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

[2021] SGHC 244

Originating Summons No 242 of 2021 (Summons No 1477 of 2021)

Between

Westbridge Ventures II
Investment Holdings

… *Plaintiff*

And

Anupam Mittal

… *Defendant*

JUDGMENT

[Arbitration] — [Interlocutory order or direction] — [Anti-suit injunction]
[Arbitration] — [Agreement] — [Scope]
[Arbitration] — [Arbitrability and public policy] — [Law governing the issue of subject matter arbitrability]
[Civil Procedure] — [Jurisdiction] — [Submission to jurisdiction] — [Amenability to court's jurisdiction]

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29 April, 2 July 2021

26 October 2021 Judgment reserved.

S Mohan JC:

Introduction

1 Party A commences court proceedings against, among others, party B in jurisdiction X. In those proceedings, party A alleges, *inter alia*, minority oppression by party B. Party B, in response, applies for an anti-suit injunction in Singapore to restrain party A from prosecuting the court proceedings in X on the basis that those proceedings are brought in breach of an arbitration agreement requiring all disputes between them to be arbitrated in Singapore. Party A contends that the claims made by it in the court proceedings in X are non-arbitrable under the laws of X (which party A asserts is the *proper law governing the arbitration agreement*) and thus, those proceedings are not brought in breach of the arbitration agreement. On the other hand, party B contends that the claims are arbitrable under Singapore law as the *law of the arbitral seat* and thus, the court proceedings brought by party A are in breach

of the parties' arbitration agreement, thereby warranting the grant by this court of an anti-suit injunction.

2 What then is the system of law that should govern, at the pre-award stage, the question of whether the claims brought by party A are, or are not, arbitrable? Is it the proper law governing the arbitration agreement (as contended by party A) or the law of the seat, *ie*, Singapore law (as contended by party B)? This threshold question lies at the heart of the applications before me. I am informed by counsel for the parties that it is a question that has hitherto not been decided by our courts. It would also appear from the leading arbitration commentaries referred to by counsel during the hearing that whilst some civil law jurisdictions have had occasion to consider this issue, it has not been addressed by any of the courts in the Commonwealth.

3 In HC/OS 242/2021 ("OS 242"), the plaintiff, Westbridge Ventures II Investment Holdings, seeks a permanent anti-suit injunction against the defendant, Mr Anupam Mittal. The primary reliefs sought by the plaintiff are an injunction to restrain the defendant, his agents or otherwise from:

> (a) pursuing, continuing and/or proceeding with the action(s) commenced or to be commenced by the defendant by way of a company petition in the National Company Law Tribunal ("NCLT") in Mumbai, India, which was served on the plaintiff on 3 March 2021; and/or
>
> (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 in accordance with cl 20.2 of the SHA 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.

4 The defendant in turn seeks an order in HC/SUM 1477/2021 ("SUM 1477") to set aside or discharge an *ex parte* interim injunction order (HC/ORC 1463/2021) ("ORC 1463") granted by the High Court against the defendant on 15 March 2021 in HC/SUM 1183/2021 ("SUM 1183"); the defendant argues that the plaintiff should not have proceeded with SUM 1183 *ex parte* and there was material non-disclosure by the plaintiff at the *ex parte* hearing which took place before Andrew Ang SJ.

5 As I heard OS 242 on an *inter partes* basis with full arguments presented by both sides, it is not necessary for me to deal separately with the defendant's application in SUM 1477. In OS 242, the issue before me is whether a permanent anti-suit injunction should be granted. If I allow OS 242, whether the *ex parte* injunction should be set aside is rendered moot. Conversely, if I dismiss OS 242, the *ex parte* injunction must also fall away and would consequently be set aside, irrespective of whether the plaintiff should have proceeded *ex parte* or whether there was any material non-disclosure. I therefore focus on OS 242.

6 In essence, the plaintiff argues that the defendant has breached the arbitration agreement in the SHA by raising disputes "relating to the

management of [People Interactive] or relating to any of the matters set out in [the SHA]" before the NCLT despite being contractually bound to submit such disputes to arbitration seated in Singapore.[1] The defendant, on the other hand, argues that the disputes and the claims before the NCLT pertain to oppression and mismanagement under Indian law and the natural, proper and competent forum for the adjudication of such disputes is the NCLT.[2]

7 In order to determine if the claims raised by the defendant before the NCLT are indeed brought in breach of the arbitration agreement in the SHA, this court has to first decide whether the claims are arbitrable in Singapore as the arbitral seat. The answer to that question turns on the consideration of a further threshold anterior question - which system of law governs the issue of determining subject matter arbitrability at the *pre-award stage*? Is it the law of the seat or the proper law of the arbitration agreement?

8 As I mentioned above at [2], it appears that there is no local authority on the point and sparse authority elsewhere addressing this specific question; unfortunately, neither is there any international consensus on the correct approach. As observed in Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd ed, 2021) ("*International Commercial Arbitration*") at p 639, "[t]he nonarbitrability doctrine raises potentially complex choice-of-law questions in determining what law(s) apply to determine whether a claim or dispute is nonarbitrable. There is little agreement among national courts and commentators on the resolution of this issue". As such, I take the opportunity to consider this question in greater detail in this judgment.

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1 Plaintiff's written submissions dated 22 April 2021 ("PWS") at para 7.

2 Defendant's written submissions dated 22 April 2021 ("DWS") at para 4.

I start by summarising the background facts to the extent that they are material in laying down the context in relation to the present matter.

Facts

9 The plaintiff is a private equity fund incorporated under the laws of Mauritius. It holds 30.96% of the authorised, issued and paid-up share capital of People Interactive, a private limited company registered in Mumbai which carries on the business of providing various value-added and internet-related services. Amongst other things, People Interactive owns and operates a well-known online and offline matrimonial service called "shaadi.com" ("Shaadi.com"). Shaadi.com was co-founded by the defendant and his cousins, Anand Mittal ("Anand") and Navin Mittal ("Navin"), both of whom were among the initial shareholders of People Interactive, together with the defendant. The defendant is an Indian resident and the Managing Director of People Interactive from 30 November 2004 to 30 November 2019. According to the plaintiff, the defendant holds 43.85% of the authorised, issued and paid-up share capital of People Interactive. The defendant asserts that on a "fully diluted basis", the plaintiff's shareholding in People Interactive is 44.38%, Anand's is 13.13% and his 30.26%.[3]

10 On 10 February 2006, the plaintiff, the defendant, People Interactive, Anand and Navin entered into the SHA. The SHA sets out, *inter alia*, the rights and obligations of the shareholders and their rights regarding the management of People Interactive. In the SHA, the plaintiff, the defendant, Anand and Navin are referred to individually as the "Founder" and collectively as the

[3] Shobitha Annie Mani 1st affidavit dated 17 March 2021 ("1SAM") at paras 10 to 11, 13; Anupam Mittal affidavit dated 30 March 2021 ("1AM") at paras 10 to 13.

"Founders".[4] On 7 May 2008, the parties to the SHA signed the First Supplementary Subscription-Cum-Shareholders' Agreement ("SSSA") with SVB India Capital Partners LP, SVB Financial Group and the plaintiff (then Sequoia Capital India Investment Holdings II). Clause 20.2 of the SHA and cl 10.2 of the SSSA contain identical arbitration clauses providing for arbitration to be seated in Singapore in accordance with the ICC Rules.[5] The dispute resolution clause in cl 20 of the SHA is reproduced 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.
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> 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.
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> …
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> [Emphasis in original omitted; emphasis added in italics and bold italics]

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4 1SAM at p 177.

5 1SAM at paras 14 to 15; 1AM at para 26.

11 The parties' relationship began to deteriorate from 2017.[6] Clause 16.3 of the SHA provides for the plaintiff's right to appoint and remove two directors on People's Interactive's board of directors. Clause 3.4 of the SHA envisaged that People Interactive was to complete an initial public offering ("IPO") within five years from closing (as defined in the SHA). If People Interactive failed to complete an IPO, the plaintiff would be able to exit its investment through its redemption and, if necessary, "drag along" rights as provided for in the SHA, which meant that the plaintiff could compel the Founders to sell all or part of their shares, together with the plaintiff's shares, to the third party buyer.[7] As no IPO as contemplated under the SHA was achieved, discussions began on the potential sale of People Interactive to a third party, including to an entity known as Info Edge ("Info Edge") which was a competitor of People Interactive.[8] Disputes arose between the parties regarding, *inter alia*, the management of People Interactive, the composition of its board of directors, the potential sale of People Interactive and the appointment of nominee directors to the board of directors.[9] Ms Shobitha Annie Mani ("Ms Mani") was appointed by the plaintiff as a director on the board of directors of People Interactive on 24 April 2019,[10] and the relevance of this will become apparent later on in my judgment. In very broad terms, the defendant complains that:[11]

(a) the plaintiff colluded with other shareholders or members of the board of directors of People Interactive, including Ms Mani, to

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6 1SAM at para 52; 1AM at para 32.

7 1SAM at para 17.

8 1SAM at para 57; 1AM at para 33.

9 1SAM at paras 27 to 35, 38 to 50, 54 to 63; 1AM at paras 39, 48 to 52, 55 to 56, 71 to 72.

10 1SAM at para 12.

11 DWS at para 9.

undertake a series of actions to wrest control of management of People Interactive in a manner contrary to the interests of People Interactive, including attempts by the plaintiff to flood the People Interactive board of directors with its nominees; and

(b) the plaintiff colluded with Info Edge and other shareholders or members of the board of directors of People Interactive to provide Info Edge with sensitive and confidential information regarding People Interactive without having any non-disclosure obligations in place.

12 There is some contention by the parties as to the characterisation of the disputes between them. While the plaintiff says that the disputes are essentially issues relating to the exercise of contractual rights under various provisions of the SHA, the defendant instead contends that the disputes pertain to minority oppression and mismanagement under Indian law.[12]

13 On 3 March 2021, the defendant filed and served the NCLT petition on the plaintiff.[13] At that time, no case number had yet been assigned to the petition. On or about 24 March 2021, the NCLT petition was assigned its case number, *ie*, Company Petition No. 92 of 2021 ("NCLT Proceedings"). In the NCLT Proceedings, the defendant is the petitioner and People Interactive, the plaintiff, Ms Mani, Anand and Navin are named as the respondents. Apart from Ms Mani, all the other parties to the NCLT Proceedings are also parties to the SHA. In the NCLT Proceedings, the defendant seeks the following:[14]

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12 PWS at para 20; DWS at para 4.

13 1SAM at para 6; DWS at para 12.

14 1SAM at pp 147 to 153.

(a) an injunction to restrain the plaintiff and the plaintiff's directors, employees, servants, agents and or any person claiming through or under them, from in any manner, disrupting the management and operation of People Interactive and/or conducting the affairs of People Interactive in a manner prejudicial or oppressive to any member of People Interactive or People Interactive;

(b) a declaration that the defendant's continuation as an executive director of People Interactive, pursuant to the resolution passed by the board of directors of People Interactive at the meeting held on 28 November 2019 is valid and that all actions taken by the defendant as an executive director of People Interactive shall not be invalid;

(c) an injunction to restrain the plaintiff, People Interactive 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 defendant from performing his functions as an executive director of People Interactive;

(d) an order to direct the plaintiff, People Interactive and certain others to initiate a process for identifying and appointing a suitable, independent, non-partisan and impartial candidate in the capacity as managing director of People Interactive in a time-bound manner; and

(e) certain other declarations and interim reliefs.

14 OS 242 was filed on 15 March 2021, which was after the NCLT Proceedings were filed and served on the plaintiff but before a case number had been assigned. On the same day, the plaintiff also filed SUM 1183 seeking an

urgent *ex parte* interim anti-suit injunction against the defendant.[15] Ang SJ heard SUM 1183 on the same day and made the orders in ORC 1463.[16] An order was also made by Ang SJ in HC/ORC 1458/2021 ("ORC 1458"), pursuant to prayer 2 of OS 242, granting the plaintiff leave to serve OS 242 and the supporting affidavit on the defendant out of jurisdiction in India.[17] As I indicated above at [4], ORC 1463 is the subject of the defendant's setting-aside application in SUM 1477, which was filed on 31 March 2021.

15 On 18 March 2021, the defendant also commenced Suit No. 7816 of 2021 in the Bombay High Court ("Suit 7816") seeking the following orders:[18]

(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 plaintiff 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

(ii) pursuing or continuing with OS 242 and SUM 1183 in the Singapore High Court.

At this time, the Bombay High Court has yet to render a decision in respect of Suit 7816.

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15 Agreed Bundle of Documents Volume 1 of 5 ("ABOD Vol 1"), Tab 2.

16 ABOD Vol 1, Tab 4.

17 ABOD Vol 1, Tab 3.

18 1AM at para 91.

Parties' cases

16 Counsel for the plaintiff, Mr Thio Shen Yi SC, submits that a permanent anti-suit injunction should be granted against the defendant before the NCLT Proceedings are too far advanced. It is not disputed that a valid arbitration agreement binds the parties[19] and all the disputes raised in the NCLT Proceedings are disputes "relating to the management of [People Interactive] or relating to any of the matters set out in [the SHA]" and therefore are contractual and fall squarely within the scope of the arbitration agreement. Further, the defendant should not be permitted to "dress up" the disputes as oppression or mismanagement claims in order to circumvent the arbitration agreement and litigate them before the NCLT.[20]

17 The plaintiff further argues that the commencement of the NCLT Proceedings by the defendant is a breach of the arbitration agreement.[21] The disputes are arbitrable and the question of arbitrability is governed by the law of the seat, *ie*, Singapore law, where it is undisputed that even oppression and mismanagement claims are arbitrable.[22] Even if the law governing arbitrability is the proper law of the arbitration agreement, Singapore law would nevertheless apply.[23] 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 are therefore arbitrable even under Indian law.[24] Since a breach of an arbitration

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19 PWS at para 4.

20 PWS at paras 18 to 21.

21 PWS at paras 21 and 33 to 34.

22 PWS at para 35 to 43.

23 PWS at para 44 to 52.

24 PWS at paras 53 to 55.

agreement is sufficient basis for an anti-suit injunction to be granted under Singapore law, the court should grant the plaintiff's application and issue a permanent anti-suit injunction against the defendant.[25]

18 On the other hand, counsel for the defendant, Mr Nandakumar Ponniya, submits that the court should decline to grant the permanent anti-suit injunction sought by the plaintiff, dismiss OS 242 and in turn discharge the *ex parte* anti-suit injunction for the following reasons. First, the defendant is not amenable to the jurisdiction of the Singapore courts because he does not reside in Singapore and was not amenable to being served with proceedings out of jurisdiction. The defendant has also not submitted to the jurisdiction of the Singapore courts.[26] Second, the defendant is not in breach of the arbitration agreement because the disputes relating to oppression and mismanagement do not fall within the scope of the arbitration agreement. According to the defendant, the law governing the arbitration agreement is Indian law. Since the pith and substance of the NCLT Proceedings lies in minority oppression and mismanagement of People Interactive, 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.[27] Both parties' Indian law experts agree that the NCLT is the forum that has exclusive jurisdiction under Indian law to adjudicate on disputes relating to oppression and mismanagement and that such disputes are non-arbitrable under Indian law.[28] Third, in any event, the arbitration agreement is null and void, inoperative or incapable of being performed *vis-à-vis* disputes relating to oppression and mismanagement

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25 PWS at paras 3 to 7.

26 DWS at paras 27 to 32.

27 DWS at paras 33 to 57.

28 DWS at para 60.

because such disputes are non-arbitrable under Indian law.[29] Fourth, the ends of justice are best served by allowing the NCLT Proceedings to continue. Otherwise, grave injustice would be caused to the defendant since any eventual award rendered in Singapore would be unenforceable in India. Injustice would also be occasioned to the defendant by reason of the plaintiff's vexatious and oppressive conduct in commencing proceedings before the Singapore High Court, as the arbitration agreement does not bind all parties to the dispute while the NCLT Proceedings will and the NCLT is the natural, proper and competent forum to hear the dispute.[30]

The issues

19 From the parties' submissions, the following issues arise for my consideration in OS 242:

(a) whether the disputes between the parties are arbitrable;

(b) whether the bringing of the claims by the defendant before the NCLT is in breach of the arbitration agreement; and

(c) whether the court should grant the permanent anti-suit injunction sought by the plaintiff.

First issue: Whether the disputes between the parties are arbitrable

20 I begin by first determining whether the disputes between the parties are arbitrable. As stated by the Court of Appeal in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen Holdings*") (at [72]–[74]), arbitrability may be relevant to an arbitration at both

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29 DWS at paras 62 to 68.

30 DWS at paras 74 to 99.

its initial and terminal stages. At the initial stage, under s 6(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), the court may refuse a stay of court proceedings in favour of arbitration where the dispute concerns a non-arbitrable subject matter. The arbitration agreement would, in such circumstances, be either "inoperative" or "incapable of being performed" in relation to such a dispute involving a non-arbitrable subject matter. At the terminal stage, an award rendered on a non-arbitrable dispute is liable to be set aside or refused enforcement under Art 34(2)(*b*)(i) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") and s 31(4)(*a*) of the IAA and/or under Art 34(2)(*b*)(ii) of the Model Law and s 31(4)(*b*) of the IAA.

21 As can be seen from the parties' submissions summarised above at [16]–[18], it is crucial that the court first decides what system of law applies to determine the question of subject matter arbitrability at the pre-award stage. If it is the law of the seat (*ie*, Singapore law) that governs that question, it is common ground between the parties that shareholder disputes and even minority oppression claims *are* arbitrable, as held by the Court of Appeal in *Tomolugen Holdings* (at [84]). It would then not matter whether one characterises the disputes as contractual or arising out of the SHA, or as minority oppression or mismanagement claims. However, if it is the proper law of the arbitration agreement that governs the issue of subject matter arbitrability, it will (at least on the defendant's case) then be necessary to determine what is the proper law of the arbitration agreement in the SHA before considering if the disputes are arbitrable under that law.

22 With regard to determining the proper law of an arbitration agreement, both parties accept that the applicable test or framework is encapsulated in *BCY*

v BCZ [2017] 3 SLR 357 ("*BCY*") (at [40]), where Steven Chong J (as he then was) summarised the three-stage test as follows:

(a) the parties' express choice;

(b) the implied choice of the parties as gleaned from their intentions at the time of contracting; or

(c) the system of law with which the arbitration agreement has the closest and most real connection.

Analysis and decision

23 Having carefully considered the parties' submissions on the threshold question I identified at [7] above, in my judgment, it is the *law of the seat* that applies to determine the issue of subject matter arbitrability at the pre-award stage. In my judgment, such an approach is more logical, is principled and is to be preferred over the application of the proper law of the arbitration agreement. I arrive at this conclusion for the following main reasons:

(a) subject matter arbitrability, when raised at the pre-award stage before the seat court, is essentially an issue of jurisdiction;

(b) the same law should be applicable 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 to promote international commercial arbitration; and

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

24 I expand on each of these reasons in the paragraphs that follow.

Subject matter arbitrability, when raised at the pre-award stage before the seat court, is essentially an issue of jurisdiction

25 The concept of arbitrability finds legislative expression in s 11 of the IAA which states as follows:

> **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]

Section 11 of the IAA thus recognises that subject matter arbitrability is subject to the limits imposed by public policy. While the IAA is silent on the applicable law to determine pre-award subject matter arbitrability, it can be reasonably inferred that the reference in s 11(1) IAA to "public policy" is to the public policy *of Singapore* (as opposed to, for example, the public policy of the law governing the arbitration agreement where that law is not also Singapore law). Section 2(2) of the IAA provides that "[e]xcept so far as the contrary intention appears, a word or expression that is used both in this Part and in the Model Law (whether or not a particular meaning is given to it by the Model Law) has, in the Model Law, the same meaning as it has in this Part".

26 There are references to public policy in Arts 34(2)(*b*)(ii) and 36(1)(*b*)(ii) of the Model Law. In the former instance, the seat court may set aside an arbitral award if it finds that "the award is in conflict with the *public policy of this State*"

[emphasis added]. In the latter instance, the enforcement court may refuse to recognise or enforce an arbitral award if it finds that the "recognition or enforcement of the award would be contrary to the *public policy of this State*" [emphasis added]. In both instances, the relevant public policy is that of the state in which the court hearing the post-award challenge sits. Thus, be it the seat court (in the case of setting-aside) or the enforcement court (in the case of recognition or enforcement), the court applies its own law regarding public policy. Even if I leave aside Art 36(1)(*b*)(ii) of the Model Law on the basis that it does not have the force of law in Singapore by virtue of s 3(1) of the IAA, that still leaves Art 34(2)(*b*)(ii). In any event, Art 36(1)(*b*)(ii) of the Model Law is replicated in s 31(4)(*b*) of the IAA. These provisions provide some support for the argument that similarly, in s 11(1) of the IAA, the reference to "public policy" in the context of arbitrability is to the public policy of Singapore. Unless expressly provided for within its own law, there is, in my judgment, no reason or need for this court, as a seat court, to apply a foreign law and determine another state's public policy to the question of subject matter arbitrability.

27 Both parties referred to and relied on the Court of Appeal's decision in *BNA v BNB and another* [2020] 1 SLR 456 ("*BNA*") (at [53]–[55]) in support of their respective positions. I should point out at the outset that *BNA* was not a case involving any issue of subject matter arbitrability, but one where the court was considering a challenge to the jurisdiction of the arbitral tribunal on the basis that the seat of the arbitration was not Singapore but Shanghai. The court affirmed the applicability of the framework in *BCY* to determine the proper law of the arbitration agreement, and then commented as follows (at [49]–[50]):

> 49 Before applying the *BCY* framework to the facts of this case, we make some brief observations as to the significance of the proper law of the arbitration agreement so as to forestall any confusion that might arise, particularly at the stage of

> setting aside an arbitral award though no such concern was raised in this appeal.
>
> 50 A concern that might arise *at the stage of setting-aside proceedings* is the prospect of the seat court having to apply some law other than its own in determining the application to set aside the arbitral award. This possibility would arise if, for example, the proper law of the arbitration agreement is determined under the *BCY* framework to be a law other than the law of the seat. In that instance, must the seat court apply the proper law, or should it apply its own law, *ie*, the law of the seat?
>
> [emphasis added]

28 In the ensuing discussion and after reproducing the provisions of s 24 of the IAA and Art 34(2) of the Model Law, the Court of Appeal expressed certain views in *obiter*, and in the context of its discussion on a *post-award* challenge scenario. I reproduce the relevant passages below:

> 53 It is evident from the above statutory provisions that there are *some grounds of challenge for which the seat court is mandated to apply its own law*, most obviously, ***where the challenge is made on the grounds of arbitrability*** and of alleged conflict with the public policy of the seat: see Art 34(2)(*b*) of the Model Law.
>
> 54 On the other hand, there are grounds of challenge where the seat court in hearing the setting-aside application is mandated to apply some law other than its own, most obviously, when the 'said agreement is not valid under the law to which the parties have subjected it': see Art 34(2)(*a*)(i). *In such a scenario*, the proper law of the arbitration agreement, as determined in the *BCY* framework, will have to be applied by the seat court to decide whether the arbitral tribunal has jurisdiction over the dispute under the terms of the arbitration agreement. However, Art 34(2)(*a*)(i) provides that the seat court will apply its own law in the event that there is no indication as to the law to which the parties had subjected the arbitration agreement.
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> 55 For present purposes, it is *not necessary for this court to express a definite view as regards the law that is to apply to determine each of the grounds of challenge* under s 24 of the IAA or Art 34(2) of the Model Law *as they were not before us*. It suffices to say that *in general, the seat court will apply the law of the seat and where the law directs it to some other system of law, usually the proper law of the arbitration agreement, then it*

> *will apply that law*. However, as we have illustrated above, in general, the proper law of the arbitration agreement will be most relevant to questions as to formation, validity, effect and discharge of the arbitration agreement: David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell, 3rd ed, 2015) ('*David Joseph*') at para 6.53. In the final analysis, *the particular system of law that the seat court will apply is that which the relevant arbitration law in the seat directs it to*.
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> [emphasis in original omitted; emphasis added in italics and bold italics]

Aside from observing that it is "evident" that the seat court would, in the context of a post-award setting aside application, apply its own law to challenges made on the grounds of arbitrability, the Court of Appeal also stated that the general position is that the seat court will apply its own law *unless* it is directed by that law to some other system of law.

29 Applying this reasoning by extension to subject matter arbitrability at the *pre-award stage*, there is no indication or hint in the IAA, the Model Law or any other "relevant arbitration law" in Singapore that directs it as the seat to look to some *other* system of law (*including* the proper law of the arbitration agreement) to determine the question of subject matter arbitrability at the pre-award stage.

30 Mr Nandakumar focused on the sentence in *BNA* (at [55]) where the Court of Appeal stated that "in general, the proper law of the arbitration agreement will be most relevant to questions as to formation, validity, *effect* and discharge of the arbitration agreement" [emphasis added], to support his argument that Indian law as the proper law of the arbitration agreement should govern subject matter arbitrability.[31]

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[31] NE 2 July 2021 at pp 20 (lines 31 to 32), 21 (lines 1 to 7) and 22 (lines 1 to 5).

31 I disagree with that submission. In my judgment, it is not appropriate to characterise a dispute over subject matter arbitrability as a question on the "effect" of an arbitration agreement. The effect of an arbitration agreement may engage issues such as its scope, *ie*, whether a particular dispute falls within the wording or ambit of the arbitration agreement. However, in this case, the issue is simply whether the disputes raised in the NCLT Proceedings are arbitrable, *irrespective* of the scope of the arbitration agreement. In my judgment, the question of subject matter arbitrability is not an issue that touches on the "effect" of an arbitration agreement. Furthermore, the submission also takes that sentence in *BNA* out of context – as I have highlighted above at [27]–[28], the Court of Appeal's comments were only focusing on a *post-award* setting aside scenario. That particular sentence was a quote from a passage from David Joseph QC, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell, 3rd ed, 2015) ("*Jurisdiction and Arbitration Agreements*") at para 6.53. The relevant passage in *Jurisdiction and Arbitration Agreements* itself did not contain any discussion on the issue of the proper law to determine the question of arbitrability. In fact, the focus of the passage was on whether the putative proper law of a separable dispute resolution agreement (be it choice of court or arbitration) ought to determine questions of whether a dispute resolution agreement is impeached by allegations of invalidity or illegality. For ease of reference, I reproduce below the relevant passage from *Jurisdiction and Arbitration Agreements* (at para 6.53):

> 6.53 Likewise, the governing law of the choice of court or arbitration agreement as determined at common law will *determine questions as to formation, validity, effect and discharge of such agreements*. Formation (including the special considerations concerning questions of disputed incorporation) has already been referred to above. Further, the putative governing law of the separable agreement ought to determine questions of whether a dispute resolution agreement is impeached by allegations of illegality or invalidity. Thus, in *Mackender v Feldia AG* the Court of Appeal had to consider

> whether or not to stay proceedings brought before it on the grounds that the parties had concluded an insurance contract which made provision for disputes to be referred to the Belgian courts. The Court of Appeal made no distinction between the law governing the insurance contract and the jurisdiction agreement, but the validity of both the governing contract and the jurisdiction agreement were questions that the parties had agreed to refer to the Belgian courts in accordance with Belgian law. Likewise, in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* the question of whether or not the arbitration agreement was impeached by allegations of illegality had to be assessed by reference to the law governing the arbitration agreement, which was English law.
>
> [emphasis added]

32 Finally, the illustration referred to in *BNA* (at [54]) was an example where the law of the seat *expressly* directs the seat court to apply the law of the arbitration agreement in the first instance to determine its validity. That is not the case before me.

33 In the circumstances and for the reasons I have articulated above, I disagree that the *obiter* comments in *BNA* afford any assistance to the defendant.

34 Further, in its Explanatory Note on the 1985 Model Law on International Commercial Arbitration as amended in 2006 (at para 48), it was noted by the UNCITRAL secretariat that:

> 48. Although the grounds for setting aside as set out in article 34 (2) are almost identical to those for refusing recognition or enforcement as set out in article 36(1), a practical difference should be noted. An *application for setting aside under article 34 (2) may only be made to a court in the State where the award was rendered* whereas an application for enforcement might be made in a court in any State. For that reason, ***the grounds relating to public policy and non-arbitrability may vary in substance with the law applied***

> ***by the court (in the State of setting aside or in the State of enforcement)***.
>
> [emphasis added in italics and bold italics]

Thus, whether it is the seat court (dealing with a setting-aside application) or an enforcement court (dealing with a request for recognition or enforcement of an award), the Model Law envisages the application of domestic law to questions of arbitrability and public policy, at least in the context of post-award applications. Since s 11 of the IAA deals with arbitrability *generally* without distinguishing between subject matter arbitrability pre-award and post-award, the "public policy" referred to in s 11(1) of the IAA ought, in my view, to bear the same meaning it does in the Model Law. That in turn would mean the application of the *domestic law* of Singapore as the seat court to determine if the subject matter of a dispute is non-arbitrable because it is contrary to Singapore's public policy.

35 This is, in my judgment, a principled approach because the underlying purpose of the non-arbitrability rule is to set a limit on party autonomy where such autonomy conflicts with *the public policy of the state* being asked to give effect to an arbitration agreement. As stated in Julian David, Mathew Lew QC, Loukas A. Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) ("*Comparative International Commercial Arbitration*") at paras 9-1 to 9-3:

> 9-1 Arbitrability is one of the issues where *the contractual and jurisdictional natures of international commercial arbitration meet head on*. It involves the simple question of what types of issues can and cannot be submitted to arbitration. Party autonomy espouses the right of parties to submit any dispute to arbitration …
>
> 9-2 *National laws often impose restrictions or limitations on what matters can be referred to and resolved by arbitration*. … More important than the restrictions relating to the parties are

> limitations based on the subject matter in issue. This is 'objective arbitrability'. *Certain disputes may involve such sensitive public policy issues that it is felt that they should only be dealt with by the judicial authority of state courts.* An obvious example is criminal law which is generally the domain of national courts.
>
> 9-3 These disputes are not capable of settlement by arbitration. ***This restriction on party autonomy is justified to the extent that arbitrability is a manifestation of national or international public policy.*** Consequently, arbitration agreements covering those matters will, in general, not be considered valid, will not establish the jurisdiction of the arbitrators and the subsequent award may not be enforced.
>
> [emphasis added in italics and bold italics]

36 Furthermore, a finding by the seat court as to the arbitrability (or non-arbitrability) of a particular dispute is one that strikes at the jurisdiction of the tribunal in respect of that dispute. As succinctly explained by Bernard Hanotiau, in "The Law Applicable to Arbitrability" (2014) 26 SAcLJ 874 ("*The Law Applicable to Arbitrability*") (at [1]):

> 1 Although judicial power is an essential prerogative of States, the parties may, if they express the wish to do so, give jurisdiction to arbitrators to settle their disputes. However, the State retains the power to prohibit settlement of certain types of dispute outside its courts. It is then claimed that the dispute is not arbitrable. If an arbitration agreement is entered into, it will not be valid. Arbitrability is indeed a condition of validity of the arbitration agreement and, *consequently, of the arbitrators' jurisdiction.*
>
> [emphasis added]

This point is also noted in *Comparative International Commercial Arbitration* at para 9-18 where the authors state that "[t]hough arbitrability is often considered to be a requirement for the validity of the arbitration agreement it is primarily a question of jurisdiction". The jurisdiction of a tribunal has been defined as referring to "the power of a tribunal to hear a case" (see *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2019] 1 SLR 263

(at [207]). Indeed, where the dispute is a non-arbitrable one, the tribunal has *no* power to hear the case even if the parties wish for it to be heard and regardless of the width or scope of the arbitration agreement. It is the law of the seat which limits party autonomy by prescribing what type of disputes are arbitrable and consequently, limiting the tribunal's jurisdiction accordingly. It is therefore principled that the law of *the seat* should apply to determine subject matter arbitrability at the pre-award stage.

37 This approach finds some support in the Genoa Court of Appeal's decision in *Fincantieri – Cantieri Navali Italiani SpA and Oto Melara SpA v Ministry of Defence, Armament and Supply Directorate of Iraq, Republic of Iraq* (1996) XXI YBCA 594 ("*Fincantieri*") (at [13]), cited in *Comparative International Commercial Arbitration* at para 9-14. The court there was faced with the question of whether disputes as to the effects of a United Nations embargo against Iraq were arbitrable and consequently, whether the Italian court proceedings should be stayed in favour of arbitration in Paris. It held (at [13]) that:

> For the present purpose it is sufficient to answer the question whether, at the time of commencing this action ..., the arbitral clause in the contracts was 'null and void, inoperative or incapable of being performed'. *The answer must be sought in Italian law, according to the jurisprudential principle that, when an objection for foreign arbitration is raised in court proceedings concerning a contractual dispute, the arbitrability of the dispute must be ascertained according to Italian law as this question directly affects jurisdiction, and the court seized of the action can only deny jurisdiction on the basis of its own legal system.*
>
> This also corresponds to the principles expressed in Arts. II and V of the [New York Convention]. Hence, the answer to the question [of arbitrability] can only be that the dispute was not arbitrable due to [the Italian embargo legislation].
>
> [emphasis added]

38 The reasoning in *Fincantieri* would, in my view, apply equally to a scenario where proceedings are brought before the seat court purportedly in breach of an arbitration agreement. It would, in my judgment, be logical for the seat court, in that event, to (a) apply its own law to determine if the dispute is arbitrable and (b) decide if it should decline its jurisdiction to hear the dispute and order a stay of proceedings in favour of arbitration.

39 I also draw support from *BBA and others v BAZ and another appeal* [2020] 2 SLR 453 ("*BBA*") (at [74]–[79]), and the Court of Appeal's discussion therein on the distinction between the jurisdiction of a tribunal and admissibility of a claim. I lay out the relevant paragraphs below:

> 74 This court in *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2019] 1 SLR 263 ('*Swissbourgh*') distinguished between jurisdiction and admissibility as follows:
>
> > Jurisdiction is commonly defined to refer to 'the power of the tribunal to hear a case', whereas admissibility refers to 'whether it is appropriate for the tribunal to hear it': *Waste Management, Inc v United Mexican States* ICSID Case No ARB(AF)/98/2, Dissenting Opinion of Keith Highet (8 May 2000) at [58]. To this, Zachary Douglas adds clarity to this discussion by referring to 'jurisdiction' as a concept that deals with 'the existence of [the] adjudicative power' of an arbitral tribunal, and to 'admissibility' as a concept dealing with 'the exercise of that power' and the suitability of the claim brought pursuant to that power for adjudication: [Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009)] at paras 291 and 310.
>
> 75 In *Swissbourgh*, this court quoted Chin Leng Lim, Jean Ho & Martins Paparinskis, *International Investment Law and Arbitration: Commentary, Awards and other Materials* (Cambridge University Press, 2018) at p 118, which set out two ways of distinguishing between jurisdiction and admissibility:
>
> > … The more conceptual reading would focus on the legal nature of the objection: is it directed against the tribunal (and is hence jurisdictional) or is it directed at the claim (and is hence one of admissibility)? The more draftsmanlike reading would focus on the place that the

> issue occupies in the structure of international dispute settlement: is the challenge related to the interpretation and application of the jurisdictional clause of the international tribunal (and hence jurisdictional), or is it related to the interpretation and application of another rule or instrument (and is hence one of admissibility)?

76 In our judgment, the ***'tribunal versus claim' test underpinned by a consent-based analysis should apply for purposes of distinguishing whether an issue goes towards jurisdiction or admissibility***.

77 The 'tribunal versus claim' test asks whether the objection is targeted at the tribunal (in the sense that the claim *should not be arbitrated* due to a defect in or omission to consent to arbitration), or at the claim (in that the claim itself is defective and *should not be raised at all*). Jan Paulsson explains the test in these terms (Jan Paulsson, 'Jurisdiction and Admissibility' (2005) in *Global Reflections on International Law, Commerce and Dispute Resolution*, *Liber Amicorum in honour of Robert Briner* (Gerald Aksen *et al* eds) (ICC Publishing, 2005) at pp 616 and 617; see also the Chartered Institute of Arbitrators Guideline 3 on Jurisdictional Challenges (2016) at paras 6–8 of the preamble and the commentary on Art 3):

> … the ***nub of the classification problem is whether the success of the objection necessarily negates consent to the forum.*** Our lodestar takes the form of a question: is the objecting party taking aim at the tribunal or at the claim? … in the event the [time limit] was exceeded, was it the parties' intention that the relevant claim should no longer be arbitrated by … arbitration but rather in some other forum, or was it that the claim could no longer be raised at all? Opting for the former conclusion would mean that the objection is jurisdictional …
>
> …
>
> To understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds:
>
> - If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.
>
> - If the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility and the tribunal's decision is final.

> 78 ***Consent serves as the touchstone for whether an objection is jurisdictional because arbitration is a consensual dispute resolution process: jurisdiction must be founded on party consent. For this reason, arguments as to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional***, as are questions of the claimant's standing to bring a claim or the possibility of binding non-signatory respondents (Robert Merkin QC & Louis Flannery QC, *Merkin and Flannery on the Arbitration Act 1996* (Informa Law from Routledge, 6th Ed, 2019) at ch 30.3 ; see also Michael Hwang SC & Lim Si Cheng, 'The Chimera of Admissibility in International Arbitration' in *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Neil Kaplan & Michael J Moser eds) (Kluwer Law International, 2018) at pp 277–278). A similar consent-based analysis was adopted by this court in *Swissbourgh* ([74] *supra*) (at [206] and [209]).
>
> 79 Conversely, admissibility relates to the 'nature of the claim, or to particular circumstances connected with it': *Case Concerning the Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections, Separate Opinion of Judge Sir Gerald Fitzmaurice)* [1963] ICJ 97 at 102. It asks ***whether a tribunal may decline to render a decision on the merits for reasons other than a lack of jurisdiction***, and is determined by the tribunal ***on the basis of their discretion*** guided by, amongst others, principles of due administration of justice and any applicable external rules: Friedrich Rosenfeld, 'Arbitral Praeliminaria – Reflections on the Distinction between Admissibility and Jurisdiction after *BG v Argentina*' (2016) 29 Leiden Journal of International Law 137 at 148–151.
>
> [emphasis in original in italics; emphasis added in bold italics]

40 Applying the "tribunal versus claim" test underpinned by a consent-based analysis, in my judgment, the issue of subject matter arbitrability, when it arises before the seat court at the pre-award stage, is better characterised as an issue that, in essence, goes towards *jurisdiction*. At first glance, it might appear that an issue of subject matter arbitrability may be seen as directed at *the claim* (and hence concerns a question of admissibility). However, this belies the *substance* of the consent-based analysis that underpins the "tribunal versus claim" test. A claim that a particular dispute is non-arbitrable due to its subject matter, in substance, raises a defect as to the *parties' consent to arbitration*, and

as I mentioned above at [31], regardless of the width and scope of the wording of the arbitration agreement. Therefore, such a claim raises a question of the jurisdiction of the tribunal. Simply put, the parties' consent would be invalid since parties cannot agree to submit non-arbitrable disputes to arbitration as a matter of public policy. The courts will, in such circumstances, recognise (under s 6 of the IAA) that the arbitration agreement is either "inoperative" or "incapable of being performed" (see above at [20]).

41 Further, the *consequences* of a challenge (whether pre-award or post-award) made to a *seat court*, by a party asserting non-arbitrability, are consistent with such a challenge being in the nature of a jurisdictional objection; more so where the challenge succeeds. As noted in *BBA* at [77] (see [39] above), "[i]f the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse". If the challenge before the seat court succeeds, it simply means that the particular dispute cannot be arbitrated in the seat. It can, however, still be *litigated* in the appropriate *court*. In contrast, there is no discretion for the tribunal to exercise as to whether it wishes to hear a dispute which is non-arbitrable. In my judgment, when so viewed through the "tribunal versus claim" lens, the question of subject matter arbitrability cannot merely be a matter of admissibility. Rather, it strikes at the tribunal's jurisdiction.

42 Thus, where this court as the seat court is asked to consider an arbitral tribunal's *subject matter* jurisdiction on grounds of arbitrability, whether pre-award under s 6(2) and/or s 10(3) of the IAA, or post-award under Art 34(2)(*b*) of the Model Law, the court should, in my judgment, apply Singapore law as the law of the seat to determine that question.

43 The conclusion I have reached above is consistent with the UNCITRAL Secretariat's analysis of Art 16 of the Model Law in the *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General*, UNGAOR, 18th Sess, UN Doc A/CN.9/264 (1985) at p 38 where it is stated that:

> 3. Article 16 does not state according to which law the arbitral tribunal would determine the various possible issues relating to its jurisdiction. It is submitted that ***the applicable law should be the same as that which the Court specified in article 6 would apply in setting aside proceedings under article 34***, since these proceedings constitute the ultimate court control over the arbitral tribunal's decision (article 16(3)). ***This would mean*** that the capacity of the parties and the validity of the arbitration agreement would be decided according to the law determined pursuant to the rules contained in article 34(2)(a)(i) and ***that the question of arbitrability and other issues of public policy would be governed by the law of 'this State'*** (see present text of article 34(2)(b)). 52/ As regards these latter issues, including arbitrability, it is further submitted that the arbitral tribunal, like the Court under article 34(2)(b), should make a determination *ex officio*, *i.e.* even without any plea by a party as referred to in article 16(2). 53/
>
> [emphasis in original omitted; emphasis added in bold italics]

As can be seen from the passage quoted above, the UNCITRAL secretariat took the view, which I find logical and persuasive, that a *tribunal* dealing with issues relating to its jurisdiction at the *pre-award stage* should apply the same law which the *seat court* would apply at the *post-award stage* in setting-aside proceedings. This includes *the question of arbitrability* and other issues of public policy. It stands to reason that similarly, at the pre-award stage, the *seat court* should *also* apply *its own law* to issues of subject matter arbitrability.

44 As observed by the High Court in *BAZ v BBA and others and other matters* [2020] 5 SLR 266 (at [50] and [68]), public policy and arbitrability are unique to each state. They are also fundamental to the forum such that an award

that falls foul of public policy or arbitrability should not be enforced *even if* parties waive their objection. It is thus less than desirable for the seat court to have to apply the public policy considerations of another jurisdiction (based on the proper law of the arbitration agreement). On the other hand, it is wholly appropriate for the seat court to apply its own law to determine the public policy considerations of its own state. For this reason also, I conclude that it is the law of the seat that determines the issue of subject matter arbitrability at the pre-award stage.

45 Before I end this section, I make one observation. It should be noted that the conceptual rationale behind a *foreign enforcement court's* application of the non-arbitrability doctrine may well be different. Where a foreign enforcement court is asked not to recognise or enforce an arbitral award on grounds of non-arbitrability or public policy, it applies its own law to determine that question. This is described as an "exceptional escape valve" which allows contracting states of the New York Convention to refuse enforcement of an otherwise valid and binding arbitration award on non-arbitrability grounds (*International Commercial Arbitration* at pp 1040 and 643). This is consistent with the Court of Appeal's observation in *Tomolugen Holdings* (at [73]) that the effect of Art 1(5) of the Model Law which provides that the Model Law "shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law" is to preserve the force of the domestic state's laws on arbitrability. Individual states are given the discretion under the New York Convention to refuse to enforce an award it deems non-arbitrable or contrary to its own public policy. The result, as stated in *Comparative International Commercial Arbitration* at para 9-18, is that "each country determines for itself which disputes it considers to be arbitrable". In this case, the rationale is simply

to respect the public policy considerations of contracting states such that they are not forced to enforce foreign awards they deem contrary to their own public policy.

46 Thus, one could conceive of a scenario where a seat court in Singapore, applying its own law, refuses to set aside an award on grounds of non-arbitrability or public policy; that essentially means that the arbitral tribunal was clothed with jurisdiction to hear the dispute concerned. Despite this determination by the seat court, a foreign enforcement court may, applying *its own law*, nevertheless *decline* to enforce that award on the very same grounds of non-arbitrability and/or public policy according to its law. There is nothing incongruous or anomalous about such an outcome as this is simply an illustration of the "exceptional escape valve" mechanism that is ingrained within, and therefore in a sense envisaged by, the very structure of the Model Law and the New York Convention.

47 On the other hand, anomalies may well result if the law of the seat is *not* applied to the issue of subject matter arbitrability at the pre-award stage, as I demonstrate in the next section.

The same law should be applicable to arbitrability issues at the pre-award and post-award stages

48 The second main reason for my conclusion is that applying the law of the seat avoids potential anomalies that would otherwise arise from applying the proper law of the arbitration agreement to the question of pre-award subject matter arbitrability. It is uncontroversial that when the seat court considers an application to set aside an award on grounds of non-arbitrability of the dispute, it applies its own law (*ie*, the law of the seat) – see *BNA* at [28] above. However, if the defendant's case is to be accepted, then the seat court must apply a

potentially different law (*ie*, the proper law of the arbitration agreement) to arbitrability issues at the *pre-award* stage. If so, it is not difficult to envision potentially anomalous outcomes, and I can think of two examples.

49 In both examples, the following assumptions are made – (a) that the contract contains an arbitration agreement providing for disputes to be arbitrated in Singapore (b) that the proper law of the arbitration agreement is not Singapore law but a foreign system of law and (c) that the particular dispute between the parties is *not* arbitrable under Singapore law as the law of the arbitral seat but *is* arbitrable under the foreign proper law of the arbitration agreement.

50 In the first example, party A commences court proceedings in Singapore against party B and in response, party B makes an application under s 6 of the IAA for a stay of the court proceedings in favour of arbitration. Party A asserts, in opposition to the application, that a stay should be refused because the subject matter of the dispute is not arbitrable under Singapore law as the *lex loci arbitri* whereas party B contends that the stay should be granted because the dispute is arbitrable under the proper law of the arbitration agreement. 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. Arbitration proceedings are then commenced in Singapore, prosecuted and an award is rendered against party A. After the award is rendered, party A who initially (and unsuccessfully) opposed the stay application may then file an application in the Singapore court to set aside the award and rely on Art 34(2)(*b*)(i) of the Model Law. Since under that provision, the seat court is *mandated* to apply *the law of the seat* at the post-award setting aside stage, it would then have to decide that the dispute is not arbitrable under Singapore law and consequently, set aside the award.

51 In the second example, party A commences arbitration proceedings against party B in Singapore. Party B makes an application to challenge the jurisdiction of the tribunal on the basis that the subject matter of the dispute is not arbitrable. The tribunal, applying the foreign proper law of the arbitration agreement, decides that it has jurisdiction as the dispute is arbitrable under that system of law. Party B, being dissatisfied with the tribunal's jurisdiction ruling, 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. Party B then applies to set aside the award under Art 34(2)(*b*)(i) Model Law. Now, at the post-award stage, the *same court* would have to apply *Singapore law* as the law of the seat, arrive at the conclusion that the subject matter is not arbitrable under Singapore law and consequently, set aside the award.

52 Based on the examples above, it seems illogical for the same court to come to two different conclusions on subject matter arbitrability of the dispute(s) in question merely because the argument or challenge is raised at different stages in the process (*ie*, pre-award versus post-award). The examples I have raised above are not esoteric or far-fetched and were briefly alluded to by Mr Thio SC in his oral arguments.[32] Mr Nandakumar's response was that the court could legitimately apply different laws to the issue of arbitrability depending on the stage at which the issue arises.[33] Conceptually, that may well be so, but it does not provide a satisfactory answer to the more fundamental question, which is whether the occurrence of such anomalous outcomes is justified. One can easily imagine the substantial time and costs that would be

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32 NE 29 April 2021 at pp 7 (lines 24 to 31) and 8 (lines 1 to 7); NE 2 July 2021 at p 16 (lines 14 to 25).

33 NE 2 July 2021 at pp 21 (lines 30 to 32) and 22 (lines 1 to 5).

wasted as a result of the seat court applying the proper law of the arbitration agreement for arbitrability challenges pre-award and the law of the seat post-award, particularly if the court arrives at different conclusions at both stages and an award is eventually set aside, effectively rendering it a *brutum fulmen*. One might also argue that it is an exercise in futility to recognise, pre-award, the jurisdiction of an arbitral tribunal applying the proper law of the arbitration agreement only for that tribunal's award to end up being set aside by the seat court applying the law of the seat post-award.

53 There is no principled reason why the *same approach* should not be applied to subject matter arbitrability issues at *both* stages. Such an approach ensures that a consistent result is always arrived at by the seat court regardless when the issue of arbitrability arises. This approach (*ie,* of applying the law of the seat) is, in my judgment, correct and to be preferred. It avoids the anomalous outcomes in the two examples I have highlighted above and engenders certainty in the law.

Applying the law of the seat at the pre-award stage is consistent with the policy to promote international commercial arbitration

54 The third main reason is that applying the law of the seat would be more consistent with the policy to promote international commercial arbitration. As noted in *International Commercial Arbitration* at p 649:

> The forum court is also fully entitled to deny effect to a foreign nonarbitrability rule if it conflicts with a mandatory law or public policy of the forum itself – ***including specifically with public policies of the forum that favour international arbitration.*** *Thus, even if the laws of State B provide that particular statutory claims under State B's laws may not be resolved by arbitration, State C courts may properly decide that State C's public policy is to give broad effect to international arbitration agreements, including with regard to particular categories of disputes, and that State B's nonarbitrability rules will therefore not be applied in State C.*

[emphasis added]

Our courts have consistently given broad effect to international arbitration agreements. The Court of Appeal in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 (at [28]) noted that an unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. That policy is consistent with the intention expressed by Parliament in the IAA and I am prepared to accept that it is part of Singapore's public policy to promote or favour international arbitration. Thus, the court ought to give effect to the parties' contractual choice as to the manner of dispute resolution unless it offends our law. In my view, this extends naturally, at one end of the spectrum, from enforcing the contractual bargain of parties to arbitrate their disputes to, at the other end of that spectrum, upholding the finality of arbitral awards save for exceptional circumstances where the grounds for setting aside or refusal of enforcement are met. As such, it is in my judgment neither necessary nor desirable for this court to give effect to foreign non-arbitrability rules, particularly when doing so would potentially *undermine* Singapore's policy of supporting international commercial arbitration. Instead, applying the law of the seat to the issue of subject matter arbitrability would, in my judgment, be consistent with the policy to facilitate such arbitration in Singapore.

The weight of authority leans in favour of the law of the seat being applied

55 Finally, the weight of academic authority and such case law as is available leans in favour of the view that the law of the seat should apply to determine issues of arbitrability.

56 In Gary Born's *International Commercial Arbitration* at pp 643, 644, 649 and 650, the learned author recognises that a number of choice of law options are possible but opines that the "better course is for the judicial

enforcement forum not to give effect to foreign nonarbitrability rules, but instead to recognize the otherwise valid agreement to arbitrate" (at p 643) and "it is only in rare and exceptional cases that a foreign nonarbitrability rule should be given effect by a national court … Consistent with this, the weight of authority concludes that a court or tribunal should only take into account the nonarbitrability rules of a foreign jurisdiction in extremely limited instances, generally involving a violation of either international or local public policy or mandatory law" (at p 650).

57 In *Comparative International Commercial Arbitration* at paras 9-10 to 9-11, the authors note that there are a number of divergent views in national court practices. One such view involves the application of different criteria depending on whether the question arises at the referral stage or at the enforcement stage. The authors cite a Brussels Court of Appeal decision, *Company M v M S A* (1986) YBCA XIV 618 (*"Company M"*), where the court held that:

> the arbitrability of a dispute must be ascertained according to different criteria, depending on whether the question arises when deciding on the validity of the arbitration agreement or when deciding on the recognition and enforcement of the arbitral award.
>
> In the first case, the arbitrability is ascertained according to the law which applies to the validity of the arbitration agreement and …… its object. It is therefore the law of autonomy which provides the solution to the issue of arbitrability.
>
> An arbitrator or court faced with this issue must first determine which law applies to the arbitration agreement and then ascertain whether, according to this law, the specific dispute is capable of settlement by arbitration. […]
>
> Within the framework of the New York Convention, the expression 'concerning a subject matter capable of settlement by arbitration' Article II(1) does not affect the applicability of the law designated by the uniform solution of conflict of laws for deciding on the arbitrability of the dispute at the level of the arbitration agreement.

> According to the New York Convention, the arbitrability of the dispute under the law of the forum must be taken into consideration only at the stage of recognition and enforcement of the award and not when examining the validity of the arbitration agreement. This rule can be explained by the consideration that the arbitral award will, in the majority of cases, be executed without the intervention of an enforcement court …

58 The defendant relies on this decision as support that it is the law governing the arbitration agreement which applies to determine the arbitrability of a dispute.[34] I note that the full report of the decision was not available and, in any event, it does not bind this court. The Brussels Court of Appeal considered that within the framework of the New York Convention, the expression "concerning a subject matter capable of settlement by arbitration" in Art II(1) does not "affect the applicability of the law *designated by the uniform solution of conflicts of laws* for deciding on the arbitrability of the dispute at the level of the arbitration agreement". With respect, it is not clear to me what the court meant by that and whether it was applying a particular Belgian conflicts of law rule pointing the court to the proper law of the arbitration agreement for arbitrability issues at the pre-award stage. I am therefore hesitant to adopt the reasoning in *Company M* and I am not persuaded that it should be followed in Singapore. The approach taken in *Company M* also does not cohere with the jurisdictional nature of subject matter arbitrability, would likely create anomalous results and is not consistent with the policy in Singapore to promote international commercial arbitration. In my view, the approach adopted by the Genoa Court of Appeal in *Fincantieri* (above at [37]) is preferable and consistent with my own analysis and decision.

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34 DWS at para 65.

59 Further, the authors of *Comparative International Commercial Arbitration* at para 9-18 also ultimately conclude, after noting that arbitrability is primarily a question of jurisdiction, that "the better view is that the law applicable to the question of arbitrability in court proceedings should be governed exclusively by the provisions of the law of the national court which determines the case".

60 This conclusion is echoed by Bernard Hanotiau in *The Law Applicable to Arbitrability* (at [29]) where the author opines as follows:

> Suppose one of the parties has commenced the arbitration procedure in accordance with the arbitration agreement and the other party considers that the dispute is not arbitrable and starts a procedure before a national court. How is the national court going to decide this issue of arbitrability? Subject to any contrary solution under an applicable international convention, *it will in principle apply its national law. This is the better view even if it has been argued by some authors and decided by various courts that arbitrability should be determined by the law applicable to the validity of the arbitration agreement.*
>
> [emphasis added]

In the footnotes to the passage above, the author refers to *Comparative International Commercial Arbitration* at para 9-18 and to *Company M*.

61 In terms of available case law, the conclusion reached in *Fincantieri* is aligned with the "better view" expressed in the academic literature. I myself can see no compelling or exceptional reason to take a different path in the case before me.

62 Thus, applying Singapore law as the law of the arbitral seat, I find that the disputes between the parties in the NCLT Proceedings *are* arbitrable. It is therefore not necessary for me to make a finding on whether the "pith and substance" of the disputes between the parties are contractual in nature and/or

arise out of the SHA or whether they relate to oppression and mismanagement since *all* of these disputes, no matter their characterisation, are arbitrable under Singapore law. Nor is it necessary for me to determine what is the proper law of the arbitration agreement. Even if it is found to be Indian law, that is of no relevance as it is *Singapore law* as the law of the seat that I have found to be relevant to the issue of subject matter arbitrability. Additionally, while the defendant argues that the arbitration agreement is null and void, inoperative or incapable of being performed *vis-à-vis* disputes relating to oppression and mismanagement because such disputes are non-arbitrable *under Indian law*,[35] this argument also necessarily fails given my findings and conclusions above.

Second issue: Whether the bringing of the claims by the defendant before the NCLT is in breach of the arbitration agreement

63 I turn now to address whether the bringing of the claims by the defendant before the NCLT is in breach of the arbitration agreement. This issue concerns the construction of the arbitration agreement and its scope. The plaintiff says that the disputes are essentially issues relating to the exercise of contractual rights under the SHA and fall within the scope of the arbitration agreement. Thus, the defendant has breached the arbitration agreement by commencing the NCLT proceedings.[36] However, the defendant contends that the disputes pertain to oppression and mismanagement under Indian law and do not fall within the scope of the arbitration agreement. Parties could not have intended for disputes relating to oppression and mismanagement to fall within the scope of the arbitration agreement since it would be unworkable and liable to be declared void under Indian law.[37]

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35 DWS at paras 62 to 68.

36 PWS at paras 33 and 53 to 55.

37 DWS at para 4.

64 I note that no evidence was led by the parties and no arguments were made on whether Indian law (assuming it is the proper law of the arbitration agreement) applies principles that are different to Singapore law with regard to the *construction* of an arbitration agreement. As such, I have proceeded on the basis that the approach to construing an arbitration agreement and its ambit is the same, whether under Singapore or Indian law.

Analysis and decision

65 I have been guided in this task by the Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petropod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 ("*Larsen Oil*") (at [19]) where it was explained that arbitration clauses should be generously construed such that all manner of claims, whether common law or statutory, should be regarded as falling within their scope unless there is good reason to conclude otherwise. Further, the court must consider "the pith and substance" of the dispute as it appears from the circumstances in evidence (and not just the particular terms in which the claims have been formulated in court) (see *Oei Hong Leong v Goldman Sachs International* [2014] 3 SLR 1217 at [36]).

66 In my judgment, all the disputes between the parties brought before the NCLT by the defendant fall within the scope of the arbitration agreement. The arbitration clause (see [10] above) is not only widely drafted but, importantly, also specifically mentions disputes "*relating to* the *management of the Company* or *relating to* any of the matters set out in this Agreement" [emphasis added]. All the disputes including the claims relating to collusion and breach of fiduciary duties relate to the management (or mismanagement as the case may be) of People Interactive and fall squarely within the wording and ambit of the arbitration agreement. There can be no serious argument to the contrary.

67 I see no merit in the defendant's submissions that the disputes between the parties fall outside of the scope of the arbitration agreement on the basis 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 otherwise be declared void under Indian law.[38] This is contrary to the express wording of the arbitration clause which specifically identifies disputes relating to the "management" of People Interactive. It is also, in my judgment, 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.

68 Thus, I find that the disputes in question do fall within the scope of the arbitration agreement in the SHA, and the defendant commenced the NCLT Proceedings in breach of the arbitration agreement.

Third issue: Whether the court should grant the permanent anti-suit injunction sought by the plaintiff

69 Finally, I turn to the issue of whether a permanent anti-suit injunction should be granted. The applicable legal principles are well-settled and not in dispute. The Court of Appeal, in *Sun Travels & Tours Pvt Ltd* v *Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 (*"Sun Travels"*) (at [66]), summarised the five factors to be considered in deciding whether to grant an anti-suit injunction as follows:

(a) whether the defendant is amenable to the jurisdiction of the Singapore court;

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38 DWS at para 56.

(b) whether Singapore is the natural forum for resolution of the dispute between the parties;

(c) whether the foreign proceedings would be vexatious or oppressive to the plaintiff if they are allowed to continue;

(d) whether the anti-suit injunction would cause any injustice to the defendant by depriving the defendant of legitimate juridical advantages sought in the foreign proceedings; and

(e) whether the institution of foreign proceedings was or would be in breach of any agreement between the parties.

70 The Court of Appeal in *Sun Travels* also reaffirmed the well-known principle that, in cases of arbitration agreements, it would suffice to show that there was a breach of an arbitration agreement and in which case, anti-suit injunctive relief would ordinarily be granted unless there are strong reasons not to. This is a *separate* basis on which an anti-suit injunction may be granted, distinct from when such an injunction may be granted to prevent unconscionable conduct by the injunctee. There is no need to adduce any additional evidence of unconscionable conduct in cases where the party to be injuncted has brought, or is threatening to bring, proceedings in breach of its obligations under an arbitration agreement. The court ought not to, in such circumstances, feel any diffidence in granting an anti-suit injunction subject to the caveat that the injunction "is sought promptly and before the foreign proceedings are too far advanced" (*Anggeliki Charis Compania Maritima SA v Pagnan SpA* [1995] 1 Lloyd's Rep 87 (at 96); *Sun Travels* at [66]–[68]). If there is delay in bringing the application, comity considerations may become relevant (*Sun Travels* at [75] and [81]–[83]).

Analysis and decision

The defendant is amenable to the jurisdiction of the court

71 As a preliminary point, the defendant argues that he is not amenable to the jurisdiction of the Singapore courts because he does not reside in Singapore and was not amenable to being served with proceedings out of jurisdiction. He also contends that he does not submit to the jurisdiction of the Singapore courts and the only and proper forum for the resolution of the dispute between him and the plaintiff is the NCLT.[39] The plaintiff contends that the court has *in personam* jurisdiction over the defendant under s 16(1)(*a*)(ii) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) because leave was granted to serve the cause papers for OS 242 on the defendant out of jurisdiction and the defendant was personally and validly so served.[40] The defendant has also submitted to the jurisdiction of the Singapore courts by agreeing to arbitration of the disputes in the SHA in Singapore.[41]

72 An injunction will only be issued restraining a party who is amenable to the jurisdiction of the court (see *Bank of America National Trust and Savings Association v Djoni Widjaja* [1994] 2 SLR(R) 898 at [11]). In *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 (*"Koh Kay Yew")* (at [17]), the Court of Appeal stated that a party would be amenable to the jurisdiction of the court if that party was "validly served with the required court documents as required by the present Rules of Court finding jurisdiction in Singapore" or submitted to the court's jurisdiction. As also noted by the Court of Appeal in *Koh Kay Yew* (at [17]):

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39 DWS at paras 27 to 32; 1AM at para 5.

40 HR/ORC 1458/2021.

41 1SAM at para 87(a).

> Being amenable to the jurisdiction of the local courts simply means being liable or accountable to this jurisdiction. As such, so long as any local courts have *in personam* jurisdiction over a party, ***either*** *through the proper service of documents* ***or*** *through submission to the jurisdiction*, this first criteria would be satisfied.
>
> [emphasis added in italics and bold italics]

73 In my judgment, the defendant is amenable to the jurisdiction of this court on both counts. ORC 1458, granting the plaintiff leave to serve OS 242 and the supporting affidavit of Ms Mani on the defendant out of jurisdiction, was made on 15 March 2021. In its leave application, the plaintiff relied on O11 r 1(*r*) of the Rules of Court (2014 Rev Ed) ("ROC"), namely that OS 242 was in respect of matters in which the defendant had agreed to submit to the jurisdiction of the court. Even though the defendant does not reside in Singapore, he is party to an arbitration agreement which envisages arbitration seated in Singapore. As such, the defendant has also, in my view, agreed to submit to the *supervisory jurisdiction* of this court as the court in the arbitral seat. Such supervisory jurisdiction is not limited to merely supervising the actual arbitral process but includes the jurisdiction to supervise the conduct of a party to a contract and compelling, if necessary, that party to comply with its contractual obligations to resolve disputes with its counterparty in Singapore in accordance with the contractually agreed dispute resolution mechanism.

74 In the context of this case where the defendant has entered into an arbitration agreement specifying Singapore as the seat of arbitration, the words "agreed to submit to the jurisdiction of the Court" in O 11 r 1(*r*) of the ROC are, in my judgment, wide enough to encompass an agreement to submit to such supervisory jurisdiction of this court.

75 Secondly, and related to the point made at [73] above, the defendant's conduct is to be taken (a) as a submission to this court's jurisdiction or alternatively (b) a waiver of any jurisdictional irregularity. In the further alternative, the court is in any event entitled to proceed on the basis that there has been proper service on the defendant. I elaborate below.

76 The defendant avers in his *affidavit* in support of SUM 1477 and in opposition to OS 242 that he does not submit to the jurisdiction of this court and that the actions taken by him in OS 242 do not amount to a step in the proceedings. However, and significantly, the defendant *did not* take any steps to dispute the jurisdiction of the court by way of an application to set aside *ORC 1458* (*ie,* the order granting the plaintiff leave to serve the cause papers in OS 242 on the defendant *ex juris*).

77 O 28 r 2A(1) of the ROC provides as follows:

> **Dispute as to jurisdiction (O. 28, r. 2A)**
>
> **2A.**—(1) A defendant *who wishes to dispute the jurisdiction of the Court* in the proceedings by reason of any irregularity in the originating summons or service thereof *or in any order giving leave to serve the originating summons out of the jurisdiction* or extending the validity of the originating summons for the purpose of service or on any other ground ***shall within 21 days*** *after service of the originating summons and supporting affidavit or affidavits on him apply to the Court for —*
>
> (*a*) an order setting aside the originating summons or service of the originating summons on him;
>
> (*b*) an order declaring that the originating summons has not been duly served on him;
>
> (*c*) *the discharge of any order giving leave to serve the originating summons on him out of the jurisdiction*;
>
> (*d*) the discharge of any order extending the validity of the originating summons for the purpose of service;

> (*e*) the protection or release of any property of the defendant seized or threatened with seizure in the proceedings;
>
> (*f*) the discharge of any order made to prevent any dealing with any property of the defendant;
>
> (*g*) a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject-matter of the claim or the relief or remedy sought in the action; or
>
> (*h*) such other relief as may be appropriate.
>
> [emphasis added in italics and bold italics]

O 28 r 2A(1) mirrors the wording of O12 r 7(1). However, O 28 does not contain the equivalent of O 12 r 7(6), which provides that:

> Except where the defendant makes an application in accordance with paragraph (1), *the appearance by a defendant shall*, unless the appearance is withdrawn by leave of the Court under Order 21, Rule 1, be *treated as a submission by the defendant to the jurisdiction of the Court* in the proceedings.
>
> [Emphasis added]

78 Even so, in my judgment, if the defendant wished to dispute the jurisdiction of the court, it was incumbent on him to make an application under O 28 r 2A(1)(*c*) of the ROC to set aside or discharge ORC 1458 within 21 days after the service of OS 242 and the supporting affidavit on him. It is not in dispute that the defendant was served with the cause papers for OS 242 on 26 March 2021[42] and thereafter, proceeded to defend the application.[43] Yet, the defendant *did not* apply to set aside ORC 1458. As I have explained, SUM 1477 filed by the defendant on 30 March 2021 together with his supporting affidavit, was *not* an application to set aside ORC 1458 but to set aside *ORC 1463*, which was the *ex parte* injunction order.

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42 1AM at para 89.

43 1AM at para 88.

79 O 28 r 2A(1) of the ROC is phrased in mandatory terms as seen by the use of the words "***shall*** within 21 days". In my judgment, a failure to challenge jurisdiction under O 28 r 2A(1) of the ROC within the prescribed time limit would mean that the defendant is, *thereafter*, taken to have submitted to the court's jurisdiction or waived any jurisdictional irregularity in relation to OS 242. Alternatively, the court is entitled to proceed on the basis that there has been "proper service" on the defendant (*Koh Kay Yew* at [17]).

80 There is support for my conclusion in the authorities. In *Woh Hup (Pte Ltd v Property Development Ltd* [1991] 1 SLR(R) 473 ("*Woh Hup*") (at [20]), Chan Sek Keong J (as he then was) considered that a failure to enter a conditional appearance with a view of setting aside the service of the originating summons outside of the jurisdiction on the ground of lack of jurisdiction meant that the defendants had submitted to the jurisdiction of the court. The commentary in *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull SC gen ed) (Sweet & Maxwell, 2021) at para 12/7/4 regarding O 12 r 7 of the ROC, states as follows:

> …But where a defendant disputes the court's jurisdiction he must comply with the provisions of O.12, r.7. Thus, a defendant who wishes to challenge an order extending the validity of a writ should do so by invoking O. 12, r.7(1) … Failure to do so will *preclude the defendant from challenging jurisdiction at a later stage* in the proceedings …
>
> [emphasis added]

In *Allenger Shiona (trustee-in-bankruptcy of the estate of Pelletier, Richard Paul Joseph) v Pelletier, Olga and another* [2020] SGHC 279 (at [104]), Ang SJ noted that the effect of the time limits for challenging the court's jurisdiction in O 12 r 7(1) of the ROC is to *disallow challenges made beyond such limits*, unless an extension has been granted. Finally, in *Broadcast Solutions Pte Ltd v Zoom Communications Ltd* [2014] 1 SLR 1324 (at [30]), Woo Bih Li J (as he

then was) also opined, in the context of a stay application, that a non-challenge as to jurisdiction would ordinarily be construed as a submission.

81 In my judgment, the proposition that a defendant who fails to dispute jurisdiction in accordance with the ROC is precluded from later challenging jurisdiction applies equally in the context of O 28 r 2A(1); particularly so since the wording of O 28 r 2A(1) of the ROC is *in pari materia* with O 12 r 7(1). Thus, the defendant's assertions on affidavit are, in my judgment, ineffective and inadequate to constitute a dispute as to the court's jurisdiction (and by extension, his amenability to this court's jurisdiction). It does not alter the fact that the defendant's decision not to challenge the court's jurisdiction in the manner prescribed by O 28 r 2A(1), by way of an application to set aside or discharge ORC 1458, would amount to a submission to this court's jurisdiction in so far as OS 242 is concerned, or at the least a waiver of any jurisdictional irregularity that may have existed. Alternatively, even if I am wrong on this, in these circumstances, the court nevertheless proceeds on the assumption that the defendant has been properly served; until ORC 1458 is set aside, it remains a valid order and the court proceeds on that basis. Thus, the amenability requirement would still be met. As held in *Koh Kay Yew* at (see [72] above), the amenability test is satisfied either by proper service or submission to jurisdiction.

82 Finally, while the defendant argues that OS 242 was not validly served out of jurisdiction since the disputes are non-arbitrable under Indian law, that contention falls away in the light of my conclusions above on the issue of arbitrability. I therefore reject the defendant's contention that he is not amenable to the jurisdiction of the court.

83 Since, as I have found, the defendant's commencement of the NCLT Proceedings in India is in breach of the arbitration agreement in the SHA, *prima facie*, an anti-suit injunction should be granted against the defendant unless there is strong reason not to do so. Concerns regarding comity do not arise in this case since there is no delay by the plaintiff in seeking injunctive relief. Ultimately, this court is not arrogating to itself jurisdiction exercised by the court of a foreign friendly state but is merely seeking to uphold and enforce the parties' contractual bargain.

84 The remaining question is whether there nevertheless exists strong reason not to grant an anti-suit injunction.

There is no strong reason not to grant an anti-suit injunction

85 Mr Nandakumar raised four grounds in seeking to establish the existence of strong reason not to grant an anti-suit injunction, namely:

(a) the resulting award will not be enforceable in India;[44]

(b) the NCLT Proceedings are not vexatious and oppressive and it is the plaintiff's application in Singapore that is vexatious and oppressive;[45]

(c) the arbitration agreement does not bind all parties to the dispute whereas the NCLT has jurisdiction over all relevant parties;[46] and

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44 DWS at paras 79 to 83.

45 DWS at paras 84 to 93.

46 DWS at paras 94 to 96.

(d) the NCLT is the natural and competent forum to hear the dispute.[47]

In my judgment, none of these grounds, singly or collectively, constitutes strong reason not to grant the injunction sought by the plaintiff. I address each ground in turn.

86 The first ground, even if correct, does not afford strong reason why the arbitration agreement should not be enforced. The seat court is not concerned with ensuring that an award emanating from a tribunal in the seat country will be enforceable, whether in the jurisdiction where enforcement will likely take place or in any other jurisdiction. The Court of Appeal in *Larsen Oil* (at [26]) stated that:

> Second, it is important to remember that arbitration is not an end in itself. Parties engage in arbitration in order to obtain an arbitral award that can be enforced. An arbitral award in respect of [a] non-arbitrable claim is a *brutum fulmen* as it can be set aside under s 48(1)(*b*)(i) of the AA even if the issue of arbitrability is not raised by the parties. It is an utter waste of time for parties to incur time and cost through arbitration, only to obtain an arbitral award that is later set aside for non-arbitrability, and to have the entire litigation process repeated again to have their dispute sorted out….

Whilst *Larsen Oil* was a case concerned with the Arbitration Act (Cap 10, 2002 Rev Ed), the observations made by the court in the passage quoted above would apply equally to an arbitration subject to the IAA. The seat court's concern, if at all, should be to ensure as far as possible that an award rendered in the arbitral seat does not become a *brutum fulmen* because it is liable to being set aside by the very same seat court on account of non-arbitrability.

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47 DWS at paras 98 to 99.

87 That reasoning cannot however be extended to also ensuring that the award will be enforceable in all other conceivable jurisdictions. Public policy and arbitrability considerations are unique to individual states. Both the Model Law and the New York Convention recognise this by providing for an "escape valve" mechanism allowing contracting states to refuse to recognise or enforce an arbitral award it deems to be contrary to its own policy. As I have alluded to at [46], this "risk" is inherent within the scheme of international commercial arbitration. Further, under the New York Convention, any award rendered by a tribunal in this case is potentially enforceable in any country in which the said convention applies, and not just in India. It would be speculative for the court to predict which are the more likely venues of enforcement especially given that assets may be moved from jurisdiction to jurisdiction. As such, the likelihood of an award being enforceable in other jurisdictions, while it may conceivably be raised as a factor for the court's consideration, does not, in my judgment, amount to strong reason in this case not to grant the anti-suit injunction.

88 The second ground is also insufficient to amount to strong reason. Flowing from my conclusions that subject matter arbitrability is governed by the law of the seat and that the claims made by the defendant in the NCLT Proceedings are arbitrable, it follows that the NCLT Proceedings were brought by the defendant in breach of the arbitration agreement and are therefore, *prima facie*, vexatious and oppressive. The arguments on how the proceedings in Singapore were conducted or prosecuted by plaintiff also fall away and are, in any case, not enough to displace the case for an anti-suit injunction. It cannot, in the circumstances, be said that the application for an anti-suit injunction was itself vexatious and oppressive conduct by the plaintiff, especially since the plaintiff would, *prima facie*, be *entitled* to an anti-suit injunction to enforce the arbitration agreement in the first place.

89 The third ground also falls away in the light of the defendant's breach of the arbitration agreement. There is no need for the plaintiff to show any separate basis as to why the NCLT Proceedings are vexatious or oppressive. While the defendant claims that an arbitral tribunal would have no jurisdiction over Ms Mani since she is not a party to the SHA, Mr Thio SC confirmed during the oral hearing and it was recorded by the court, that if necessary, Ms Mani is prepared to give an undertaking that she agrees to submit to any arbitration commenced by the defendant in Singapore in relation to the claims brought by the defendant in the NCLT Proceedings.[48] I also note that Ms Mani has stated on affidavit that the arbitration agreement applies to her notwithstanding that she is not party to the SHA because she is a "[party] to the dispute".[49] All the other parties to the NCLT Proceedings (see [13] above) are parties to the SHA. Thus, this concern also falls away accordingly.

90 The fourth ground also does not afford strong reason and is, in my judgment, not relevant in this case. As I have found that the claims in the NCLT Proceedings have been brought in breach of the arbitration agreement, then as a matter of the parties' contractual bargain, Singapore is where proceedings have to be brought. That is the positive aspect of the parties' obligations under the arbitration agreement. Therefore, in that sense, it could be said that it is Singapore that is the natural and competent forum and not India (or the NCLT specifically).

91 However, even if India is, *ex hypothesi*, the natural forum considering the connecting factors to the parties and the dispute, that is also immaterial because parties have contractually agreed to resolve their disputes by way of

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48 NE 2 July 2021 at pp 19 (line 32) and 20 (line 3).

49 Shobitha Annie Mani 2nd affidavit dated 19 April 2021 at paras 16 to 17.

arbitration proceedings in Singapore. It therefore does not matter that India is where the parties and the dispute may have more substantial connections. Consideration of the natural forum to hear the dispute (in the traditional sense as laid down in *Spiliada Maritime Corporation v Cansulex* [1987] AC 460) should not figure in the court's analysis when it is deciding whether to grant an anti-suit injunction to restrain conduct that is in breach of an arbitration agreement, and there is good reason why this should be the case.

92 For one, it is entirely conceivable that Singapore may be chosen by commercial parties as the arbitral seat *precisely because* it has no connections to the parties or the transaction and is therefore a completely neutral forum. For a party to then contend that another forum is the natural forum and that affords strong reason *not* to grant an anti-suit injunction to enforce the parties' contractual bargain would effectively render the parties' autonomous choice nugatory. It also completely undermines the principle undergirding the grant of an anti-suit injunction in such circumstances which is to compel compliance with contractually agreed obligations.

Conclusion

93 For all of the reasons mentioned above, I find that there is sufficient merit in the plaintiff's application. I therefore allow OS 242 and grant a permanent anti-suit injunction against the defendant in the following terms:

> 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.

94 I note that while the plaintiff made brief submissions on the appropriateness of the scope of the injunction sought, the defendant has not done so, save for the point relating to Ms Mani which I have already addressed above at [89]. In any case, the scope of the injunction sought is, in the circumstances of this case, appropriate.

95 For completeness, it is unnecessary for me to decide on the matters raised in the defendant's application in SUM 1477 to set aside the *ex parte* injunction granted in ORC 1463. As I heard full arguments *inter partes* on OS 242 and have decided that a permanent anti-suit injunction should be granted,

whether the interim injunction should be set aside is moot. Consequently, I dismiss SUM 1477.

96 I shall hear the parties on costs separately.

S Mohan
Judicial Commissioner

Thio Shen Yi SC, Tan May Lian Felicia and Uma Jitendra Sharma (TSMP Law Corporation) for the plaintiff;
Nandakumar Ponniya Servai, Ashish Chugh, Pradeep Nair and Yiu Kai Tai (Wong & Leow LLC) for the defendant.