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

[2024] SGHC 54

Originating Application No 1057 of 2023

Between

Sacofa Sdn Bhd

… *Claimant*

And

(1) Super Sea Cable Networks Pte Ltd
(2) SEAX Malaysia Sdn Bhd

… *Respondents*

GROUNDS OF DECISION

[Arbitration — Award — Recourse against award — Setting aside — Competing arbitration and non-exclusive jurisdiction clauses —Whether tribunal exceeded its jurisdiction]
[Arbitration — Award — Recourse against award — Setting aside — Whether award contravened foreign law and public policy — Whether award contravened Singapore public policy]
[Arbitration — Conduct of arbitration — Estoppel]

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Sacofa Sdn Bhd
v
Super Sea Cable Networks Pte Ltd and another

[2024] SGHC 54

General Division of the High Court — Originating Application No 1057 of 2023
Wong Li Kok, Alex JC
23 January, 26 February 2024

28 February 2024

Wong Li Kok, Alex JC:

Introduction

1 This was an application by the claimant to set aside arbitral award No 089 of 2023 dated 14 July 2023 (the "Award") made in the SIAC Arbitration No 304 of 2022 (the "Arbitration") by the sole arbitrator (the "Tribunal"). The dispute between the parties originally arose out of a telecommunications project in Malaysia. The claimant contracted with the first respondent to build and operate a telecommunications cable system to be landed in Malaysia from Singapore. The relationship soured when the claimant re-entered the land on which the system was to be built. The claimant stated that the first respondent did not have the requisite regulatory licences to undertake the project.

2 A key issue between the parties concerned the conflicting dispute resolution clauses in contracts between the parties and which contract formed

the centre of gravity in the parties' dispute. Ancillary to that arose issues surrounding illegality and public policy in Malaysia and whether such illegality and public policy concerns would also be in conflict with Singapore public policy. Finally and as a result of numerous parallel proceedings between the parties in Malaysian courts, the issue of transnational issue estoppel also had to be addressed.

Facts

Background to the dispute

3 The claimant is a Malaysian company in the business of providing telecommunications infrastructure.[1] It is a registered proprietor of a plot of land located in Mukim Jemaluang, Mersing, Johor and described as No PTD 1623 (the "Land").[2] A cable landing station (the "Landing Station") on the Land was operated by the claimant.[3]

4 The first respondent, a Singaporean company, owns the second respondent, a Malaysian company (collectively, the "respondents").[4] The respondents operate an undersea telecommunications cable system between Malaysia, Singapore and Indonesia.[5]

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1 2nd affidavit of K Prasad A/L S. Krishnapillai dated 9 November 2023 ("2KSK") at para 4.

2 2KSK at para 4.

3 1st affidavit of Louis Teng Bingquan dated 21 November 2023 ("LTB") at para 10.

4 2KSK at para 5.

5 LTB at para 8.

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5 The claimant and the first respondent were parties to a Strategic Alliance Agreement dated 20 December 2013 (the "SAA").[6] Under the SAA, the claimant agreed to allow the first respondent to build and operate the Containerised Cable System (the "CCS") and other related equipment (the "Built Facilities") on the Landing Station.[7] The SAA also contained an arbitration agreement.[8] While the second respondent was not a party to the SAA, it was nominated by the first respondent as the licensed third party to whom ownership of the Built Facilities would be transferred under the SAA.[9] The second respondent also contributed to the building, maintenance and payment of the Built Facilities.[10]

6 Pursuant to the SAA, the claimant and the first respondent entered into a lease agreement dated 1 January 2019 (the "LA") for the claimant to lease a portion of the Land (the "Demised Land") to the first respondent.[11] Under the LA, the parties agreed to the exclusive jurisdiction of the Malaysian courts.[12]

7 The parties' relationship proceeded as planned under the SAA up till October 2022.[13] The respondents were given access to the Landing Station for inspection and maintenance work on the Built Facilities.[14] On 15 October 2022,

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6 1st affidavit of K Prasad A/L S. Krishnapillai dated 13 October 2023 ("1KSK") at para 8.

7 LTB at para 14.

8 1KSK at p 122.

9 LTB at paras 14 and 17.

10 LTB at para 15.

11 2KSK at para 7.

12 1KSK at p 207.

13 1KSK at p 68.

14 LTB at para 24.

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the claimant re-entered the Demised Land and prevented the respondents from accessing the Demised Land and the Built Facilities on it.[15] This was on the basis that the first respondent had allegedly, contrary to its obligation under the LA, failed to obtain the requisite state consent to operate from the Demised Land.[16]

Procedural history

8 On 25 October 2022, the claimant commenced, in the Johor Bahru High Court (the "JBHC"), Suit No JA-22NCvC-162-10/2022 (the "JBHC Suit") against the respondents.[17] The claimant sought, amongst others, (a) a declaration that the LA is illegal, unlawful and/or null and void, and (b) an injunction to restrain the respondents from entering, accessing and taking possession of the Demised Land.[18]

9 On 18 November 2022, the respondents applied for a stay of the JBHC Suit in favour of an arbitration.[19] This was dismissed by the JBHC on the ground that there was no arbitration agreement under the LA.[20]

10 On 6 December 2022, the respondents commenced the Arbitration against the claimant pursuant to the arbitration agreement in the SAA.[21] In the Arbitration, the respondents pleaded a claim for conversion of the Built Facilities.[22] While the Tribunal found that it had no jurisdiction over the second

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15 LTB at para 24.

16 2KSK at para 8.

17 2KSK at para 9.

18 1KSK at pp 336−337.

19 2KSK at para 10.

20 2KSK at para 10.

21 LTB at para 31.

22 LTB at para 32.

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respondent (since the second respondent was not a party to the SAA and the arbitration agreement contained therein),[23] it ruled in favour of the first respondent, ordering, amongst others, a delivery-up of the Built Facilities to the licensed third party nominated by the first respondent (*ie*, the second respondent).[24]

11 On 17 March 2023, the claimant applied for an anti-arbitration injunction in the JBHC Suit to restrain the respondents from continuing with the Arbitration pending conclusion of the JBHC Suit.[25] The basis for the application was that the issues submitted to the Arbitration overlapped with those in the JBHC Suit.[26] On 7 May 2023, the JBHC dismissed the application without issuing any written grounds.[27]

12 The claimant then appealed against the JBHC's dismissal of the anti-arbitration injunction application.[28] Concurrently, the claimant filed a motion to seek an injunction restraining the respondents from continuing the Arbitration pending determination of the anti-arbitration injunction appeal.[29] Once again, the claimant relied on the overlap between the JBHC Suit and the Arbitration.[30] Both the motion and the appeal were dismissed by the Court of Appeal of

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23 1KSK at para 56.5.

24 1KSK at para 56.11.

25 2KSK at para 11.

26 LTB at para 42.

27 LTB at para 51.

28 LTB at para 52.

29 LTB at para 55.

30 LTB at paras 52 and 55.

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Malaysia (the "Malaysian CA") on 15 June 2023 and 7 July 2023 respectively, without any written grounds for dismissal.[31]

13 On 21 August 2023, the first respondent obtained an order from the Kuala Lumpur High Court (the "KLHC") to register and enforce the Award (the "KLHC Decision").[32] The claimant's appeal against this order remains pending to date.[33] On 30 August 2023, the claimant applied to stay the enforcement of the Award until the conclusion of the pending appeal against the KLHC Decision. This stay application has been dismissed by both the KLHC, and the Malaysian CA on appeal.[34]

14 On 13 October 2023, the claimant brought the present application to set aside the Award in this court.

The parties' cases

The claimant's case

15 The claimant relied on two grounds to set aside the Award:

(a) Under Art 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), the Award deals with a dispute not contemplated by or not falling within the terms of the submission to the Arbitration, or contains decisions on matters beyond the scope of the submission to the Arbitration (the "Excess of Jurisdiction Ground"); and

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31 LTB at paras 56−57.

32 1KSK at para 58.

33 1KSK at para 60.

34 LTB at paras 69−70 and 73.

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(b) Under Art 34(2)(*b*)(ii) of the Model Law, the Award is in conflict with the public policy of Singapore (the "Public Policy Ground").

16 As to the Excess of Jurisdiction Ground, the claimant argued that the Tribunal exceeded his jurisdiction by deciding on a claim for the tort of conversion.[35] This was because the Tribunal had touched on the right to access the Demised Land, which fell under the LA and had to be resolved in the JBHC Suit.[36] The remedy of delivery-up granted in the Award also impacted the parties' rights under the LA.[37] Specifically, the claimant argued that the practical effect of the remedy would result in the parties directly contravening the *ad interim* order granted by the JBHC.[38] Therefore, the remedy of delivery-up was beyond the scope of submission to the Tribunal.

17 As for the Public Policy Ground, the claimant contended that the Tribunal's finding that the first respondent was the beneficial owner of the Built Facilities was illegal under Malaysian law.[39] This was contrary to the public policy of Malaysia, and in turn contrary to Singapore's public policy.[40]

18 Pre-empting the respondents' position that *res judicata* applies, the claimant submitted that it had been unable to raise its illegality objections during the Arbitration because the respondents had not pleaded clearly that the first respondent was the beneficial owner of the Built Facilities.

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35 Claimant's Written Submissions dated 18 January 2024 ("CWS") at paras 18 and 38.

36 CWS at paras 28 and 36.

37 CWS at para 45.

38 CWS at para 47.

39 CWS at para 56.

40 CWS at para 54.

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19 As to the respondents' argument that transnational issue estoppel arises, the claimant raised two main counter-arguments. First, the court should not elevate the KLHC Decision, which is the decision of an enforcement court, to that of a seat court. Secondly, the KLHC Decision is not a final and conclusive decision on the merits.[41]

The respondents' case

20 The respondents argued that the Tribunal did not exceed his jurisdiction because the claim for conversion was more closely connected to the SAA, and no determination was made on the LA at all.[42] As for the relief of delivery-up, it was consequential upon a finding that the conversion claim was established.

21 With respect to the Public Policy Ground, it was argued that the court cannot make findings on Malaysian law without any expert evidence on Malaysian law.[43] The Singapore court was also not in a position to make a determination on Malaysian public policy. In any event, the alleged illegality did not satisfy the high threshold to establish a breach of Singapore public policy.[44] Under the doctrine of *res judicata*, the claimant's illegality objections should have been raised in the Arbitration,[45] since the respondents had explicitly pleaded that either the first or the second respondent should have beneficial ownership.

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41 CWS at para 88.

42 Respondents' Written Submissions dated 18 January 2024 ("RWS") at para 9.

43 RWS at para 78.

44 RWS at paras 92−94.

45 RWS at para 86.

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22 The respondents also argued that transnational issue estoppel applied. The claimant's jurisdictional objections had been dismissed by the JBHC and the Malaysian CA in the claimant's application for an anti-arbitration injunction, and in the KLHC Decision.[46] The KLHC Decision had also dismissed the claimant's illegality objections.[47] According to the respondents, these Malaysian court decisions ought to have persuasive effect.[48] Hence, the claimant was estopped from raising its objections in this application.

Issues to be determined

23 Based on the parties' submissions, the following issues arise:

(a) in relation to the Excess of Jurisdiction Ground, (i) whether the centre of gravity of the claim for conversion lay in the SAA or the LA, (ii) whether the claim for conversion was inextricably linked to the LA (and cannot arise solely from the SAA), and (iii) whether the remedy of delivery-up was within the Tribunal's jurisdiction;

(b) in relation to the Public Policy Ground, (i) whether the Award was in furtherance of an illegal act under Malaysian law and hence against the public policy of Singapore, and (ii) whether the doctrine of *res judicata* applied to estop the claimant from raising its illegality objections; and

(c) finally, under the doctrine of transnational issue estoppel, whether the claimant was estopped from raising its jurisdictional and/or illegality objections in this application.

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46 RWS at paras 66−67.

47 RWS at para 80.

48 RWS at paras 70 and 85.

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Issue 1: The Tribunal did not exceed his jurisdiction

24 The issue of whether the Tribunal has exceeded his jurisdiction arises because of the two competing dispute resolution clauses under the two inter-connected contracts (*ie*, the SAA and the LA) governing the parties' relationship. Where a dispute potentially falls within the ambit of either dispute resolution clause, the courts' task is to determine where the centre of gravity of the dispute lies (*Oei Hong Leong v Goldman Sachs International* [2014] 3 SLR 1217 ("*Oei Hong Leong*") at [30]). *Oei Hong Leong* was an analogous case involving a stay of proceedings under the International Arbitration Act (Cap 143A, 2002 Rev Ed). The defendant sought a stay of proceedings in favour of arbitration, contending that the claims fell within the scope of the arbitration agreement. The claimant objected to the stay on the basis that a non-exclusive jurisdiction clause in another contract applied instead. This court held that the test is which dispute resolution clause the parties objectively intended to apply (*Oei Hong Leong* at [25]−[26]). To determine this, the court must locate the "centre of gravity of the dispute" or the "pith and substance of the dispute as it appears from the circumstances in evidence" (*Oei Hong Leong* at [30] and [36]). In other words, as put in *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821 ("*Transocean*") at [26]:

> … *Where a claim arose out of or was more closely connected with one agreement than the other*, the claim ought to be subject to the dispute resolution regime contained in the former agreement, even if the latter was, on a literal reading, wide enough to cover the claim … [emphasis added]

The centre of gravity of the claim for conversion lay in the SAA

25 I agreed with the respondents that the centre of gravity of the conversion claim lay in the SAA. Looking at the parties' transaction as a whole, the SAA

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was the governing heart of the commercial relationship between the parties. Recital (C) of the Preamble to the SAA provided as follows:[49]

> … Both Parties are keen to create a strategic alliance, whereby [the first respondent] will extend it's [*sic*] Super Sea Cable System into Malaysia by utilizing [the claimant]'s Landing Station in Mersing, Johor and its name in order to provision Bandwidth Service to telecommunications service providers and other related operators, in consideration thereof, SSCN shall provide SACOFA with the agreed Bandwidth Capacity, subject to the terms and conditions hereinafter appearing.

26 Clause 3.2(b) of the SAA deals with the scope of the SAA and states that the claimant was "to allow the [first respondent] to access and utilize [the claimant]'s space within the specified area of the Landing Station".[50] Subsequent clauses elaborate on the claimant's obligations, and I highlight the salient ones. Under cl 4.1, the claimant was obliged to allow the first respondent to access and utilise the claimant's facilities "within the specified Landing Station at all times".[51] Under cl 4.2, the claimant agreed to "permit [the first respondent] a specified portion of the land within the specified Landing Station" for the setting up of the CCS.[52] The claimant was also obliged under cl 4.3 to allow the Super Sea Cable System to land in the CCS "located in the Landing Station".[53] Pursuant to cl 4.8, the claimant was to provide the first respondent with a standard operating procedure "for access to the Landing Station".[54] Finally, under cl 6.1, the claimant was to hand over the ownership of the Built

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49 1KSK at p 105.

50 1KSK at p 109.

51 1KSK at p 110.

52 1KSK at p 110.

53 1KSK at p 110.

54 1KSK at p 110.

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Facilities to a licensed third party nominated by the first respondent (*ie*, the second respondent).[55]

27 I pause to make a brief observation that the SAA addresses the first respondent's right to access the Landing Station, to set up the CCS (which is a part of the Built Facilities) on the Landing Station, and to land the Super Sea Cable System in the CCS. The SAA also deals with the second respondent's role as a nominated party to whom the ownership of the Built Facilities would be transferred. But, as the claimant's counsel pointed out during the hearing, the SAA is silent on the leasing of the Demised Land and other related issues such as rent. This is addressed in the LA instead. The Preamble to the LA explains that the agreement deals with the lease of the Demised Land from the claimant to the first respondent.[56] Crucially, the Preamble also states that the LA was entered into by the parties "[p]ursuant to the strategic alliance" established under the SAA.[57] Another agreement which was entered into "[p]ursuant to the strategic alliance" in the SAA is a Service Agreement dated 14 October 2020 (the "SA") for the first respondent's provision of bandwidth capacity to the claimant.[58] While the SA is not directly relevant to this case, the respondents pointed out that cl 1.3 of the SA is significant in identifying the SAA as the highest-ranking agreement by reference to which any inconsistencies amongst the three contracts are to be resolved, albeit not conclusive of the SAA being the centre of gravity of the dispute.[59]

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55 1KSK at p 113.

56 1KSK at p 202.

57 1KSK at p 202.

58 1KSK at p 217.

59 RWS at para 27, 1KSK at pp 220−221.

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28 Against this backdrop, I turn to the competing dispute resolution clauses. Clause 25 of the SAA (as modified by the 2nd Novation & Supplementary Agreement between the claimant and the first respondent dated 7 December 2017) is a widely framed arbitration clause, providing that:[60]

> 25.1 If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Agreement [*ie*, the SAA] or the performance of the obligations of the Parties, then either Party shall be entitled to give the other Party a notice of dispute adequately identifying the details of the dispute.
>
> 25.2 If a dispute has not been resolved within thirty (30) Days of the service of the notice of dispute, either Party may, by notice, refer the dispute to arbitration.
>
> 25.3 Any dispute shall be settled by arbitration in accordance with the current applicable rules of the Singapore International Arbitration Centre ("SIAC") …

29 The jurisdiction clause found in cl 13.0 of the LA states as follows:[61]

> *This Agreement and its validity, construction and performances* shall be governed in all respects in accordance with the Law of Malaysia and the Parties hereof hereby submit to the exclusive jurisdiction of Court of Malaysia. [emphasis added]

30 The parties' objective intention was to resolve issues "of any kind whatsoever" relating to the strategic alliance through arbitration. The narrower issues of "validity, construction and performances" of the LA were *carved out* of the more generally applicable arbitration agreement for determination before the Malaysian courts. Such an arrangement in commercial transactions of this nature is common. This is particularly prevalent where one of the agreements in the wider transaction involves the land on which a particular project is sited. These agreements are typically governed by the law of the jurisdiction where the land is situated with disputes resolved by the local courts.

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60 1KSK at pp 122−123 and 156.

61 1KSK at p 207.

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31 In *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2021] 3 SLR 1422 ("*Silverlink*"), the insurance policy concerned contained, amongst others, two clauses relevant to the present discussion. The first was an arbitration clause, which stipulated that "[a]ny dispute arising out of or in connection with this contract" would be referred to arbitration. The second was a jurisdiction clause, which provided for "any dispute … regarding the interpretation or the application of" the policy to be submitted to the Singapore courts. This court held that the objective intention of the parties was to carve out, from the arbitration clause, disputes relating to the interpretation or application of the policy (*Silverlink* at [51]). This "made commercial sense because such disputes may be resolved effectively, efficaciously and efficiently through the originating summons procedure" (*Silverlink* at [58]). Similarly, in the present case, it made perfect commercial sense to deal with matters relating to the LA before the Malaysian courts – the LA concerned the lease of land in Malaysia and attracted territory-specific regulatory matters such as land registration, taxes and local authority rates, which would be resolved most efficaciously and appropriately by the Malaysian courts.[62]

32 In light of the above, while I agreed with the claimant that that the LA played an important role in the parties' strategic alliance, I did not agree that "it would have been impossible to give effect to the SAA" without the LA which was "the operative heart" of the parties' agreement.[63] While the two must co-exist, the LA was an *ancillary* agreement facilitating the strategic alliance created by the SAA. Looking at the chronology of events, the parties had entered into the SAA first, and by the time the LA was executed almost 5 years later,

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62 RWS at para 35.

63 CWS at para 20.

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the Built Facilities were already installed on the Demised Land.[64] The LA does not deal with ownership and/or possession of the Built Facilities. In fact, it refers to the definition of the Built Facilities in the SAA.[65] Considering also the broad ambit of the arbitration clause in the SAA, I found that the claim for conversion for the *Built Facilities* was "more closely connected with" the SAA than the LA (*Transocean* at [26]).

The claim for conversion was not inextricably linked to the LA

33 Even if the parties' objective intention was for the arbitration clause to apply to the dispute, was it possible for the Tribunal to deal with the conversion claim *without* engaging the LA? In my view, the Tribunal was right in finding that the conversion claim could "arise independently of any questions surrounding access to the [Demised Land] which would arise under the [LA]".[66] I explain with reference to the two elements of conversion that the Tribunal had to examine in the Arbitration: (a) the immediate right of possession and/or ownership of the Built Facilities; and (b) any interference with such rights of possession and/or ownership.[67]

34 On the first element, to establish the right of possession to the Built Facilities, the respondents relied on two clauses of the SAA. The first was the claimant's obligation under cl 4.1 of the SAA (see [26] above). The second was the respondent's concomitant obligation under cl 5.5 of the same to maintain the CCS in good operating conditions.[68] Still on the first element, the

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64 LTB at p 106.

65 1KSK at p 204.

66 1KSK at p 77.

67 1KSK at p 77.

68 LTB at p 119.

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respondents' right of ownership of the Built Facilities was pleaded based on factors such as the respondents' contribution to the funding of the Built Facilities and the presence of the second respondent's logo on the CCS.[69] None of these relate to the LA. In fact, as the Tribunal observed,[70] the *claimant's* own submission on the issue of ownership of the Built Facilities was premised upon the SAA. In its arguments on that point, the claimant had cited cl 6.1 of the SAA, which provided that the Built Facilities "shall be under [its] ownership" until the said ownership is to be handed over to the second respondent.[71]

35 Hence, it was entirely possible to deal with the first element of conversion without any reference to issues arising out of the LA, and the Tribunal's eventual finding was indeed premised only on the SAA. Specifically, cl 6.2 of the SAA provided that the first respondent would identify the licensed third party to whom ownership of the Built Facilities will be handed over.[72] Relying on this, the Tribunal found that the first respondent was the beneficial owner of the Built Facilities because the claimant "at any time … could be required to transfer said facilities to a third party nominated by the [first respondent] for zero consideration".[73]

36 More controversial is the second element of conversion. To establish this, the respondents relied on the claimant's "refusal to permit the [respondents] to access [the] Built Facilities" and its act of "taking control of the locking mechanisms to [the] Built Facilities", which were all allegedly in

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69 LTB at pp 129−130.

70 1KSK at p 77.

71 1KSK at p 113.

72 1KSK at p 113.

73 1KSK at p 82.

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breach of cll 3.2(b), 4.1 and/or 4.2 of the SAA.[74] However, according to the claimant, the act of dominion did not merely concern padlocking of the Built Facilities, but also other acts such as re-entering the Demised Land and denying the respondents access to the same.[75] Hence, whether the claimant was justified in interfering with the respondents' alleged rights of possession and/or ownership over the Built Facilities "*fundamentally* turns on" the validity of the LA [emphasis in original].[76] If the LA is invalid, then the respondents would not even be entitled to access the Demised Land *on which the Built Facilities lie*.[77] If the LA is invalid, it also cannot be said that the claimant was wrongful in exercising acts of dominion over the Built Facilities.[78] The claimant explained that this was because whether there is an act of conversion depends on which party has a superior right of possession. Hence, if the chattel is on a piece of land which the landowner can deny the owner of the chattel from accessing, the former would have a better possessory right over the chattel. The claimant added that even if the first respondent had a superior possessory right under the SAA, the LA was still engaged because the Tribunal would need to consider the issue of the chattel being on the claimant's Demised Land.

37 I disagreed with the claimant. While the LA (being in the nature of a lease) granted proprietary rights over the Demised Land to the first respondent, the first respondent already had a contractual right to access the Demised Land to install and operate the Built Facilities under the SAA. This is clear from cl 3.2(b) of the SAA, read with the claimant's obligations under cll 4.1, 4.2, 4.3

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74 1KSK at pp 75−76.

75 CWS at para 42.

76 CWS at para 32.

77 CWS at paras 32 and 37.

78 CWS at paras 32 and 37.

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and 4.8 of the same (see [26] above) to grant such access rights to the first respondent. In that regard, the claimant's acts of re-entry into the Demised Land and denying the respondents access to the same are immaterial. These actions which engage the LA are irrelevant to the claim for conversion of the *Built Facilities*. I agreed with the respondents that based *solely* on the first respondent's rights as provided under the SAA, it was possible for the Tribunal to decide whether the first respondent has a superior possessory right over the Built Facilities than the claimant. The claimant may be the owner and lessor of the Demised Land on which the Built Facilities are constructed, but the subject matter of the action in conversion is the chattel and not the land. To put it differently, there is no prerequisite that the first respondent must be entitled to access the Demised Land under the LA, before it can enjoy its right of possession and/or ownership over the Built Facilities under the SAA.

38 Even if the LA had to be engaged in a cursory way in the Tribunal's determination, that does not detract from the substance of the decision resting on the SAA. For the avoidance of doubt, I did not find that the Tribunal had engaged the LA in his determination. Rather, the Tribunal did the opposite by emphasising that he was not engaging with the LA. In finding that this element was satisfied, the Tribunal clarified that the act of interference was "not based on any failure to permit the [respondents] access to the [Demised] Land (which would be relevant to the Lease Agreement)".[79] Rather, it was based on the claimant's act of padlocking the Built Facilities and denying the respondents access to the same.[80] To this, the claimant reiterated that the act of padlocking was "merely a practical manifestation of its proprietary right of prohibiting

79 1KSK at p 90.

80 1KSK at p 90.

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unauthorised access to the [Demised Land] it owns".[81] The claimant's counsel argued during the hearing that it was artificial and unrealistic for the Tribunal to "slice and dice" the matter in this way – the issue of access to the Demised Land (which falls under the LA) cannot be ignored since the Built Facilities can *only* be accessed by entering the Demised Land.

39 As I observed above at [30], such artificiality is merely a product of the parties' agreed arrangement to carve out matters relating to the lease of the Demised Land under the LA from the wider commercial transaction. The court will give effect to such agreements "so far as it is possible and commercially rational to do so, even where this may result in a degree of fragmentation in the resolution of disputes" (*PT Thiess Contractors Indonesia v PT Kaltim Prima Coal* [2011] EWHC 1842 (Comm) at [37], citing *Dicey, Morris and Collins on the Conflict of Laws* (Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed with 4th Cumulative Supplement, 2010) at para 12−094). I note that the latest edition of *Dicey, Morris and Collins on the Conflict of Laws* (Lawrence Collins gen ed) (Sweet & Maxwell, 16th Ed, 2022) at para 12−082 is less emphatic on this issue but reaches a similar conclusion: a "broad, purposive and commercially-minded construction" in light of the transaction as whole should be adopted, though this would sometimes result in "a degree of fragmentation" in disputes.

40 In the present case, there was good reason to uphold the parties' agreements. Such fragmentation was part and parcel of everyday commercial transactions of this nature, particularly where international investors or service providers are involved in projects requiring land access in the jurisdiction where that project is located. The respondents sought to give effect to these agreements

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[81] CWS at para 40.

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– after the dismissal of the stay application by the JBHC, the respondents amended their Statement of Claim filed in the Arbitration (the "SOC") to remove all matters and reliefs relating to the LA, except by way of background.[82] For instance, the relief relating to the validity of the LA and references to the use of the Demised Land were deleted.[83] The effect of the amendment was that the remaining claim pertained only to the parties' rights and obligations under the SAA. The "slicing and dicing" and the artificiality of the circumstances which offended the claimant was exactly the situation that this commercial transaction had deliberately created and was legitimate. Hence, I found that it was "possible and commercially rational" to give effect to the parties' arrangement notwithstanding the fragmentation of disputes.

41 The claimant further argued that the Award rendered the JBHC Suit moot, which was clear evidence that the Tribunal has exceeded his jurisdiction.[84] This is misconceived. One of the reliefs sought before the JBHC was a declaration that the LA is illegal, unlawful and/or null and void.[85] However, as explained above, the validity of the LA is immaterial to the conversion claim because the latter arose from the SAA alone and independently of the LA. As to the sought declaration that the claimant's re-entry and re-possession of the *Demised Land* was valid and lawful,[86] that is also unaffected by the claim for conversion – the subject matter of conversion is the Built Facilities, not the Demised Land.

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82 RWS at para 39.

83 1KSK at para 51.

84 CWS at para 86.

85 1KSK at p 336.

86 1KSK at p 336.

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42 For completeness, I address the claimant's argument that the respondents did not make clear whether the conversion claim was with respect to the first or the second respondent. If the claimant's allegation was that the first respondent's ownership of the Built Facilities was not within the scope of submission to the Tribunal, that failed. As the counsel for the respondents pointed out during the hearing, the SOC uses the phrase "SSCN [*ie*, the first respondent] and/or SEAX Malaysia" throughout its claim for conversion.[87] Hence, one of the pleaded cases was that the first respondent has beneficial ownership of the Built Facilities.

The remedy of delivery-up was within the Tribunal's jurisdiction

43 I now turn to the claimant's additional and/or alternative argument that the Tribunal had no jurisdiction to award the relief of delivery-up of Built Facilities.[88] Here, the claimant had two principal arguments.

(a) First, the remedy of delivery-up was proprietary in nature, and the first respondent was only entitled to a contractual remedy of damages under cl 6.3 of the SAA.

(b) Second, the practical effect of ordering a delivery-up of the Built Facilities was to grant the first respondent access to the Demised Land. This was in contravention of the *ad interim* order granted in the JBHC Suit, which essentially prevented the respondents from accessing the Demised Land and the Built Facilities.[89]

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87 LTB at pp 275−281.

88 CWS at para 45.

89 CWS at para 47.

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44 I disagreed with the claimant on both arguments. As to the first argument, having found above that the claim for conversion was properly within the scope of the parties' submission to the Tribunal, the remedy of delivery-up was a relief consequential upon the Tribunal's finding that the elements of conversion were established. I also agreed with the respondents that cl 6.3 of the SAA was not relevant here. The respondents' claim was for the tort of conversion, not for a breach of contract (let alone for breach of cl 6.3 of the SAA). I set out the clause in full:[90]

> 6.3 In the event [the claimant] fails to effect the transfer of [the] Built Facilities to the Licensed Third Party within thirty (30) Days from the date of notice of transfer, [the claimant] hereby agrees to compensate [the first respondent] with monetary amount equivalent to the estimated value of [the] Built Facilities and the Super Sea Cable System together with the potential loss in revenue.

45 The first respondent had issued to the claimant a "notice of transfer" of the Built Facilities to the second respondent on 7 March 2023.[91] This meant that the claimant was potentially in breach of cl 6.3 of the SAA for failure to effect a transfer of the Built Facilities to the second respondent. However, any relief relating to cl 6.3 of the SAA was subsequently dropped in the Arbitration.[92] It was within the respondents' prerogative to bring a cause of action that would best advance its position. In any event, as the notice of transfer was only issued after the commencement of the Arbitration,[93] the right to damages under cl 6.3 of the SAA had not arisen at the time the Arbitration was brought. Even if the claimant's objection lies in the Tribunal's erroneous interpretation of cl 6.3 of the SAA (*ie*, that on a proper construction, the clause excluded a remedy of

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90 1KSK at p 114.

91 1KSK at pp 5527−5544.

92 LTB at p 102.

93 1KSK at para 97.

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delivery-up), that would be an error of law. An error of law is not a basis for setting aside an arbitral award (*CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW*") at [33]).

46 As to the second argument, the order of delivery-up did not contravene the *ad interim* injunction because the Built Facilities could be delivered up to the first respondent without granting it access to the Demised Land. Further, the injunction was only an *interim* one, and the JBHC may well eventually come to the conclusion that the injunction ought not to have been granted. Accordingly, any alleged contravention of the *ad interim* injunction could not have deprived the Tribunal of his jurisdiction to order a relief that flowed from a claim of which he had properly seized jurisdiction. Finally, I note that the *ad interim* order had been varied on 22 January 2024 to grant the first respondent limited access to the Demised Land for the purpose of extracting the Built Facilities. I agreed with the respondents that this suggests that the Award can be given effect without relying on any terms contained in the LA, and notwithstanding the JBHC Suit.[94]

47 For completeness, the claimant also argued that under Malaysian law, the order of delivery-up can only be granted in claims for detinue (but not for conversion).[95] This was a bare assertion. The claimant failed to provide any evidence on Malaysian law to support this point. Further, any error of law on the part of the Tribunal was not a ground for setting aside the Award (*CRW* at [33]).

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94 LTB at para 114.

95 1KSK at para 85.

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48 In summary, the Excess of Jurisdiction Ground was not made out. The claim for conversion and the consequential relief of delivery-up arose out of the SAA, and hence properly fell within the scope of submission to the Tribunal.

Issue 2: The Award was not in conflict with Singapore's public policy

49 The claimant's case was premised on the alleged contravention of two statutory provisions under Malaysian law. First, reg 5 of the Communications and Multimedia (Licensing) Regulations 2000 (PU(A) 129/2000) (M'sia) (the "CMLR") provides as follows:

> The following persons or classes of persons shall be ineligible to apply for an individual licence:
>
> (a) a foreign company as defined under the Companies Act 1965 [Act 125];
>
> (b) an individual or a sole proprietorship;
>
> (c) a partnership; and
>
> (d) such other persons or classes of persons as may be decided by the Minister from time to time.

50 Second, s 126 of the Communications and Multimedia Act 1998 (No 588 of 1998) (M'sia) (the "CMA") makes it an offence for an unlicensed company to own any network facilities:

> **126.** (1) Subject to such exemptions as may be determined by the Minister by order published in the *Gazette*, no person shall –
>
> (a) own or provide any network facilities;
>
> (b) provide any network services; or
>
> (c) provide any applications services,
>
> except under and in accordance with the terms and conditions of –
>
> (aa) a valid individual licence granted under this Act; or
>
> …

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> expressly authorizing the ownership or provision of the facilities or services.
>
> (2) A person who contravenes subsection (1) commits an offence …

51 The claimant argued that "it is self-evident and uncontroversial" that the first respondent is ineligible under Malaysian law to hold the requisite licence to own the Built Facilities.[96] The Tribunal's finding that the first respondent was the beneficial owner of the Built Facilities contravened the CMA and the CMLR.[97] Considering that the telecommunications services sector is "a highly protected and regulated industry in Malaysia", the Tribunal's finding was in conflict with the public policy of Malaysia.[98] By virtue of international comity, this was alleged by the claimant to also be contrary to Singapore's public policy.[99]

There was no evidence of an illegal act under Malaysian law

52 The claimant did not adduce any expert evidence on Malaysian law to show that it is illegal for the first respondent to have beneficial ownership of the Built Facilities. The only persuasive authority before the court was the KLHC Decision which held that there was no contravention of the CMA and the CMLR (see [68] below).

53 Even on a plain reading of the provisions, as the claimant invited me to do, the position was not as clear-cut as the claimant made it out to be. Though reg 5(a) of the CMLR prohibits a foreign company from applying for the

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96 CWS at para 56.

97 CWS at para 61.

98 CWS at para 68.

99 CWS at para 76.

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requisite licence, neither of the provisions relied on by the claimant prohibits a foreign company from being a beneficial owner of the relevant facilities through ownership of a Malaysian-incorporated subsidiary that has the requisite licence. In any event, in the absence of expert evidence, I was unable to make a finding that Malaysian law was breached.

It did not automatically follow that a conflict against foreign public policy would be a conflict against Singapore public policy

54 Even on the assumption that there was a breach of Malaysian law, the claimant had to satisfy the court that (a) such illegality was contrary to Malaysian public policy; and (b) there was a breach of Singapore public policy. On the former, a similar issue was raised in *CBX v CBZ* [2020] 5 SLR 184 ("*CBX*"). In discussing the Public Policy Ground, the Singapore International Commercial Court noted that whether or not the alleged illegality in the award contravened Thai public policy was "a question best left to the Thai court to determine" (*CBX* at [61]). No expert evidence was adduced on Thai public policy in *CBX*. Similarly in the present case, I agreed with the respondents that the issue of foreign public policy is not a matter that Singapore courts can decide of its own accord and without evidence. On the latter, even if the Award were contrary to Malaysian public policy, it is trite law that the Public Policy Ground is only satisfied in exceptional circumstances. The relevant test is helpfully summarised in *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 ("*Gokul Patnaik*") at [204]:

> The authorities demonstrate that the public policy ground under Art 34(2)(*b*)(ii) of the Model Law is a *narrow* ground, and the test is whether the upholding of the arbitral award would "shock the conscience"; is "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public"; or "where it violates the forum's most basic notion of morality and justice" … To succeed on a public policy argument, the party has to cross a "very high threshold" and demonstrate "egregious circumstances such as

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> corruption, bribery or fraud, which would violate the most basic notions of morality and justice" … [emphasis in original]

55 In particular, where the Public Policy Ground is invoked on the basis of a breach of foreign law, a "minor illegality or regulatory infringement by a contract" is insufficient (*Gokul Patnaik* at [206]). For instance, in *Gokul Patnaik*, a sale and purchase agreement to purchase certain securities for a consideration amounted to an assured return which was allegedly inconsistent with Indian foreign exchange regulations. However, the court held that the mere breach of those regulations was insufficient to establish the Public Policy Ground (*Gokul Patnaik* at [206]). In *CBX*, the Compound Interest Orders of the Tribunal "contravene[d] Thai mandatory law" which prohibited compounding of interest under the contract in question and was hence "against public order and good morals in Thailand" (at [52]). However, the Public Policy Ground was still not made out in that case, as the illegality was not a "palpable and indisputable illegality" which generally refers to "conduct of an obvious criminal nature" such as corruption and illicit enterprise (*CBX* at [57]).

56 Going further, the upholding of an arbitral award that is contrary to the public policy of another jurisdiction is *not* indubitably against the public policy of Singapore. Conversely, there may be matters that are not in conflict with foreign public policy but are clearly matters of public policy that are important in Singapore. The claimant made the point that there was commonality in public policy sensitivities in the telecommunications industries in Singapore and Malaysia. I agreed that there indeed could be many areas of commonality in public policy between jurisdictions, but this was still a fact-sensitive exercise. Everything would turn on the individual facts of the case and issues at hand.

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57 In that regard, the claimant's submission was that Singapore's public policy entails upholding similar foreign laws.[100] The claimant referred to s 3(1) of the Telecommunications Act 1999 (2020 Rev Ed) (the "TA") which provides that the Info-communications Media Development Authority (the "IMDA") "has the exclusive privilege for the operation and provision of telecommunication systems and services in Singapore". In turn, under the IMDA, *Guidelines on Submission of Application For Facilities-Based Operations Licence* (28 June 2021) at para 3.2, only "a company incorporated under the Singapore Companies Act" can apply to the IMDA for the relevant licence to operate and/or provide telecommunication systems and services in Singapore. According to the claimant, while the TA is not *in pari materia* with the CMA, Singapore's licensing regime on telecommunication systems is comparable to that in Malaysia. On that basis, the claimant argued that it would "shock the conscience" of the public if Singapore courts were to uphold an award that circumvents similar laws pertaining to the protection of network facilities.[101] Further or alternatively, it was in line with the principle of comity for Singapore's public policy to uphold a foreign enforcement jurisdiction's public policy which "could impact the parties or the arbitration in some way".[102]

58 Nothing turned on this in the present case, as the claimant failed to establish that there was an illegality (see above at [52] and [53]). I did not however disagree, in principle, with the claimant's arguments on this point (see above at [57]) if it could be shown that upholding an award would be "clearly injurious to the public good" or "violate the most basic notions of morality and justice" in Singapore (*Gokul Patnaik* at [204]).

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100 CWS at para 76.

101 CWS at para 77.

102 CWS at paras 78 and 80.

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The doctrine of res judicata applied to estop the claimant from raising its illegality objections

59 The extended doctrine of *res judicata* operates to estop a party from raising matters that (a) are covered by an arbitration agreement, (b) are arbitrable, and (c) could and should have been raised by one of the parties in an earlier set of proceedings that had already been concluded (*AKN and another v ALC and others and other appeals* [2016] 1 SLR 966 at [59]). Only the last element was disputed.

60 The respondents alleged that the claimant could and ought to have raised its illegality objections during the Arbitration.[103] Having failed to do so, the claimant was estopped from raising them in this application. The claimant's response was that the SOC did not plead explicitly that the first respondent was the beneficial owner. The following aspects of the SOC were highlighted by the claimant:

(a) The sub-heading of the claim for conversion stated "Ownership of Built Facilities vests in SEAX Malaysia",[104] hence referring only to the second respondent.

(b) The parties could not have been arguing about the first respondent's ownership rights because cl 6.1 of the SAA contemplates handing over ownership "to a third party" with the requisite licence (who is not the first respondent).

(c) In fact, it is illegal to speak of the first respondent's ownership, as that is in breach of the CMA and the CMLR.

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103 RWS at para 91.

104 LTB at p 275.

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61 The claimant's response was unconvincing. By using the phrase "SSCN and/or SEAX", it is beyond doubt that the first respondent's beneficial ownership was pleaded in the SOC (see above at [42]). Thus, the claimant could have raised the issue of illegality in the Arbitration but did not do so. Accordingly, I found that even if the Award fell under the Public Policy Ground, the claimant was estopped from raising its illegality objections to set aside the Award.

Issue 3: The claimant was estopped from raising its illegality objections under the doctrine of transnational issue estoppel

62 I turn to the final issue of whether the claimant was barred by the doctrine of transnational issue estoppel from raising the jurisdictional and illegality objections which had already been dismissed by the Malaysian courts. There are two sub-issues that flow from this:

(a) Is the doctrine of transnational issue estoppel applicable where a *seat* court is faced with a prior decision of an *enforcement* court?

(b) If yes, were the elements of transnational issue estoppel satisfied in the present case?

The doctrine of transnational issue estoppel applied to the claimant's illegality objections

63 I start with the first sub-issue of the threshold point on the applicability of transnational issue estoppel to the claimant's illegality objections. This issue arose because the Court of Appeal in *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10 ("*Deutsche Telekom*") dealt with this doctrine in the context where an issue decided by a *seat* court was subsequently raised before the Singapore *enforcement* court. In relation to the reverse situation (as in the

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present case), the Court of Appeal "[did] not express a concluded view on this point" but made the following observation (*Deutsche Telekom* at [92]):

> … We only observe that if the position to be taken is that transnational issue estoppel does apply in the context of international arbitration, then any departure from that position when considering a prior decision of an enforcement court would have to be grounded in principle, and that may, or may not, lie in *the policy that is reflected in the scheme for the judicial supervision and support of arbitral proceedings, which does place an emphasis on the seat court, and for the recognition and enforcement of awards*. [emphasis added]

64 From the Court of Appeal's discussion above, perhaps a suitable starting point would be to also apply the doctrine of transnational issue estoppel to the decisions of the enforcement court (see also *Deutsche Telekom* at [215] *per* Mance IJ). This is the starting point to consider the claimant's illegality objections which had been dismissed in the earlier KLHC Decision, although, as I make clear below at [71]–[74], this can be departed from with good reason. I agreed with the respondents that the KLHC Decision should have persuasive effect because the claimant's illegality objections are premised upon issues of Malaysian law and Malaysian public policy which the Malaysian courts are best placed to deal with (see *CBX* above at [54]).[105]

The elements of transnational issue estoppel were satisfied for the illegality objections

65 Having dealt with the threshold point, I now turn to the next sub-issue on whether the elements of transnational estoppel were satisfied in relation to the illegality objections. The elements are set out in *Deutsche Telekom* at [64]:

> (a) the foreign judgment must be capable of being recognised in this jurisdiction, where issue estoppel is being invoked. Under the common law, this means that the foreign judgment must:

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105 RWS at para 85.

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> (i) be a final and conclusive decision on the merits;
>
> (ii) originate from a court of competent jurisdiction that has transnational jurisdiction over the party sought to be bound; and
>
> (iii) not be subject to any defences to recognition;
>
> (b) there must be commonality of the parties to the prior proceedings and to the proceedings in which the estoppel is raised; and
>
> (c) the subject matter of the estoppel must be the same as what has been decided in the prior judgment.

66 All the above elements were satisfied. First, the KLHC Decision is a final and conclusive decision on the merits. A foreign judgment "is no less final merely because it is subject to an appeal" (*Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK and another* [2016] 5 SLR 1322 ("*Humpuss*") at [69]). The key is whether the decision is one "which cannot be varied, re-opened or set aside *by the court that delivered it* [emphasis in original]" (*Humpuss* at [69]). Though the KLHC Decision is pending appeal,[106] it was not suggested by the claimant that the KLHC would vary, re-open or set aside its judgment.

67 Second, there was no evidence that the KLHC Decision did not originate from a court of competent jurisdiction that has transnational jurisdiction over the claimant. Third, there was also no evidence that the KLHC Decision was subject to any defences to recognition. Such defences include (a) contravention of the forum's public policy; (b) foreign judgment obtained by fraud or in breach of natural justice; or (c) direct or indirect enforcement of foreign penal, revenue or other public laws (*Deutsche Telekom* at [66]), all of which did not apply in the present case. Fourth, turning to commonality of parties, the second respondent was not a party to the KLHC enforcement proceedings. But as the

106 1KSK at para 60.

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respondents also pointed out, the court does not take a narrow view of this requirement (*Goh Nellie v Goh Lian Teck and others* [2007] 1 SLRI 453 at [32]). As there was a sufficient nexus or mutuality of interest between the respondents, I was satisfied that there was commonality of parties.

68 Finally, the subject matter of the estoppel was the same as that decided in the KLHC Decision. In other words, the objections that the claimant raised under the Public Policy Ground (*ie*, the subject matter of the estoppel) have already been dismissed by the KLHC. Before the KLHC, the claimant argued that the Tribunal's finding of the first respondent's beneficial ownership contravened s 126 of the CMA.[107] The Award was hence in conflict with the public policy of Malaysia.[108] To this, the KLHC held that "there is no risk that registration and enforcement of the final award will contravene the CMA, as relief no 2 of the final award, allows delivery up to be made to, *inter alia*, the [first respondent]'s nominated party, [the second respondent], who is in possession of the relevant licenses".[109] Further, "the very high threshold" to succeed on the public policy ground had not been established.[110] These findings were made in relation to the same illegality objections that the claimant raised in this application.

69 I make two further points on the final element of commonality of subject matter. First, there is generally no identity of subject matter where the public policy of the forum is in issue (*Deutsche Telekom* at [86]). Though Singapore public policy *is* in issue in the present case, this hinges upon the alleged

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107 1KSK at p 5495.

108 1KSK at p 5495.

109 LTB at p 557.

110 LTB at p 556.

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contravention of Malaysian law, and in turn, Malaysian public policy. Hence, as the respondents rightly pointed out, the subject matter of the KLHC Decision was the same as the anterior issue in this application.[111] Second, I disagreed that the claimant's arguments in this application were "distinct" from the "grounds" argued before the KLHC.[112] Those "grounds" before the KLHC included the ground that "the award is in conflict with the public policy of Malaysia",[113] which is one of the recognised grounds for refusing recognition or enforcement under the Arbitration Act 2005 (No 646 of 2005) (M'sia)).[114] Therefore, the "grounds" argued before the KLHC raised the same issue as the Public Policy Ground.

70 Finally, the Court of Appeal in *Deutsche Telekom* noted that "the correct approach is to apply the principles identified unless there are special circumstances such that it would be unjust to do so" (at [69(d)]). The claimant argued that applying these principles would not work justice because it has been prejudiced by the Award.[115] Specifically, "as a result of the Arbitrator having acted in excess of his jurisdiction", (a) the Award undermined the purpose of the JBHC Suit; and (b) the claimant had to apply for a variation of the *ad interim* injunction to comply with the Award.[116] This argument failed. On the first point, I have found above at [41] that the Award did not render the JBHC Suit moot. Hence, there was no prejudice suffered by the claimant in that regard. On the second point, the claimant could have complied with the Award without

111 RWS at para 84.

112 CWS at para 88.

113 1KSK at p 4928.

114 LTB at p 555.

115 CWS at para 90.

116 CWS at para 86.

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granting the first respondent access to the Demised Land (see above at [46]). I note that it was the *claimant* which decided to apply to the JBHC for a variation – the claimant considered it "more prudent" to allow the respondents to dismantle and retrieve the Built Facilities given the risks of explosion.[117] Since the claimant initiated the variation of the *ad interim* injunction out of safety concerns on its Demised Land, it cannot be said that the claimant suffered any prejudice. Accordingly, transnational issue estoppel applied to estop the claimant from raising the illegality objections which had been determined in the KLHC Decision.

The doctrine of transnational issue estoppel did not apply to the claimant's jurisdictional objections

71 However, I came to a different conclusion in relation to the second sub-issue addressing jurisdictional objections. The principle of primacy of the seat court which underpins the scheme for recognition and enforcement of awards, was a principled basis to justify a departure from the general position. During the hearing, the claimant highlighted wider ramifications that the estoppel would bring, including the subversion of the role of the seat court and the risks of bad forum shopping. These concerns have also been recognised in *Deutsche Telekom* at [91]–[92]:

> 91 … It has been suggested that applying transnational issue estoppel to an earlier decision of another enforcement court may have the unintended effect of raising the status of the first enforcement court's decision to something akin to that of a seat court judgment, and that *this might run contrary to the structure of the New York Convention and the importance of according to the seat the primary role of supervising the arbitration* (see Art V(1)(*e*) and Art VI; see also Matthew Barry, "The Role of the Seat in International Arbitration: Theory,

117 LTB at p 27.

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> Practice, and Implications for Australian Courts" (2015) 32 J. Int'l Arb. 289 at 319).
>
> 92 It has also been suggested that such a rule could *incentivise forum shopping and the emergence of parallel and possibly conflicting post-award proceedings*, with the award creditor first seeking enforcement in a forum with the most arbitration-friendly approach and then using a presumably favourable decision to bind subsequent enforcement courts …
>
> [emphasis added]

72 I found these concerns eminently persuasive. As explained in *BAZ v BBA* [2020] 5 SLR 266 ("*BAZ*") at [45], the seat court's primacy in reviewing an award forms the basis for Arts V(1)(*e*) and VI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), 330 UNTS 38 (entered into force 7 June 1959, accession by Singapore 21 August 1986) (the "New York Convention"), and s 31(5) of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA"). Art V(1)(*e*) of the New York Convention provides that the recognition and enforcement of the award may be refused if the award "has been set aside". The fact that the only foreign judgment that serves as a ground for refusal of enforcement under the New York Convention is a setting-aside judgment of the seat court, indicates the special role of a seat court. Further, Art VI of the New York Convention provides that an enforcement court may adjourn the enforcement proceedings if an application for setting aside or suspension has been brought before the seat court. Similarly, s 31(5) of the IAA provides that the Singapore court may refuse to enforce a foreign award if there is an application to set aside or suspend the award before the seat court. This also recognises the deference to the seat court's primary and supervisory jurisdiction. In light of these provisions, to give preclusive effect to a prior enforcement (or non-enforcement) decision would undermine the role of the seat court and subvert the scheme underlying the New York Convention.

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73 Relatedly, the competing interest of promoting finality in litigation between the parties "applies more strongly where the seat court has decided whether to set the award aside", but does not feature "as strongly" in the present context because it is "only" the seat court which can set aside an award (*BAZ* at [47]). Another competing interest is upholding the principle of comity, which refers to the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws" (*Deutsche Telekom* at [67], citing *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 at 1096). However, the principle of comity is not an overriding one. It does not go so far as to preclude parties, in *all* instances, from raising before the seat court objections which have been dismissed by the prior enforcement court.

74 A distinction should be drawn between objections that specifically implicate the enforcement jurisdiction's own statutes, public policy and other domestic interests (*eg*, the alleged contravention of the CMA), and objections that do not (*eg*, the interpretation of the SAA and the LA). While the principle of comity has a greater weight in relation to the former type of objections, the principle of party autonomy should be upheld in relation to the latter. To explain, the parties' choice of seat entails an implicit agreement to favour the supervisory jurisdiction of the seat court over the jurisdiction of the other enforcement courts (see Sundaresh Menon CJ, "The Role of the National Courts of the Seat in International Arbitration", keynote address at the 10th Annual International Conference of the Nani Palkhivala Arbitration Centre (17 February 2018) <https://www.judiciary.gov.sg/news-and-resources/news> at para 53). Hence, it is the seat court which ought to have a final say on that litigated objection. In this case, the claimant's jurisdictional objections were of a different nature from the illegality objections founded upon Malaysian law

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and public policy. Accordingly, I found that transnational issue estoppel should not apply to the claimant's objection that the Tribunal acted in excess of his jurisdiction.

75 But ultimately, nothing turned on this issue, as I have found above (see [52] and [53]) that the claimant failed in establishing the Public Policy Ground.

Conclusion

76 The claimant's application was dismissed. Costs were ordered in the respondents' favour in the amount of S$33,000.

77 Finally, I commend both sets of counsel for their cogent and concise arguments which were of substantial assistance to me in identifying the nub of the issues in dispute.

Wong Li Kok, Alex
Judicial Commissioner

Thio Shen Yi SC, Sherlyn Lim (TSMP Law Corporation) (instructed), Richard Yeoh, Koong Len Sheng, Joshua Ang Zhao Neng (Hong Zhaoneng) (David Lim & Partners LLP) for the claimant;
Ng Jern-Fei KC (JFN Chambers LLC), Tan Jun Hong (Calvin Liang LLC) (instructed), Wong Thai Yong (Wong Thai Yong LLC) for the first and second respondents.

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