de novo* basis. This means that the hearing is conducted as if the original had not taken place: see *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [41]. Therefore, there is no general bar against adducing fresh evidence.

29 Further, the Developer does not contend that the new issues are irrelevant to the application. Neither does it claim to have suffered prejudice from an inability to respond to Dr X's opinion on the two matters. In fact, Mr Y gave his opinion on those questions when he responded to Dr X's report.

Repudiation of the Arbitration Agreement

The law on repudiatory breach

30 At the case management conference on 7 July 2021, the parties took the position that English and Singapore law were the same on the question of repudiatory breach of an arbitration agreement. A similar position was taken before the Tribunal. However, this position might not be accurate, as a review of the jurisprudence makes it evident that there is a difference of approach between Singapore and English law. The divergence is apparent from the written and oral submissions of the Government. It argues that the Developer has "not offered any convincing explanation *to rebut the presumption* that its conduct in commencing and pursuing [the Ruritanian Proceedings] was a repudiatory breach of the Arbitration Agreement" (emphasis added). This is an allusion to observations by the Singapore Court of Appeal in *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)* [2018] 2 SLR 1207 ("*Marty*"). The court in *Marty* stated that "it is strongly

arguable that the commencement of court proceedings is itself a *prima facie* repudiation of the arbitration agreement" and it would "be open to the claimant to displace this *prima facie* conclusion by furnishing an explanation for commencement of the court proceedings": at [54].

31 On the other hand, the Developer's arguments were premised on English cases such as *Rederi Kommanditselskaabet Merc-Scandia IV v Couniniotis SA (The "Mercanaut")* [1980] 2 Lloyd's Rep 183 ("*The Mercanaut*"). Under English law, the breach of an arbitration agreement by pursuing a matter in court does not give rise to a presumption of repudiation. Rather, it must be proven that, by its breach, a party evinced a clear and unequivocal intention not to be bound by the arbitration agreement. Notably, the approach in *The Mercanaut* was criticised in *Marty* at [57]–[60].

32 The parties agree that the law applicable to the question of repudiation is English law. We believe that this is correct. While there is no express choice of law in the Arbitration Agreement, there is a rebuttable presumption that the parties' choice of law for the underlying agreement is the proper law of the arbitration agreement: *BNA v BNB and another* [2020] 1 SLR 456 at [47]. Nothing in the evidence suggests that this presumption has been displaced. Neither party has argued otherwise. Therefore, English law applies. That was also the Tribunal's position.

33 Nonetheless, regardless of whether the applicable law is English or Singapore law, the conclusion ought to be the same. At heart, the English and Singapore approaches involve the same inquiry – did the conduct of a party, objectively assessed, evince a repudiatory intent, that is, was there an unambiguous intention to repudiate the arbitration agreement and abandon the obligation to submit disputes arising out of a contract to arbitration? The parties

accepted this in oral submissions. This is a factual inquiry, the core objective of which was set out in *Marty* at [52] and [54]:

> 52 ***We would emphasise, however, that whether an agreement has been repudiated is an objective inquiry. A repudiatory breach consists of the "manifested intentions" of the breaching party, which a reasonable man in the position of the innocent party would take to indicate that the breaching party no longer intended to perform its contractual obligations*** (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 17.012). To that extent, any explanation given by the breaching party for commencing litigation is ***only relevant if it is manifested in the breaching party's conduct such that it would be apparent to a reasonable person in the position of the innocent party*** …
>
> 54 … It would, however, still be open to the claimant to displace this *prima facie* conclusion by furnishing an explanation for commencement of the court proceedings, ***either on the face of the proceedings themselves or by reference to events and correspondence occurring before the proceedings started which showed objectively that it had no repudiatory intent in doing so***. …
>
> [emphasis added in bold italics; emphasis in italics in original]

This view is shared by the English courts. In *Downing v Al Tameer Establishment and another* [2002] EWCA Civ 721 at [38] the court noted that it was "[a]pproaching the matter objectively, and looking at the correspondence as a whole". In similar vein, in *BEA Hotels NV v Bellway LLC* [2007] 2 Lloyd's Rep 493 ("*BEA Hotels*") at [13] and [14], it was stated that:

> 13 In order to show a repudiation of that agreement to refer, it was not disputed *that BEA would have to show that Bellway evinced an intention no longer to be bound by that agreement and that Bellway's conduct would have to be such that a reasonable person, in BEA's shoes, would understand Bellway to be saying that it was not prepared to continue with the reference.* It was common ground that it was not repudiatory merely to bring proceedings in breach of an arbitration agreement, even if the claims pursued in those proceedings were plainly ones which were subject to the arbitration agreement. *It was undisputed that a breach of an arbitration*

> *agreement by bringing other proceedings was only repudiatory if it was done in circumstances that showed that the party in question no longer intended to be bound to arbitrate*. It was also agreed that *such an intention could not lightly be inferred and could only be inferred from conduct which was clear and unequivocal. If there was some other reason for the breaching of proceedings it would be hard to infer that the party bringing them intended to renounce its obligation to arbitrate*.
>
> 14 Thus, *if the conduct of that party in all the surrounding circumstances did not reveal a clear intention not to be bound by the agreement to refer the claims in question to arbitration, it could not be said that the arbitration agreement or reference had been repudiated. …*
>
> [emphasis added]

34 Thus, the ultimate inquiry is essentially the same under English and Singapore law. *Marty* simply shifts the evidential burden to the party who initiated court proceedings by presuming that the commencement of those proceedings was a *prima facie* repudiation of the arbitration agreement. However, that presumption may be displaced by "furnishing an explanation for commencement of the court proceedings, either on the face of the proceedings themselves or by reference to events and correspondence occurring before the proceedings started, which showed objectively that it had no repudiatory intent in doing so.": at [54]. This shift in emphasis does not alter the overall objective of the inquiry. The facts that must be considered to answer the question of repudiation and repudiatory intent are the same regardless of whether one takes the Singapore or English law approach. The end result of the inquiry ought therefore to be the same.

Breach of the Arbitration Agreement?

35 There was considerable debate between the parties on the nature of the Ruritanian Proceedings. The Developer suggested that, because the Ruritanian Proceedings were merely administrative in nature, there was no breach of the Arbitration Agreement. The Government argued that the

Ruritanian Proceedings constituted a breach of the Arbitration Agreement even if they were administrative in nature. In support, the Government relied on the evidence of an English law expert that was adduced before the Tribunal. The expert opined that, even if the Ruritanian Proceedings were administrative in nature, they would still fall within the ambit of the Arbitration Agreement. He reasoned that the Arbitration Agreement was broadly worded, so that the word "dispute" was not confined in any way. Accordingly, even if the Ruritanian Proceedings were of an administrative character, they "clearly [involved] a dispute arising out of, or relating to, [the JVA], falling within the ambit of [the Arbitration Agreement]", as it "arose with respect to the enforcement of the contractual obligation under … [the JVA]."

36 Neither party pointed us to authority explicitly stating that an administrative action can never constitute a breach of an arbitration agreement. The Government's argument is defensible on a plain reading of the wording of the Arbitration Agreement. Equally, there is force in the Developer's position. It is arguable that a dispute involving significant administrative elements is not arbitrable. In the present case, it might be said that an arbitral tribunal would not have the power to compel the three Ministries named in the Plaint to exercise their statutory powers and discharge their statutory duties. That would constitute a claim for administrative relief which would only be available from a municipal court. This would mean that the dispute in the Ruritanian Proceedings was not arbitrable and, as a matter of contractual interpretation, it could not reasonably be contemplated as falling within the meaning of "dispute" in the Arbitration Agreement.

37 This point was posed to counsel during the hearing of the present application. In response, counsel for the Government relied on *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals*

[2016] 1 SLR 373 ("*Tomolugen*") for the proposition that a party can bring a case to arbitration, resolve the issues, and then apply for consequential relief elsewhere, if such relief cannot be granted by the tribunal. However, the question in *Tomolugen* was not one of relief, but of arbitrability. *Tomolugen* was an action for minority oppression. Although the claim in *Tomolugen* was based on statute, it was nonetheless a private (and not a public) law action, in contrast to what is alleged in the present case. In fact, in *Tomolugen*, the Court of Appeal stated at [71] that matters are not arbitrable where they "so pervasively involve 'public' rights and concerns, or *interest of third parties, which are the subjects of uniquely governmental authority*" (emphasis added). If anything, *Tomolugen* supports the Developer's position.

38 In the present application, for reasons which will become apparent when we discuss the principal issue of repudiatory intent, we do not need to decide definitively whether the bringing of the Ruritanian Proceedings by the Developer constituted a breach of the Arbitration Agreement.

Repudiatory intent manifested?

39 The fact of breach would not by itself necessarily justify a conclusion that the Arbitration Agreement had been repudiated. This is because, on the English law approach, a mere breach does not establish repudiatory intent. The wrongdoer's conduct must also be shown from an objective standpoint to evidence a clear intention to repudiate the Arbitration Agreement: *BEA Hotels* at [24]; *The Mercanaut* at 185. One needs to examine whether a reasonable person in the position of the Government would conclude that by its conduct, the Developer evinced an intention no longer to be bound by the Arbitration Agreement. On the Singapore law approach in *Marty*, it would remain open to a party who commenced litigation in *prima facie* breach of an arbitration clause

to displace the presumption of repudiatory intent by offering an explanation based on the record of the court proceedings or on events and circumstances leading up to the commencement of the litigation. On either approach, as noted above at [34], the central factual question is the same: did the breaching party, by words or conduct, objectively evince an intention to no longer be bound by the arbitration agreement?

40 It follows that the evidence must be evaluated to determine whether (a) the Developer evinced a clear intention not to be bound by the Arbitration Agreement by instituting the Ruritanian Proceedings and (b) the Government unequivocally accepted the repudiation by taking part in the Ruritanian Proceedings, thereby terminating the Arbitration Agreement. These are factual inquiries, such that the context of the Ruritanian Proceedings (namely, the parties' dealings leading up to the commencement of the litigation) is relevant to a proper assessment of (a) and (b).

41 The parties rely heavily on their respective experts' evidence in characterising the claim made and the reliefs sought in the Ruritanian Proceedings. However, neither of the experts considered the context in which the Ruritanian Proceedings had been brought. Their analyses were primarily confined to the four corners of the court documents filed by the parties (listed in [16] above), ignoring the backdrop. We find this approach to be overly legalistic and of limited assistance. We would have preferred the experts to have based their opinions on the factual substratum against which the litigation was commenced and pursued. Given the experts' narrow approach, it is important to weigh their views against the context underlying the Ruritanian Proceedings in deciding which view is more tenable.

The limited scope and purpose of the Ruritanian Proceedings

42 The Ruritanian Proceedings were commenced by the Developer for the purpose of jumpstarting the JVA, which, at the time, was essentially dead in the water. Accordingly, its scope was limited to obtaining administrative relief that would support the preliminary steps in the performance of the JVA. This is clear from an analysis of the events leading up to the Ruritanian Proceedings, as well as the documents filed therein.

(1) The background to the Ruritanian Proceedings

43 From the backdrop to the Ruritanian Proceedings (set out in detail above at [6] to [14]), it would not have been evident to the Developer that it was facing a breach of the JVA by the Government. There are two reasons for this:

(a) The Developer had no reason to believe that the Government, as a party to the JVA, was behind the MOC's delay in registering the JVC. This issue was playing out at the start of what was supposed to be a long term relationship of at least 50 years between the Developer and the Government on a potentially profitable venture involving substantial capital investment. When the Developer's applications to the MOC to register the JVC on 18 January and 11 February 2013 were returned without explanation, it would not have been reasonable for it to think that the Government, as a party to the JVA, was reneging on its contractual obligations. The Developer would more naturally have perceived the problem as stemming from some unknown bureaucratic requirement imposed by the MOC as the regulator.

(b) The Developer did not know, at any time prior to the commencement of the Ruritanian Proceedings, *why* its applications to register the JVC had not been accepted. It did not know that it needed to

> submit a letter of approval from the President's Office to the MOC. This requirement and the 19 March Letter (which sets out the requirement) were only made known to the Developer during the Ruritanian Proceedings. The President's approval was not even a requirement when the Developer submitted its applications for registration of the JVC on 18 January and 11 February 2013. That the Developer was in the dark on the requirements is seen from its letter dated 20 March 2013 to the MOC requesting an explanation why its applications had been rejected. The Developer received no reply to this letter (as noted above at [9] to [12]). Up to the commencement of the Ruritanian Proceedings, there had only been silence from the MOC.

44 That the Developer did not perceive its issue with the MOC as having been caused by the Government acting in breach of the JVA is also evident from the Developer not writing to the Government as a party to the JVA. In the six months between the Developer writing to the MOC on 20 March 2013 and commencing the Ruritanian Proceedings on 19 September 2013, the Developer made no attempt to contact the Government through the Minister under clause 19.4 of the JVA to assert a breach of contract. Nor did it issue a letter asserting breach and seeking to mediate under the Arbitration Agreement. During this period, there was simply no correspondence between the Developer and the Government relating to the JVA. If the Developer was taking the position that there was a breach of the JVA, there would at least have been some pre-action communication between the parties on this issue. The absence of such communication indicates to an objective observer in the shoes of the Government that the Developer did not view the Government as having procured the conduct of the MOC contrary to the JVA. It suggests that the Developer instead treated the problem as stemming from the MOC's

intransigence alone, that is, the Developer saw the issue as the MOC refusing, for reasons unknown, to carry out its duty as the regulator.

45 Thus, objectively assessed, the Developer was in a dilemma, and its options were limited. It needed to register the JVC so that the MLA could be signed and the JVA could get started. Yet its applications to register the JVC were returned by a regulator, the MOC, which declined to explain itself. Having no inkling of the reasons for the MOC's failure to register the JVC, the Developer could not address any shortcomings in its applications. Thus, the reasonable solution was to compel the MOC to perform its duty as the regulator. This was the backdrop to the commencement of the Ruritanian Proceedings. It would not have been apparent to a reasonable person in the position of the Government, armed with knowledge of this backdrop, that the commencement of the Ruritanian Proceedings objectively demonstrated repudiatory intent: see above at [33]. We accept that the Developer could have raised the matter with the Minister under clause 19.4 of the JVA. However, its failure to do so in fact supports the view that the Developer did not see the issue as a case of non-performance of the JVA.

(2) The Plaint

46 The Ruritanian Proceedings were commenced with the filing of the Plaint on 19 September 2013. The nub of the Developer's complaint concerned the MOC's failure to register the JVC and provide reasons for such failure, despite the Developer submitting (what the Developer thought to be) all relevant documents.

47 This first emerged from the "Summary of the complaint" which reads as follows:

> To develop a special tourist zone at [the Site], [the Government] and [the Developer] entered into an agreement. *When all the documents to incorporate [the JVC] has been submitted to [the MOC] under the Agreement signed on 18th January 2013, the Ministry has failed to incorporate [the JVC] or provide reasons for the delay in registering, for this reason the signing of the Lease Agreement of [the Site] to [the JVC] has been delayed, this complaint is to request an order by the court to the relevant authorities to speed up the process and to order [the MOC] to register [the JVC].*
>
> [emphasis added]

Objectively, the summary suggests that the claim was about seeking administrative relief against the MOC in its capacity as the corporate regulator, and not about a remedy against the Government for a breach of the JVA.

48 It is also obvious from the reliefs sought that the Ruritanian Proceedings were meant to serve a limited purpose.

(a) The only orders sought were for the MOC to speed up the process of registration ("the Registration Prayer") and for the MLA to be executed following registration ("the MLA Prayer"). The latter prayer would have been the logical consequence of registration per the terms of the JVA (see above at [6]). At the time when the Plaint was filed, there was no suggestion of any dispute over the terms of the MLA. Both prayers, if granted, would have jump-started the JVA, which had stalled for almost nine months.

(b) Conversely, there was no prayer for damages for breach of the JVA. Although the JVA was annexed to it, the Plaint made no reference to clauses 2.1 and 5.1, and made no allegation of breach of the JVA by the Government. Importantly, there was no mention of clause 19.17.1 of the JVA, which entitled the Developer to US$250,000 for every day of delay, if the MLA was not signed within the time stipulated by clause 5

> (five days from the date of the JVA, *ie*, 23 January 2013). By 19 September 2013 when the Ruritanian Proceedings were commenced, almost nine months had passed and, if the Developer was actually pursuing a claim against the Government for breach of the JVA, it would have particularised its loss or relied on clause 19.17.1. Whilst the Developer did mention "huge loss/damages" caused by the "delay in commencing [the JVA]," this appears to have been done by way of background alone. There was no prayer seeking any losses as damages. The absence of a prayer for damages despite express acknowledgement of loss and damage suggests that the claim was not for breach of the JVA. The Developer would have been aware that it could have claimed damages, but seemed to have deliberately refrained from doing so in the Ruritanian Proceedings.

49 Aside from the reliefs sought in the Plaint, the fact that it identified the three Ministries and not the Government as a whole as respondent is significant. Before us, the Government submitted that "it is irrelevant as a matter of Ruritanian law whether the Plaint was directed at the Government or the three ministries named therein", premising this on the experts' common position that the Government is not legally distinct from its Ministries. The Government argued that the Ruritanian Proceedings must have been brought on account of a perceived breach of the JVA. In our view, the Government's argument misses the point. The fact that the Government and its Ministries are the same as a matter of Ruritanian law does not necessarily mean that the Ruritanian Proceedings were otherwise than administrative in nature. As stated by Mr Y, a litigant may choose to commence proceedings against a Ministry, or the Government as a whole, depending on the nature and purpose of the legal proceedings. Despite accepting this, Dr X did not take into account the Developer's purpose in bringing the Ruritanian Proceedings. He did not

consider why it was necessary to name the three Ministries as respondents to the Ruritanian Proceedings if the claim was against the Government for breach of the JVA.

50 The material question is thus why the Developer chose to name the three Ministries as respondents to the Ruritanian Proceedings. As observed by the Tribunal, if the Developer intended to sue the Government for specific performance of clauses 2.1 and 5.1 of the JVA, it would not have been necessary to name the three Ministries in the Plaint. In the Tribunal's view, the Developer's specification of the three Ministries would make it at the very least unclear to a reasonable observer whether the claim was brought against the Government pursuant to the JVA. We agree. That the three Ministries were individually named in the Plaint is consistent with the claim being mounted purely for administrative relief. In actuality, the Developer only prayed for relief against two of the three Ministries: the MOC and the MOT. Notably, no specific relief was sought against the MOF. The MOC was the regulator responsible for registering companies, a fact both parties knew. The Developer's position was that the responsibility for executing the MLA fell on the MOT. It had attached a "no objection letter" from the MOT regarding the leasing of the Site. Its position was that the terms of the MLA had been agreed with the Ruritanian tourism minister in a meeting on 16 January 2013 (see [17] above and [62] below). It follows that, in the Plaint, the Developer singled out the Ministries that it thought were responsible for carrying out the relevant actions. To an objective observer, this targeted nature suggests that the Developer was focused on the administrative functions of the individual ministries, and not the contractual obligations of the Government as a party to the JVA.

51 It is also relevant that the Ruritanian Proceedings were commenced, pursued and argued on the basis of Ruritanian law. Dr X opined that the

application of Ruritanian law and the lack of reference to English law were "not indicative of whether the matter was of a contractual or administrative nature" and that a "more plausible explanation" was that the Ruritanian Court proceeded on the basis that Ruritanian law applied as the parties did not raise the point. This is speculative. The inquiry into repudiation considers whether there are factual indicators that unequivocally point to the existence of a repudiatory intent. The applicable law of the JVA was English law, as per clause 20.1. If the claim was one for breach of the JVA, one would have expected the Developer to state during the proceedings that English law applied to the issues at hand. The Government would no doubt have made such a point if it had truly understood the claim to be contractual (as opposed to only administrative) in nature. The fact that it did not supports the conclusion that a reasonable person in the shoes of the Government would not have perceived the commencement of the Ruritanian Proceedings as being a repudiatory breach.

52 It is correct that the Developer's failure to raise English law could have been because it took the view that there was no difference between Ruritanian and English contract law. But it is the fact that the claim was pursued on the basis of Ruritanian law that is significant, as this supports the inference that the Developer's application purely involved a claim for administrative relief under Ruritanian law. At the very least, from an objective point of view, it makes the Developer's intent equivocal.

53 Finally, the Plaint makes no reference to the Arbitration Agreement. While this could suggest that the Developer had abandoned the Arbitration Agreement, that conclusion presupposes that the failure to mediate was likewise an act of abandonment. In our view, as the Tribunal noted, the real question is whether by commencing proceedings to resolve an issue caused by a ministry's failure to perform its duties, the Developer conveyed its intention to forego the

key protection that the Arbitration Agreement provided. That protection was the ability to select arbitration at a neutral venue (Singapore) to resolve disputes arising under a long term agreement (the JVA) of at least 50 years' duration. Seen in context, it would be difficult to infer from the Developer's conduct that it plainly demonstrated an intention to forego this protection.

54 For these reasons, it cannot objectively be said the Plaint evidences an unequivocal intention to abandon the Arbitration Agreement.

(3) The Government's Response

55 It is significant that the Government did not seek to stay the Ruritanian Proceedings on the basis that the Developer's complaint ought to be resolved under the Arbitration Agreement. One would have expected the Government to have taken an unequivocal position if it viewed the Ruritanian Proceedings as having been brought in breach of the Arbitration Agreement. The Government could either have sought to stay the litigation on the ground that the dispute ought to be resolved through arbitration or it could have taken the position, as it did before the Tribunal and before us, that the Developer's conduct was a repudiation of the Arbitration Agreement which the Government accepted. The Government did neither. To be clear, we are not suggesting that it was necessary for the Government to have done the latter if it wished to accept what it perceived to be repudiatory conduct on the part of the Developer. However, one would have expected it to have stated its position clearly and unequivocally. Instead, it simply contested the Ruritanian Proceedings.

56 The Government's Response was filed on 25 December 2013, more than two months after the Plaint had been filed. It is thus reasonable to surmise that it was a considered response. It is telling that the focus of the Government's Response was on why the MOC did not register the JVC.

(a) Under the heading, "Details of the response by the Respondent", the Government explained that a letter from the President's Office was required before the JVC could be registered and this had not been submitted by the Developer. This was a reference to the 19 March Letter (see [13(b)] above).

(b) In response to the criticism that no explanation had been forthcoming from the MOC, reference was made to Ms [S]'s failure to collect the disputed letter dated 3 April 2013.

In other words, the reasons and justification offered were purely administrative or regulatory in nature. There was no mention of the JVA as justifying the MOC's conduct. If the Government regarded the issue as turning on the performance of its contractual obligations, it would have brought up the terms of the JVA by way of rebuttal. But, to the contrary, the obligation to register the JVC under clause 2.1 of the JVA was not disputed. Nor was the obligation to execute the MLA disputed. In fact, there was no mention of the MLA or the MLA Prayer in the Government's Response. This buttresses our earlier observation that a reasonable person in the position of the Government would have understood the Plaint to be a claim for administrative relief, not one for breach of the JVA.

(4) The parties' first statements

57 The parties' first statements reinforce the view that the Ruritanian Proceedings were focused on the administrative actions of the MOC as regulator, and not on the Government's actions as a party to the JVA.

58 The lack of specifics as to damages in the Developer's First Statement suggests that the Ruritanian Proceedings were not contractual in nature.

The Government's Response had asked for the Developer to "[provide] details of the damages and/or losses incurred by the delay along with the documentary evidence". Despite this, in the Developer's First Statement, there was no mention of loss or damage. Nor was there a reference to the liquidated damages provision in clause 19.17.1 of the JVA. This suggests that the Developer had deliberately chosen not to claim damages in the Ruritanian Proceedings, which supports the point that the latter had not been started to redress a breach of the JVA. Dr X and Mr Y agree that the primary consideration for an order of specific performance by the Ruritanian Courts is whether damages are an adequate remedy. For the relief to be available, there must be proof that damages are inadequate. Yet the Developer declined to provide particulars of loss or damage, despite being requested by the Government to do so. As the Developer did not provide proof that damages were inadequate, objectively, it could not be perceived as seeking an order for specific performance under Ruritanian law. Instead, its refusal to claim and particularise damages indicates that the Ruritanian Proceedings should properly be characterised as *administrative*.

59 The Developer's First Statement also reiterated that the focus of the Ruritanian Proceedings was the MOC. The statement's opening took the position that "[the MOC] would not have the authority to disregard the enforcement in the name of the Government." This was maintained in the final paragraph of the statement which concluded that "it is highly likely that [the JVA] and the obligation to establish and register [the JVC] … has not been fulfilled *due to a ministry refusing to act* according to [the JVA] *signed by another ministry*". This sentence clearly refers to the MOC's refusal to act in registering the JVC.

60 The focus on the MOC (and the associated administrative issues related to registering the JVC) was also reflected in the Government's First Statement

(made in response to the Developer's First Statement). In paragraph 2, the Government noted that certain documents had not been submitted and that a company will only be registered "in line with the general policy which is implemented in registering such companies." This was one of multiple references to the requirements for registration set out in various instruments, in particular the 19 March Letter. At paragraph 3, the Government clarified that the general policy is that "the necessary documents to register the company in question is submitted by [the MOF] to [the MOC]", and then explained that "[t]he reason for [the JVC] not being registered currently is due to the delay in acquiring the documents from the President's Office." This clarification was in response to a question from the Ruritanian court to the Government at the hearing on 29 December 2013 when the Developer made its First Statement. The Government's considered response to the question is consistent with the Developer's position that objectively construed, the Government understood itself to be addressing a claim in the Ruritanian Proceedings for administrative (and not contractual) relief.

(5) The parties' final statements

61 From the above analysis, the Ruritanian Proceedings, from the filing of the Plaint until the Government's First Statement, were squarely about the MOC and its administrative failure in registering the JVC. However, the final statements in the Ruritanian Proceedings raised an issue pertaining to the draft MLA. Before us, counsel for the Government observed that his case was stronger on the MLA Prayer, as the terms of the draft MLA were disputed during the Ruritanian Proceedings. We do not agree with the observation for the reason explained below at [66(a)]. In any case, it is apparent from the parties' final statements that this dispute was not the focus of the Ruritanian Proceedings.

62 It is clear that the obligation to execute the MLA was not in dispute. The Government did not make it an issue at any time. Further, the Developer's position was that the draft MLA had been agreed between Ms [S] and the Ruritanian tourism minister at a meeting on 16 January 2013. Accordingly, it was tendered to court on 5 March 2014 for the purpose of the MLA Prayer. In its Second Statement on 9 March 2014, the Government raised a dispute over the *terms* of the draft MLA. This was the first occasion when the Government challenged the terms of the draft MLA. The Government asserted that the burden was on the Developer to show that the draft MLA had been agreed. It contended that the Developer had failed to discharge this burden, and pointed out that the Developer had produced no correspondence showing that the draft MLA had been discussed, negotiated and agreed between the parties. The Government also alleged that it did not have a record of any agreement as alleged by the Developer.

63 However, despite disputing the terms of the draft MLA in the Government's Second Statement, the Government recognised in the same statement that this was not the core subject matter of the Ruritanian Proceedings. Paragraph 5 of the Government's Second Statement identified the issue being adjudicated upon as the obligation to register the JVC and reiterated that the reason why the JVC had not been registered was the Developer's failure to follow procedures. On this basis, the Government stated that the MLA had "*no connection or effect on the subject matter*" (emphasis added) of the Ruritanian Proceedings. Thus, even at this stage, the regulatory issues relating to the registration of the JVC remained the focus and the issue of the MLA was only an ancillary matter.

64 The Government's position that the real issue was the registration of the JVC and not the MLA is plain from its Third Statement on 20 May 2014. In

its Second Statement on 11 March 2014, made in response to the Government's Second Statement on 9 March 2014, the Developer alleged that the draft MLA had been agreed at the meeting on 16 January 2013. However, in responding, the Government's Third Statement on 20 May 2014 did not raise any further challenges to the issue of the MLA and merely stated that the MLA should be signed after the JVC was registered. This essentially brought the focus back to the Registration Prayer, re-centering the attention squarely on the administrative and procedural issues concerning the registration of the JVC which related to the MOC.

65 Consequently, although a dispute over the terms of the draft MLA had been brought up during the Ruritanian Proceedings, the parties continued to treat this as a secondary matter. The primary disagreement was with the MOC's failure to register the JVC, as had been the case since the beginning of the Ruritanian Proceedings.

66 The Tribunal concluded that the introduction of the draft MLA into the Ruritanian Proceedings could not be regarded as repudiatory conduct on the part of the Developer. We agree for three reasons:

(a) The MLA issue was raised by the Government, not the Developer, and was seemingly not pursued later by the Government. To this extent, the introduction of the dispute over the terms of the draft MLA was not conduct attributable to the Developer.

(b) As far as the Developer was concerned, the execution of the MLA was a consequence of the registration of the JVC. That is what clause 5.1 of the JVA provided and how the Plaint described the MLA Prayer.

(c) The Developer had no reason to believe that there was an issue over the MLA when it filed the Plaint. The problem that it faced was the registration of the JVC. Until 9 March 2014 (when the Government's Second Statement was made), some five months into the Ruritanian Proceedings, the Government itself raised no issue with regard to the MLA Prayer or the terms of the MLA.

In these circumstances, no significance can be attributed to the issue of the MLA in assessing whether the Developer repudiated the Arbitration Agreement.

(6) The Ruritanian Judgment

67 The Ruritanian Judgment was handed down on 15 July 2014. Its relevance has been disputed by the parties. The Government argued that the Ruritanian Judgment "would reflect a contemporaneous record of [the Developer's] conduct" and is "vital in considering how a reasonable man would have perceived [it]". The Developer has contended that the focus of the inquiry is on its conduct and the Ruritanian Judgment cannot be relevant to that question.

68 We accept the Government's position that regard may be had to the Ruritanian Judgment, but only to a limited extent. The Ruritanian Judgment, aside from providing the reasoning of the Ruritanian court, recorded the positions taken by the Developer during the proceedings. It is therefore relevant as a contemporaneous account of the Developer's conduct. This is consistent with the view in *Marty* that one may have regard to the court record to understand the explanation offered for commencing the litigation: at [54]. In contrast, the portions of the Ruritanian Judgment that explain the Ruritanian court's reasoning are not relevant, since the focus of the present inquiry is on the characterisation of the Developer's conduct as the alleged party in breach

(see at [39] above). The views of the Ruritanian court or how it framed the issues would not be pertinent to that inquiry. The Ruritanian court is not a proxy for the reasonable person. How the reasonable person would have objectively assessed the Developer's conduct is a conclusion of fact for this court to make. We therefore do not accept the Government's argument to this extent.

69 Nevertheless, the Ruritanian court's reasoning is consistent with our conclusion that, objectively assessed, the Ruritanian Proceedings were an action against the MOC, with the focus being on the administrative issues that arose with regard to the registration of the JVC. We make several observations:

(a) Although there are references to the JVA and Ruritanian contract law, the substance of the Ruritanian Judgment shows that the Ruritanian court's attention was on the MOC as the regulator, rather than on the Government as a party to the JVA. This is apparent from the "Summary of Motion" in the Ruritanian Judgment, which focused on the MOC and its failure to register the JVC. Despite there being a dispute as to the terms of the draft MLA (as noted above at [62]), the Ruritanian Judgment did not deal with this at all. This is consistent with the fact that the thrust of the Ruritanian Proceedings was on the MOC's failure to register the JVC (as noted above at [46], [56], [57] and [65]).

(b) The Ruritanian court recognised that the reason for the MOC's failure to register the JVC was due to certain documents not having been submitted to the MOC by the MOF which was the Ministry primarily responsible for ensuring that the formalities for registration were complied with as a matter of internal Government protocol. What appears to have happened, based on the explanation offered by the Government in the Ruritanian Proceedings, was an internal mix-up

between Ministries. In this regard, the court noted the Government's clarification in its First Statement, that the responsibility for fulfilling all procedural and legal obligations fell on the MOF and the failure to discharge the obligation was an internal issue amongst the Ministries: see above at [60].

(c) The Ruritanian court observed that the reason for the MOC's failure to register the JVC had not been explained to the Developer, that is, the Ruritanian court recognised that the Developer had no clarity on that matter when it commenced the Ruritanian Proceedings.

70 The foregoing suggests that the Ruritanian court did not understand the Ruritanian Proceedings to be for breach of the JVA. Consistent with this, there was no mention of contractual breach in the Ruritanian Judgment. The Ruritanian court further noted that the Government "had taken the initiative to proceed with the obligation to register [the JVC]" – in other words, it did not find any dispute over the obligation to register the JVC. Finally, there was no discussion on whether damages were inadequate. Instead, the Ruritanian Court merely granted administrative relief by ordering the Ministries to perform their duties.

(7) Conclusion on the scope and purpose of the Ruritanian Proceedings

71 The result of the foregoing analysis is that the backdrop to the Ruritanian Proceedings and the documents filed therein, suggest that the focus of the litigation was on securing the registration of the JVC and on the MOC's performance of its duties as the regulator. The context does not support the clear and unequivocal view that the Ruritanian Proceedings were a claim against the Government for breach of the JVA. Related to this, it is telling that the experts were also unable to agree on the nature of the Ruritanian Proceedings.

Mr Y's view generally was that the Ruritanian Proceedings were for administrative relief. Whilst Dr X's opinion was to the contrary, for the reasons already provided in this judgment, we are unable to agree with his position.

The value of the Arbitration Agreement

72 In essence, the Developer's goal was to achieve the preliminary steps in the JVA so that the 50-year relationship thereunder could start. It follows that it cannot reasonably be inferred that, by commencing and pursuing the Ruritanian Proceedings, the Developer evinced an intention to repudiate the Arbitration Agreement.

73 The Arbitration Agreement served as a protective mechanism for the Government and the Developer in the case of disputes arising over the 50-year life cycle of the JVA. For instance, the obligation to mediate under the Arbitration Agreement would have been in the interests of both parties in light of their anticipated long relationship as lessor and lessee. The importance of the Arbitration Agreement to both parties is likewise evident from the context.

74 If the Government did not value the Arbitration Agreement, it would not have agreed to its inclusion in the JVA. As noted above, if the Government believed that the Developer had repudiated the Arbitration Agreement by commencing litigation in the courts at the start of a 50-year relationship over a preliminary matter, one would have expected the Government to apply for a stay rather than accept the breach. Had the Government decided to accept the breach, one would have expected the Government to have made its position crystal clear. That it did not do so suggests, at the very least, that it did not regard the Developer's conduct as repudiatory.

75 For the Developer, the argument that the Arbitration Agreement is valuable as a protective mechanism is even more compelling. As an investor dealing with a foreign government in relation to a contract that was being performed on that government's own turf, it would have wanted the protection of the Arbitration Agreement. The Arbitration Agreement would allow it to refer disputes to a neutral forum and dispel concerns over litigating before the Ruritanian courts. We are not suggesting that such concerns have any legitimacy. We are only explaining why in all probability the Developer would have seen the Arbitration Agreement as valuable protection.

76 Given the value of the Arbitration Agreement to both parties, it is unlikely that either would choose to abandon it before the JVA even got off the ground. It is therefore difficult to infer that the Developer evinced an intention to give up the protection afforded by the Arbitration Agreement or that the Government accepted any such possible repudiation. The facts do not unequivocally point to such a conclusion.

77 We have found that the Plaint, properly construed against the backdrop to the Ruritanian proceedings, centred on resolving the issue with the MOC, registering the JVC, and getting the project started. In other words, the Developer commenced the Ruritanian Proceedings to ensure performance of the JVA. The Developer must have anticipated that, if the JVA commenced as a result of a successful outcome to the Ruritanian Proceedings, (a) the 50-year relationship with the Government would start and (b) disputes could arise over the course of such a relationship. As such, it would be contradictory to treat the Developer as intending to disavow the Arbitration Agreement within the JVA by bringing the Ruritanian Proceedings when the very purpose of the proceedings was to jumpstart the JVA and commence a 50-year relationship with the Government. In those circumstances, we are unable to conclude that

the Developer's conduct objectively evinced an intention no longer to be bound by the Arbitration Agreement.

Conclusion

78 For these reasons, we dismiss the present application. We will hear the parties on costs. Parties are to file their submissions on costs, limited to ten pages each, within 14 days.

Kannan Ramesh
Judge of the High Court

Sir Henry Bernard Eder
International Judge

Anselmo Reyes
International Judge

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