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Errata

[2014] 1 SLR 372 at [138] line 8: replace "Tay Kay Kheng" with "Tan Kay Kheng".

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PT First Media TBK (formerly known as PT Broadband Multimedia TBK)
v
Astro Nusantara International BV and others and another appeal

[2013] SGCA 57

Court of Appeal — Civil Appeals Nos 150 and 151 of 2012
Sundaresh Menon CJ, V K Rajah JA and Judith Prakash J
10–12 April; 31 October 2013

Arbitration *— Arbitral tribunal — Jurisdiction — Enforcement — Singapore award — Whether international arbitration award made in Singapore could be refused enforcement under s 19 International Arbitration Act (Cap 143A, 2002 Rev Ed) — Whether arbitral tribunal had improperly exercised its power to join third parties pursuant to r 24(b) 2007 Singapore International Arbitration Centre Rules — Section 19 International Arbitration Act (Cap 143A, 2002 Rev Ed) — Rule 24(b) 2007 Singapore International Arbitration Centre Rules*

Facts

The dispute arose out of a joint venture ("the JV") between on the one side, companies belonging to an Indonesian conglomerate ("the Lippo Group"), and on the other, certain companies within a Malaysian media group ("the Astro Group"), for the provision of multimedia and television services in Indonesia. The appellant ("the Appellant"), FM, is a member of the Lippo Group and was one of its guarantors in the joint venture. FM was also amongst the members of the Lippo Group who entered into a subscription and shareholders' agreement ("the SSA") with the first to fifth respondents ("1st to 5th Respondents"), which contained the terms of the JV. The sixth to eighth respondents ("6th to 8th Respondents"), who were not party to the SSA, provided funding and services to the JV in anticipation of its closing. As it became apparent that the closing of the JV would not materialise, a dispute arose over the continued provision of funding. One of the Lippo Group companies commenced court proceedings in Indonesia against the 6th to 8th Respondents in relation to this dispute. The Respondents, including the 6th to 8th Respondents, then commenced arbitration proceedings pursuant to cl 17.4 of the SSA ("the Arbitration") against the Lippo Group companies. At the same time that the notice of arbitration was filed, an application to join the 6th to 8th Respondents as parties to the arbitration was also filed by the 1st to 5th Respondents ("the Joinder Application").

The three-member arbitral tribunal ("the Tribunal") conducted a preliminary hearing to determine the Joinder Application and, pursuant to r 24(b) of the 2007 Singapore International Arbitration Centre Rules ("2007 SIAC Rules"), ordered the joinder of the 6th to 8th Respondents to the Arbitration, over the objections of the Lippo Group companies. The Tribunal's decision was contained in an award on preliminary issues. The Lippo Group companies did

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not file an appeal to the Singapore court against the Award on Preliminary Issues as permitted by s 10 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") read with Art 16(3) of the 1985 Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law ("the Model Law"), though they did reserve their position on the Tribunal's jurisdiction over the dispute concerning the 6th to 8th Respondents. The Arbitration then proceeded to the determination of the substantive merits of the dispute, whereby the Tribunal rendered four further awards in favour of the Respondents. Subsequently, the Respondents sought to enforce all five awards in Singapore ("the Awards"). FM objected to the enforcement of the Awards on the basis that r 24(b) of the 2007 SIAC Rules did not permit the Tribunal to join the 6th to 8th Respondents to the Arbitration ("the Joinder Objection") and the Awards were therefore made in excess of jurisdiction.

Before the High Court, FM's application to set aside the enforcement of the Awards was dismissed on the ground that the provisions of the IAA read with the Model Law did not permit FM to resist enforcement of the Awards on the basis of the Joinder Objection. The High Court held that the Singapore courts had no power to refuse enforcement of an international arbitral award made in Singapore (hereinafter referred to as a "domestic international award") which had not been set aside or successfully challenged previously under Art 16(3) by the party resisting enforcement. FM appealed against the High Court's decision.

Held, allowing the appeal in part:

(1) Section 19 of the IAA, when construed in consonance with the underlying philosophy of the Model Law, permitted the award debtor to apply to resist enforcement of a domestic international award even if he had not actively challenged the award at an earlier opportunity. This system of "choice of remedies", as evidenced by the *travaux préparatoires* of the Model Law (*travaux* for short), was not just a facet of the Model Law enforcement regime; it was at the *heart* of its design: at [53] to [55] and [65] to [71].

(2) Given that de-emphasising the seat of arbitration by maintaining the award debtor's "choice of remedies" and alignment with the common grounds set out in the New York Convention were the pervading themes under the enforcement regime of the Model Law, the most efficacious method of giving full effect to the Model Law philosophy through the IAA was to recognise that the same *grounds* for resisting enforcement under Art 36(1) of the Model Law were equally available to a party resisting enforcement of a domestic international award under s 19 of the IAA: at [84].

(3) Section 3(1) of the IAA could not be understood as having incidentally derogated from the clear philosophy of "choice of remedies" under the Model Law. The exclusion of Arts 35 and 36 of the Model Law on account of s 3(1) of the IAA did not militate against the interpretation of s 19 as permitting a party resisting enforcement of a domestic international award to do so on the same grounds as those found in Art 36(1): at [86] to [90] and [99].

(4) Nothing in the *travaux* on Art 16(3) of the Model Law suggested that the remedy provided in Art 16(3) was either an exception to the system of "choice of

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remedies" or intended to operate as a "one-shot remedy". The availability of recourse under Art 16(3) was for the purpose of rendering the arbitration process more efficient as compared to the alternative that had earlier been mooted of only being able to challenge jurisdictional rulings after the award on the merits had been rendered: at [109] to [123] and [125] to [132].

(5) Section 19B(1) of the IAA had everything to do with the doctrine of *res judicata* which resulted in the arbitral tribunal being *functus officio* in relation to awards already made, and nothing to do with the availability of curial remedies. Section 19B(4) of the IAA in fact clarified that awards which were final and binding might still be challenged by any recourse provided by law: at [137] to [142].

(6) The issue of whether an arbitration agreement existed was capable of being subsumed under Art 36(1)(*a*)(i) of the Model Law or Art V(1)(*a*) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In the course of determining if the ground for refusing enforcement was established, the enforcement court was entitled to undertake a fresh examination of the issues which were alleged to establish that ground of challenge: at [152] to [158] and [162] to [164].

(7) Rule 24(b) of the 2007 SIAC Rules did not confer on the Tribunal the power to join third parties who were not party to the arbitration agreement. Accordingly, the Tribunal's exercise of its power under r 24(b) to join the 6th to 8th Respondents who were not parties to the SSA to the Arbitration was improper with the corollary that no express agreement to arbitrate existed between the 6th to 8th Respondents and FM: at [178] to [185], [191] to [193] and [197] to [198].

(8) FM did not waive its rights or conduct itself in such a way that it was estopped from raising the Joinder Objection: at [205] to [222].

(9) An arbitral award bound the parties to the arbitration because the parties had consented to be bound by the consequences of agreeing to arbitrate their dispute. Their consent was evinced in the arbitration agreement. Therefore, in a multiparty arbitration agreement, the vitiation of consent between two parties did not *ipso facto* vitiate the consent between other parties. In the present case, partial enforcement was viable because the orders in the Awards did not intertwine in such a manner as to impede severance of the orders made in favour of the 6th to 8th Respondents from those made in favour of the 1st to 5th Respondents: at [226] to [228].

[Observation: It was doubtful whether an enforcement court might recognise and enforce a foreign award which had been set aside by the court in the seat of arbitration. The contemplated *erga omnes* effect of a successful application to set aside an award would generally lead to the conclusion that there was simply no award to enforce: at [76] and [77].]

Case(s) referred to

Albeko Schuhmaschinen AG v Kamborian Shoe Machine Co Ltd (1961) 111 LJ 519 (refd)

Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd [2006] 3 SLR(R) 174; [2006] 3 SLR 174 (refd)

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Arab Republic of Egypt, The v Chromalloy Aeroservices, Inc (1997) XXII Yearbook Comm Arb 691–695 (not folld)

Astro Nusantara International BV v PT Ayunda Prima Mitra [2013] 1 SLR 636 (overd)

Chai Cher Watt v SDL Technologies Pte Ltd [2012] 1 SLR 152 (refd)

Compania Naviera Micro SA v Shipley International Inc (The Parouth) [1982] 2 Lloyd's Rep 351 (refd)

Dallah Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2010] 2 WLR 805; [2009] EWCA Civ 755 (refd)

Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2011] 1 AC 763 (folld)

Dalmia Cement Ltd v National Bank of Pakistan [1975] QB 9 (refd)

Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd [2010] 3 SLR 661 (refd)

Fiona Trust & Holding Corp v Privalov [2007] Bus LR 1719; [2008] 1 Lloyd's Rep 254 (refd)

Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd [2011] 1 SLR 727 (refd)

Goodman v Sayers (1820) 2 Jac & W 249; 37 ER 622 (refd)

Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd [2013] FCAFC 109 (refd)

Hilmarton Ltd v Omnium de traitement et de valorisation (1995) XX Yearbook Comm Arb 663–665 (not folld)

Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd [2007] 1 SLR(R) 292; [2007] 1 SLR 292 (refd)

IMC Aviation Solutions Pty Ltd v Altain Khuder LLC (2011) 253 FLR 9 (refd)

Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc [1974] QB 292 (refd)

Kruse v Questier & Co Ltd [1953] 1 QB 669 (refd)

Middlemiss & Gould v Hartlepool Corp [1972] 1 WLR 1643 (refd)

Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga) [1990] 1 Lloyd's Rep 391 (refd)

Omnium de Traitement et de Valorisation – OTV v Hilmarton (1994) XIX Yearbook Comm Arb 214–222 (refd)

Pertamina Energy Trading Ltd v Credit Suisse [2006] 4 SLR(R) 273; [2006] 4 SLR 273 (refd)

Prodexport State Co for Foreign Trade v E D & F Man Ltd [1973] QB 389 (refd)

PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR(R) 597; [2007] 1 SLR 597 (refd)

Sarhank Group v Oracle Corp No 01-civ-1295, 2002 WL 31268635 (SDNY, 2002) (refd)

Sarhank Group v Oracle Corp 404 F 3d 657 (2nd Cir, 2005) (refd)

Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd [2009] 2 CLC 481 (folld)

Syska v Vivendi Universal SA [2009] Bus LR 367; [2009] 1 All ER (Comm) 244 (refd)

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Tang Boon Jek Jeffrey v Tan Poh Leng Stanley [2001] 2 SLR(R) 273; [2001] 3 SLR 237 (refd)

Yukos Oil Co v Dardana Ltd [2002] EWCA Civ 543 (refd)

Legislation referred to

Arbitration Act 1953 (Act 14 of 1953) s 20

Arbitration Act (Cap 10, 1985 Rev Ed) s 20

International Arbitration Act (Cap 143A, 2002 Rev Ed) ss 3(1), 10, 19, 19B (consd); ss 19B(4), 26

International Arbitration (Amendment) Act 2001 (Act 38 of 2001)

Interpretation Act (Cap 1, 2002 Rev Ed) ss 9A, 4(2)

Toby Landau QC (instructed counsel, Essex Court Chambers, London), Edmund Kronenburg and Lye Huixian (Braddell Brothers LLP) for the appellant; David Joseph QC (instructed counsel, Essex Court Chambers, London), Chou Sean Yu, Lim Wei Lee, Melvin Lum, Chan Xiao Wei and Daniel Tan (WongPartnership LLP) for the respondents.

[Editorial note: The decision from which these appeals arose is reported at [2013] 1 SLR 636.]

31 October 2013 Judgment reserved.

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

Introduction

1 The central question raised in the present appeals concerns the right of a party to an international arbitration, under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), to contend that an award rendered in Singapore should not be enforced against it here on the grounds of an alleged lack of jurisdiction on the part of the tribunal, in circumstances where that party did not take up the avenues that were available to it at an earlier stage to challenge the tribunal's finding that it did have jurisdiction. The answer to this question depends on the interpretation of the relevant provisions of the IAA and the 1985 Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law ("UNCITRAL") ("the Model Law") which together govern the enforcement of international arbitral awards made in Singapore.

Facts

Background

2 The judgment of the High Court judge ("the Judge") against which the present appeals have been brought is reported as *Astro Nusantara*

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International BV v PT Ayunda Prima Mitra [2013] 1 SLR 636 ("the Judgment"). The background to the substantive dispute has been set out in the Judgment at [19] to [26]. For the purposes of these appeals, it is only necessary to highlight the following facts.

Dramatis personae

3 The dispute arose out of a joint venture ("the JV") between on the one side, companies belonging to an Indonesian conglomerate ("the Lippo Group"), and on the other, certain companies within a Malaysian media group ("the Astro Group"), for the provision of multimedia and television services in Indonesia. The vehicle for the JV was to be PT Direct Vision ("DV") (also the third defendant in the proceedings below).

4 The Lippo Group's share in the JV was to be held by PT Ayunda Prima Mitra ("Ayunda") (also the first defendant in the proceedings below). Ayunda's obligations were in turn guaranteed by PT First Media TBK ("FM") (also the second defendant in the proceedings below and the sole appellant in these appeals). The Astro Group's shareholders in the JV were the third and fourth respondents initially, with the fifth respondent guaranteeing their obligations. Pursuant to a novation agreement, the first and second respondents ("the 1st and 2nd Respondents") became the Astro Group's shareholders in the JV. For ease of reference, we refer to the first to eighth respondents collectively as "Astro".

The SSA and the dispute

5 The terms of the JV were contained in a subscription and shareholders' agreement dated 11 March 2005 ("the SSA"). The parties to the SSA were the first to fifth respondents ("the 1st to 5th Respondents"), FM, Ayunda and DV. It is common ground that the sixth to eighth respondents ("the 6th to 8th Respondents") were not parties to the SSA.

6 The SSA contained a number of conditions precedent upon which the parties' respective obligations in the JV were predicated. The parties agreed that they would have until July 2006 to fulfil the conditions precedent. Nonetheless, pending such fulfilment, funds and services were provided by the 6th to 8th Respondents to DV to build up the latter's business from about December 2005.

7 The conditions precedent were not fulfilled in accordance with the schedule and by mid-August 2007, it became likely, even clear to the parties, that the JV would not close. Nonetheless, the 6th to 8th Respondents continued to provide funds and services to DV even as the parties explored their exit options. A dispute then arose over the continued funding of DV. At the heart of that dispute was whether the 6th to 8th Respondents had separately agreed, either orally or by conduct, that they would continue funding and providing services to DV.

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8 This dispute was brought to a head in September 2008 when Ayunda commenced court proceedings in Indonesia against, amongst others, the 6th to 8th Respondents ("the Indonesian Proceedings").

The arbitration proceedings

9 Relying on cll 17.4 and 17.6 of the SSA, Astro took the position that Ayunda's commencement of the Indonesian Proceedings amounted to a breach of the arbitration agreement in the SSA. Read together, the two clauses provided that if the parties are unable to resolve any dispute amicably within 30 days, any party could then commence arbitration under the auspices of the Singapore International Arbitration Centre ("SIAC"). In short, parties to the SSA were not permitted to commence court proceedings to resolve any dispute arising thereunder.

10 Astro therefore commenced Arbitration No 62 of 2008 ("the Arbitration") at the SIAC on 6 October 2008 against FM, Ayunda and DV. The seat of the Arbitration was Singapore. There was, however, a preliminary hurdle to be cleared, as the 6th to 8th Respondents were not parties to the SSA. To overcome this apparent obstacle, Astro stated in their notice of arbitration ("Notice of Arbitration") that the 6th to 8th Respondents had consented to being added as parties to the Arbitration. According to Astro, this was permitted by r 24(b) (sometimes referred to as r 24.1(b)) of the SIAC Rules (3rd Ed, 1 July 2007) ("the 2007 SIAC Rules") which governed the Arbitration. Accordingly, at the same time that the Notice of Arbitration was filed, an application to join the 6th to 8th Respondents as parties to the Arbitration was also filed by the 1st to 5th Respondents ("the Joinder Application"). This was contested by FM, Ayunda and DV.

11 On 19 February 2009, the three member tribunal ("the Tribunal") directed that a preliminary hearing be conducted to determine the Joinder Application. On 7 May 2009, the Tribunal rendered an award ("the Award on Preliminary Issues"). On the Joinder Application, the Tribunal firstly held that on a true construction of r 24(b), it did indeed have the power to join the 6th to 8th Respondents as long as they consented to being joined. It then decided that this power *should* be exercised. This was because the close connection between the different claims advanced by Astro and the potential defences and counterclaims of FM, Ayunda and DV made the joinder both desirable and necessary in the interests of justice. The Tribunal was also concerned about potential inconsistent findings arising from the Arbitration and the Indonesian Proceedings and, to that end, issued an anti-suit injunction restraining Ayunda from proceeding with the latter.

12 Thereafter, between 3 October 2009 and 3 August 2010, the Tribunal rendered four other awards, including the interim final award on the merits of the parties' dispute dated 16 February 2010 ("the Final Award"). For ease

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of reference, the five arbitral awards awarded in the Arbitration are collectively referred to as "the Awards".

Procedural history

13 Against that background, we trace and set out the procedural history leading to these appeals. The proceedings in the High Court began with Astro's *ex parte* applications in Originating Summonses No 807 of 2010 ("OS 807/2010") and Originating Summons No 913 of 2010 ("OS 913/2010") (collectively, "the Enforcement Proceedings") for leave to enforce the Awards that had been rendered by the Tribunal. Leave to enforce four awards was given in OS 807/2010 on 5 August 2010, while leave to enforce the remaining award was given in OS 913/2010 on 3 September 2010.

14 The two orders, which we shall refer to as the "Enforcement Orders", were purportedly served on FM, Ayunda and DV in Indonesia. After the time for filing an application to set aside the Enforcement Orders had expired without any action having been taken by either FM, Ayunda or DV, Astro entered judgments in Singapore on the Awards against them on 24 March 2011. On 3 May 2011, FM applied to set aside the judgments on the ground that the service of the Enforcement Orders was irregular. Ayunda and DV did not make a similar application. On 22 August 2011, the Assistant Registrar set aside the judgments against FM and granted FM leave to apply to set aside the Enforcement Orders. The Assistant Registrar's decision was upheld by the Judge on appeal: see the Judgment ([2] *supra*) at [41]–[65].

15 Consequently, on 12 September 2011, FM caused two summonses to be issued to set aside the Enforcement Orders granted in OS 807/2010 and OS 913/2010 ("SUM 4065" and "SUM 4064" respectively). These were heard by the Judge who dismissed the applications. Civil Appeals Nos 150 and 151 of 2012 are FM's appeals against the Judge's decision. At a pre-hearing conference on 20 February 2013, FM and Astro consented to having the two appeals consolidated.

The decision below

16 There were two grounds on which FM sought to set aside the Enforcement Orders. First, there was never any arbitration agreement between FM and the 6th to 8th Respondents. Second, the Award on Preliminary Issues (on the basis of which the Tribunal derived its jurisdiction to issue the subsequent four awards) should not be enforced because the Supreme Court of Indonesia had ruled that it violates the sovereignty of the Republic of Indonesia. It is apposite to clarify that the Awards are not foreign awards governed by Pt III of the IAA which gives effect to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"). This was not

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disputed by the parties. Instead, the Awards are what the Judge termed "domestic international awards", *ie*, international commercial arbitral awards made in the same territory as the forum in which recognition and enforcement is sought.

17 The Judge dismissed FM's applications without going into the merits of the grounds relied on by FM, having found in favour of Astro on two independent threshold issues. The first was that the grounds raised by FM are not recognised as grounds for resisting enforcement of a domestic international award under the IAA. The second was that FM was precluded from raising the same jurisdictional objections which formed the subject-matter of the Award on Preliminary Issues given that it had not challenged the latter as it was entitled to under Art 16(3) of the Model Law within the prescribed time. By reason of this failure, the Judge found that it was no longer open to FM to resist enforcement in reliance on those grounds which it could have, but did not raise pursuant to Art 16(3). We set out the details of the Judge's reasoning on these two independent threshold issues below.

Grounds for resisting enforcement of domestic international awards

18 The Judge held (at [82] of the Judgment) that a domestic international award is either recognised as final and binding and not set aside, or, it is not recognised as final and binding and set aside. Since the timelines for setting aside had expired and FM was only seeking to resist enforcement of the Awards, it followed that the Awards were final and binding with the necessary corollary that enforcement could not be resisted. Second, FM's argument that there should be no distinction between the enforcement regime for domestic international awards and foreign awards was a "non-starter" (at [88] of the Judgment). This was because while parties could rely on the grounds in Art V(1) of the New York Convention to resist the enforcement of foreign awards, by virtue of s 3(1) of the IAA, Art 36(1)(*a*) of the Model Law which is contained in Ch VIII thereof and which sets out the grounds for resisting enforcement of an award made in any jurisdiction (including the seat jurisdiction) does not have the force of law in Singapore. Section 3(1) of the IAA provides:

> **Model Law to have force of law**
>
> **3.**—(1) Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.

19 Article 36(1)(*a*) of the Model Law (which, as noted above, is contained in Ch VIII thereof) provides as follows:

> **Article 36. Grounds for refusing recognition or enforcement**
>
> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

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(*a*) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(*b*) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (*a*) (v) of this Article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Article 16(3) of the Model Law

20 Turning to the Judge's second ground as outlined above, she held (at [141] and [151] of the Judgment ([2] *supra*)) that where a tribunal has ruled on a jurisdictional objection as a preliminary ruling, the party wishing to challenge the preliminary ruling "must act" by lodging an application under Art 16(3), which provides as follows:

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> **Article 16. Competence of arbitral tribunal to rule on its jurisdiction**
>
> …
>
> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

21 In other words, the Judge (at [157] of the Judgment) interpreted Art 16(3) as the "exclusive route" through which a preliminary decision on jurisdiction can be challenged. Once the time limit for bringing a challenge under Art 16(3) has elapsed without any application having been made, the preliminary ruling on jurisdiction becomes final and cannot be challenged subsequently, whether by way of a setting-aside application or at the enforcement stage. As FM never challenged the Award on Preliminary Issues under Art 16(3), the Judge held that it had lost its sole and exclusive opportunity to raise its jurisdictional objection before the Singapore courts. It was therefore no longer open to a Singapore court to revisit the jurisdictional objection.

The parties' submissions on appeal

FM

22 FM's principal submission is that there is a clear and indelible distinction between active and passive remedies which is encapsulated in the Model Law's policy of "choice of remedies". Counsel for FM, Mr Toby Landau QC ("Mr Landau") submitted that at the first, *active*, level of court review, parties to an arbitration may take positive steps to invalidate the tribunal's award, such as by an application to challenge a preliminary ruling on jurisdiction under Art 16(3) or set aside an award on the grounds set out in Art 34(1) of the Model Law. At the second, *passive*, level of court review, parties may defend themselves against the award by requesting that recognition or enforcement be refused in the jurisdiction where and when the award is sought to be enforced. The Model Law provides for such passive control by Art 36. On the basis that this is the concerted policy of the Model Law, Mr Landau argued that FM was entitled to resist the enforcement of the Awards in Singapore even though it had not actively challenged the preliminary ruling via Art 16(3) or applied to set aside the Awards via Art 34. This was described as its exercise of the "choice of remedies' which the Model Law accords to the parties to an arbitration.

23 FM's submissions on "choice of remedies" were situated within a narrative in which the imperatives of the Model Law were to reduce the emphasis on the seat of arbitration. On FM's case, this policy is so strong

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that Parliament must, if it wishes to do so, expressly legislate to abolish or remove this "choice of remedies". As such, the inapplicability of Art 36 of the Model Law *per se*, which is the effect of s 3(1) of the IAA, is not sufficient to alter or displace the underlying policy which permits FM to resist the enforcement of the award as a passive remedy. Mr Landau also pointed out that the stated rationale for s 3(1) was to de-conflict the Model Law regime from the New York Convention in relation to the enforcement of *foreign* awards. It was therefore argued that s 3(1) should not be construed literally and without regard to its legislative purpose, *viz*, as having the effect of removing the court's power to refuse recognition or enforcement of domestic international awards rendered in Singapore on the grounds stated in Art 36 or some analogue thereof.

24 Mr Landau also submitted that the availability of Art 16(3) did not alter the policy of "choice of remedies" by transforming jurisdictional challenges into a "one-shot remedy". If this were so, Art 16(3) would represent such a singular departure from the underlying policy that it would have been apparent from the *travaux préparatoires* of the Model Law (or *travaux* for short). Instead, he submitted that the UNCITRAL Working Group on International Contract Practices ("the Working Group") discussed Art 16(3) exclusively within the context of its role as an active remedy, leaving the award debtor's passive remedies unaffected. He submitted that Art 16(3) was designed to allow parties to have quicker access to the courts where a preliminary ruling on jurisdiction had been issued so that the arbitration could then proceed on a more certain footing. Mr Landau also noted that there were sound practical reasons against *requiring* the adversely affected party to apply to the supervising court every time a preliminary ruling on jurisdiction was made on pain of losing any other right it might have to ventilate its grievances. Such a policy could institute delay and would cut against the legitimate interests of parties not to risk antagonising the arbitrators from the outset by challenging their preliminary ruling and stalling the proceedings.

25 Mr Landau did acknowledge, however, that there was a difference in views regarding the effect of Art 16(3) on Art 34, *viz*, whether the availability of the former active remedy precluded recourse to the latter active remedy, or if parties could in fact raise two active challenges to a preliminary ruling on jurisdiction. Nonetheless, FM's position was that the availability of passive remedies remained entirely separate from the sphere of active remedies, and would not be foregone so long as the affected party had reserved its rights to challenge the tribunal's jurisdiction. In this regard Mr Landau contended that FM had conducted itself exactly as prescribed in the following passage from Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 5.127:

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> The proper and most effective course where there are genuine grounds upon which to challenge the jurisdiction of the arbitral tribunal is to raise the matter with the arbitral tribunal itself at the earliest possible stage, to insist that all objections should be fully argued before the arbitral tribunal and that the determination of the objections should be the subject of an interim award. If the arbitral tribunal upholds its own jurisdiction, as it frequently does, the respondent should continue to participate in the arbitration, *having expressly reserved its position in relation to the matter of jurisdiction* so that this issue may be considered again after the final award is made, either by a challenge of the award in the courts of the place of arbitration, *or by resisting attempts to obtain recognition or enforcement of the award*. [emphasis added]

26 It should be clarified that it is not FM's case that "choice of remedies" enables a party to have two bites at the cherry. Rather, Mr Landau characterised the issue as one of alternative remedies, *viz*, the waiver of a right to rely on an active remedy does not prejudice recourse to a later passive remedy.

27 Returning to the Judge's decision which had found FM's case wanting at the first hurdle of establishing a statutory basis for resisting enforcement, Mr Landau pointed to s 19 of the IAA as the key provision within which Parliament had conferred on our courts the discretion to refuse recognition and enforcement of arbitral awards. The provision bears setting out in full:

> **Enforcement of awards**
>
> **19**. An award on an arbitration agreement *may, by leave of the High Court or a Judge thereof*, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.
>
> [emphasis added]

28 The key issue for us, according to Mr Landau, is the calibration of that power. He suggested that the court could take reference from Arts 34(2) and 36(1) of the Model Law, Art V(1) of the New York Convention, or even the English common law on s 26 of the 1950 English Arbitration Act ("1950 EAA"), upon which s 19 of the IAA was modelled to draw the content that would guide the exercise of the aforesaid power. Without committing to any one position, Mr Landau contended that s 19 had to be interpreted with the Model Law in mind, which entailed adopting "internationally accepted minimum standards" as grounds for refusing recognition and enforcement.

Astro

29 Astro's case in relation to the question of FM's right to challenge jurisdiction at this stage of the proceedings has three independent layers. First, Astro contends that there is no general concept of "choice of

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remedies' under the Model Law. If it is open to a party disaffected by a decision or award to actively attack it, *ie*, via Art 16(3) or Art 34, it *must* do so. As part of the Model Law regime, the failure to seek an active remedy precludes recourse to a passive remedy. Since FM did not challenge the jurisdictional ruling under Art 16(3) or set aside the Awards under Art 34, it cannot now resist enforcement of the Awards.

30 Second, even if there is a general concept of "choice of remedies", a preliminary ruling on jurisdiction under Art 16(3) is governed by a special regime. Mr David Joseph QC ("Mr Joseph"), counsel for Astro, submitted that the nature of Art 16(3) is such that all preliminary rulings on jurisdiction must be challenged within the prescribed 30-day time limit. Failure to do so will deprive the party objecting to the decision of any other chance to subsequently raise the same jurisdictional ground which had been the subject of the ruling, for instance, in setting aside or enforcement proceedings. If the preliminary ruling is challenged but not set aside by the supervisory court, the party objecting to jurisdiction cannot raise the *same grounds* in resisting enforcement of the substantive award either by a subsequent application to set aside the award before the *supervisory court*, or by resisting enforcement proceedings before the *enforcement court*, irrespective of whether the latter is in the same jurisdiction as the supervisory court or elsewhere. In other words, Art 16(3) is a "one-shot remedy".

31 Third, even if FM could resist enforcement, the grounds on which FM could attempt to do so are extremely limited. While Mr Joseph accepted that the language of s 19 of the IAA imports a residual power to resist enforcement on restricted grounds such as enforcement being contrary to public policy, tainted by corruption or by breach of natural justice, the jurisdictional grounds such as those found in Art 36(1) of the Model Law are unavailable to a party in FM's position. Like the Judge, Mr Joseph relied on the fact that Parliament, through s 3(1) of the IAA, consciously denuded Arts 35 and 36 of any force of law. He argued that the consequence of this deliberate act of Parliament must be that the court cannot have recourse to the grounds in Art 36(1) to refuse enforcement of a domestic international award. According to Mr Joseph, this was not unusual and Singapore was not alone in adopting a more "focused" regime by excluding Arts 35 and 36. He contended that Mr Landau was trying to shoehorn into s 19 a different regime, in effect introducing Art 36(1) via a backdoor to circumvent a clear legislative act of Parliament. Instead, in interpreting s 19, the court should look to other provisions, such as Art 5 (which curtails the court's residual powers) and Art 16(3) (which sets out the time limits for challenging a preliminary ruling on jurisdiction), and so adopt a restricted interpretation of s 19.

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Issues to be determined in the present appeals

32 Against this background, it is evident that the threshold question before us remains the same as that before the Judge, *viz*, whether FM is entitled to raise in SUM 4065 and SUM 4064 its objection to the joinder of the 6th to 8th Respondents which the Tribunal ordered pursuant to the Joinder Application ("the Joinder Objection"). This presents two issues:

(a) Whether the courts have a power to refuse enforcement of an award under s 19, and if so, what the ambit or content of that power is.

(b) Whether Art 16(3) is a "one-shot remedy" with the corollary that FM's failure to challenge the preliminary ruling in the Award on Preliminary Issues precludes it from raising the Joinder Objection in SUM 4065 and SUM 4064.

33 Both FM and Astro also made submissions on the merits of the Joinder Objection in the event that we find that FM is entitled to raise the Joinder Objection, as well as on the question of whether FM had waived its rights to raise the Joiner Objection assuming it had merit. We will set out and address their respective submissions in due course.

Our decision on the threshold issues

Ambit of section 19 of the IAA

History of section 19

34 The history of s 19 can be traced to the 1950 EAA. The approach towards foreign awards and domestic awards under the 1950 EAA is interesting, and in some respects superficially similar to that in the IAA. Like the IAA, the 1950 EAA did not contain a specific provision dealing with the circumstances in which enforcement of domestic awards could be refused. However, it had an entire Pt II which dealt with "Enforcement of Certain Foreign Awards". These foreign awards were those made under the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards ("1927 Geneva Convention"). The New York Convention had not yet come into existence at the time the 1950 EAA was enacted. There was a general provision in the 1950 EAA, s 26, pertaining to enforcement of awards under Pt I which was entitled "General Provisions as to Arbitration" which read:

> **Enforcement of Award**
>
> **26.** An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.

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35 As alluded to above at [28], s 26 is nearly identical to s 19 of the IAA. This is no accident as s 26 is the direct forebear of s 20 of the Singapore Arbitration Act 1953 (Act 14 of 1953) ("the 1953 AA") (see *Singapore Parliamentary Debates, Official Report* (5 March 1980) vol 39 at col 605 (Chua Sian Chin, Minister for Home Affairs)). Section 20 of the 1953 AA was, in turn, the direct forebear of s 20 of the Singapore Arbitration Act (Cap 10, 1985 Rev Ed) ("1985 AA"). And this provision was, in turn, reproduced as s 19 of the IAA when the latter was enacted in 1994. As there are no Singapore cases where s 20 of the 1953 AA, s 20 of the 1985 AA or s 19 of the IAA have been relied upon to resist enforcement of awards, the English courts' interpretation of s 26 of the 1950 EAA (as well as its predecessor, s 12 of the Arbitration Act 1889) is of some importance in aiding our understanding of the operation of s 19.

Power to refuse enforcement under section 26 of the 1950 EAA

36 In *Prodexport State Company for Foreign Trade v E D & F Man Ltd* [1973] QB 389, a dispute arose concerning the non-delivery of sugar. The sellers, who did not deliver, claimed that a law which had come into force rendered delivery illegal. The dispute was submitted to arbitration in London and the arbitrator awarded the buyers damages. The buyers sought leave from the English High Court to enforce the award under s 26 of the 1950 EAA. The sellers, on the other hand, applied for leave to extend time to set aside the award as they had exceeded the six-week statutory timeline imposed for setting aside applications. In addition, the sellers applied to have the award set aside under s 23(2), relying on the ground that the arbitrators had misconducted themselves or had acted in excess of their jurisdiction in awarding damages for the non-performance of an obligation which was illegal by the law of the country where the obligation was to be performed.

37 The court granted the sellers' application for the extension of time and then considered whether the ground for setting aside was made out. In explaining the interaction between setting aside under s 23 and enforcement under s 26, Mocatta J said (at 398):

> It is true that where a party seeks to *avoid* an ostensible award against him by establishing that there was no binding contract containing an arbitration clause to which he was a party, he usually today seeks his remedy, ***if he wishes to take the offensive rather than defend an application under section 26 of the Arbitration Act 1950 to enforce the award as a judgment***, by an action or an originating summons for a declaration rather than in a motion to set aside. There is some logical solecism in pursuing the statutory remedy to set aside an award under section 23 of the Arbitration Act 1950, when ex hypothesi, nothing exists which the law regards as an award. [emphasis added in italics and bold italics]

38 Thus, under the 1950 EAA, an award debtor had two options to avoid the consequences of an award: (a) the active remedy of setting aside under

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s 23; or (b) the passive remedy of resisting enforcement under s 26. This is buttressed by Sir Michael Mustill and Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 1982) ("*Mustill & Boyd*"), where the authors recognised that there are two categories of remedies available after an award has been released. They termed these two categories as "passive remedies" and "active remedies" and described their operation in the following terms (at p 489):

> A party avails himself of a *passive remedy when he **does not** himself take **any initiative to attack the award**, but simply waits until his opponent seeks to enforce the award* by action or summary process, and then relies upon his matter of complaint as a ground why the Court should refuse enforcement. [emphasis added in italics and bold italics]

39 The authors' commentary (at p 488) on the options available to parties with jurisdictional objections is remarkably on point:

> **Jurisdictional problems**
>
> If concerned with the existence or continued validity of the arbitration agreement, the validity of the notice to arbitrate or the qualifications of the arbitrator, [a party may] issue an originating summons or a declaration. Alternatively, [that party may] wait until after the award [has been published] and *then set aside the award **or** raise the objection as a ground for resisting enforcement*.
>
> [emphasis added in italics and bold italics]

40 If the system of "choice of remedies" is to be interpreted as one which permits parties to defend against an award passively by seeking to resist its recognition and enforcement in the enforcing court even though no active attack had been taken against the award, which is exactly how both Mr Landau and Mr Joseph understood it and how we saw it, it is evident that the features of this system were already part of English arbitration law by the 1970s at the latest.

Content of the power to refuse enforcement under section 26 of the 1950 EAA

41 It is important to note that s 26 was not a *pro forma* provision. The English courts were not compelled to enforce awards if they thought that there were good grounds not to do so. Through case law, principles were developed to guide the courts as to when enforcement under s 26 of the 1950 EAA ought to be refused. For example, in *Middlemiss & Gould v Hartlepool Corporation* [1972] 1 WLR 1643, Lord Denning MR held (at 1647) that leave to enforce the award should be given "unless there is a real ground for doubting the *validity of the award*" [emphasis added]. In *Dalmia Cement Ltd v National Bank of Pakistan* [1975] QB 9, Kerr J described (at 23) the power to enforce domestic awards under s 26 as an exercise of "discretionary jurisdiction". We have some reservations with describing the power as "discretionary", as that might convey the wrong

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impression that the courts had the broad flexibility to determine whether to enforce any particular award. Undoubtedly, it was a discretion that had to be exercised in line with recognised principles as these developed over time.

42 The authors of *Mustill & Boyd* stated (at p 489) that the court should refuse enforcement of a domestic award where: (a) the award is so defective in form or substance that it is incapable of enforcement; or (b) the whole or part of the award is so ineffective on the ground that the relief granted lies outside the jurisdiction of the arbitrator. More specifically, albeit in the slightly different context of a common law action on the award, they stated (at p 369):

> In addition to pleading and proving the arbitration agreement and the award, the plaintiff must establish that the dispute was within the terms of the submission, and that the arbitrator was duly appointed. It will be a good defence to an action to enforce an award that the award is void for failure to comply with some formal or substantive requirement, or that it was made in excess of jurisdiction or that it has been set aside or remitted, or that the authority of the arbitrator was validly revoked before he made his award, but not that the award ought to be set aside or remitted on grounds not rendering the award void but merely voidable.

The "substantive requirements" imposed on the award which, if not complied with, might render the award unenforceable, were: (a) cogency; (b) completeness; (c) certainty; (d) finality; and (e) enforceability: *Mustill & Boyd* at pp 339–343.

43 Although the principles appear to be stated with some degree of clarity in the textbooks, the cases lack the same precision. Nonetheless, the general theme in case law is consistent with what had been suggested in the textbooks. It was certainly clear that the invalidity of the award encompassed cases where the award was made without jurisdiction. In *Kruse v Questier & Co Ld* [1953] 1 QB 669, the defendant argued that as the submission to arbitration became invalid when the main contract was frustrated, the award was made without jurisdiction and was therefore null and void. The court considered this defence but dismissed it on the basis that the submission to arbitration had not become invalid – a principle we would recognise today under the rubric of separability (see *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254). In *Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc* [1974] QB 292, the Court of Appeal reversed the High Court's decision not to allow enforcement of an award on the basis that he was bound by higher authority to hold that an arbitrator generally did not have jurisdiction to make an award in a foreign currency. Lord Denning MR held that English arbitrators did have the "authority, jurisdiction and power" to make such awards and gave leave to enforce the award (at 298).

44 Given the relationship between s 26 of the 1950 EAA and s 20 of the 1985 AA (see [35] above), it cannot be gainsaid that prior to the enactment

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of the IAA, a party seeking to passively resist enforcement in Singapore of an award that was made in Singapore could do so notwithstanding that the award had not been attacked actively. In addition, the courts could refuse enforcement if there were substantial doubts as to the validity of the award. Then came the IAA through which the Model Law was received into Singapore's arbitral framework. Did the philosophy of the Model Law alter the understanding of s 19 of the IAA which had been taken from s 20 of the 1985 AA? There are two parts to this question. The first is whether the court's power to refuse enforcement in certain circumstances had been removed by the enactment of the IAA. If the answer to this is in the negative and the court's power was retained under s 19, the second issue is whether the content of that power remained the same and continued to be guided by the English authorities on s 26 of the 1950 EAA or was to be seen and understood differently given the sea change heralded by the enactment of the Model Law.

Whether the court's power to refuse enforcement was removed

45 The answer to the first question posed in the preceding paragraph must be a firm negative. This is borne out by three factors. First, save for a few inconsequential words and the positioning of a comma, s 20 in the 1985 AA was reproduced in its entirety as s 19 of the IAA. Moreover, there is nothing in the legislative debates at the time of the passing of the International Arbitration Bill ("the IAA Bill") (*Singapore Parliamentary Debates, Official Report* (31 October 1994) vol 63 (Ho Peng Kee, Parliamentary Secretary to the Minister for Law) ("*IAA Hansard*")) or in any other legislative aid which suggests that Parliament intended the abrogation of any power hitherto contained in s 20 of the 1985 AA when it was enacted as s 19 of the IAA.

46 Second, when the IAA was enacted, the 1985 AA was retained for the governance of purely domestic arbitrations which did not fall under the purview of the IAA. The adoption of the Model Law was limited to the IAA; there were no accompanying amendments to the 1985 AA. Therefore, the enforcement regime under the 1985 AA which undoubtedly included the power of the court to refuse enforcement did not change after the enactment of the IAA. If the power to refuse enforcement ceased to exist under the IAA but continued to exist under the 1985 AA, it would have meant that there were two quite different regimes operating concurrently even though they would each be rooted in virtually identical statutory terms. This seems untenable.

47 Third and perhaps most importantly, as we have shown, the philosophy of "choice of remedies" was available under the 1950 EAA. As we shall explicate below at [65]–[74], this same idea of "choice of remedies" was also fundamental to the Model Law's philosophy towards the enforcement of domestic (as opposed to foreign) awards. Therefore, there is

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every reason to think that Parliament, in receiving the Model Law into Singapore, intended to retain for the courts the power to refuse enforcement of *domestic international* awards under s 19, even if the award could have been but was not attacked by an active remedy.

Present scope and content of the power to refuse enforcement

48 Thus far, our reasoning might not be controversial as far as the parties are concerned. But this leads us to the next question which is whether the *content* of this power was affected when it was enacted in the IAA.

49 The fact that a power to refuse enforcement was retained under s 19 of the IAA does not lead to the necessary conclusion that the scope and content of that power was unchanged and continued to be guided by the English authorities. On behalf of Astro, Mr Joseph argued that the power under s 19 was narrowly circumscribed (see [31] above) and did not admit of a tribunal's lack of jurisdiction as a ground to refuse enforcement. On behalf of FM, Mr Landau argued that the scope of the court's power must be calibrated in accordance with internationally accepted minimum standards (see also [28] above). This could entail referencing the grounds in Arts 34 and 36 in the Model Law, Art V of the New York Convention, or perhaps the English common law as it stood in relation to s 26 of the 1950 EAA. As far as Mr Landau is concerned, each of these various yardsticks encompasses different expressions of what is essential to his case, namely that enforcement of an award can be resisted if the tribunal had no jurisdiction.

50 In our judgment, the scope of s 19 of the IAA must be interpreted by reference to the rules governing statutory interpretation in Singapore. Section 4(2) of the IAA reminds us that the Interpretation Act (Cap 1, 2002 Rev Ed) – s 9A in particular – is the appropriate starting point. In interpreting any provision of legislation, the court should embrace an interpretation which promotes the purpose or object underlying the legislation over one which does not. Given that s 19 is found in a statute with the primary objective of enacting the Model Law in Singapore, we are satisfied that Parliament intended that the power to refuse enforcement under s 19 be exercised in a manner which is compatible with the overarching philosophy of the Model Law on the enforcement of awards. Parliament did not legislate how that power ought to be exercised, and so must be taken to have left it to the courts to determine the appropriate content of the power under s 19. In this regard, the content of that power cannot be properly determined without an understanding of the purpose of the provision, and more generally, of the IAA and of the adoption of the Model Law in Singapore.

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(1) Commitment to Model Law philosophy

51 The IAA was enacted to create an omnibus regime for international arbitration. One of the key architectural pillars of that regime was the incorporation of the Model Law and the New York Convention. This is reflected in the preamble to the IAA which reads:

> An Act to make provision for the conduct of international commercial arbitrations based on the [Model Law] and conciliation proceedings and to give effect to the [New York Convention] and for matters connected therewith.

52 However, as the Model Law was never intended to be an international convention, much less one that was exclusive and self-standing, national arbitration laws play an important complementary function. Indeed, the Model Law was devised as a model legislation and not, for example, as a convention like the New York Convention, so that it would be easier to assimilate into national arbitration laws which were never contemplated to be replaced as such by the Model Law: Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation, 1989) ("*Holtzmann & Neuhaus*") at p 11.

53 The purpose and function of the Model Law in Singapore was fully articulated in the second reading ("Second Reading") of the IAA Bill, the instrument through which the IAA was enacted. Then Parliamentary Secretary to the Minister for Law, Assoc Prof Ho Peng Kee ("Assoc Prof Ho"), stated in moving the IAA Bill that the IAA would provide a consolidated legal framework that would include not only the Model Law but also give effect to the New York Convention to govern the resolution of international commercial disputes by arbitration. He also explained that the IAA Bill was one of the products of the review of Singapore's laws generally to ensure "adequate legal support for Singapore's regionalisation drive": *IAA Hansard* ([45] *supra*) at col 624. Assoc Prof Ho (at cols 625–628) also briefly elaborated on the genesis of the Model Law, its core features, the widespread acceptance of the Model Law since its promulgation, and the benefits of adopting the Model Law in Singapore. Noting some dissatisfaction with the arbitral framework in existence then, Assoc Prof Ho concluded (at col 627):

> In summary, the reasons why Singapore should adopt the Model Law are as follows:
>
> Firstly, the Model Law provides a sound and internationally accepted framework for international commercial arbitrations.
>
> Secondly, the general approach of the Model Law will appeal to international businessmen and lawyers, especially those from Continental Europe, China, Indonesia, Japan and Vietnam *who may be unfamiliar with English concepts*

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> *of arbitration*. This will work to Singapore's advantage as our businessmen expand overseas.
>
> Thirdly, it will promote Singapore's role as a growing centre for international legal services and international arbitrations.
>
> [emphasis added]

54 The *IAA Hansard* illuminates the considerations which were at the forefront of Parliament's deliberations. First, the Model Law was to form the cornerstone of the IAA. However, the Model Law was not intended to stand alone, at least where the enforcement of foreign awards is concerned. To that end, the New York Convention provisions and its attendant principles were to be subsumed within the IAA to address enforcement of foreign awards. Second, the consolidation of the Model Law and the New York Convention into a single legislation was the product of a thoughtful review of Singapore's arbitration landscape which was intended to ensure adequate legal support for Singapore's regionalisation drive. Third, the Model Law, which was crafted in such a way as to be acceptable both to common and civil law systems, was to herald a paradigm shift in the Singapore arbitral framework which had *until then* been guided by the English arbitration regime.

55 In the light of the above, it is clear that the scope of the power to refuse enforcement in s 19 could no longer draw direct and complete inspiration from the English authorities once the IAA came into force. The context of the 1950 EAA and the IAA were, to put it simply, informed by different considerations. The adoption of the Model Law was a game changer which necessitated an "update" of the content of the power under s 19. In short, the construction of the power to refuse enforcement under s 19 now had to be consonant with the underlying philosophy of the Model Law on the enforcement of all awards generally and more specifically, domestic international awards.

The Model Law and the New York Convention

56 UNCITRAL's general mandate was to promote the "progressive harmonization and unification of the law of international trade": *UN General Assembly Resolution 2205*, 21 UN GAOR Supp (A/6594, 17 December 1966). One of UNCITRAL's aims through the Model Law was to reduce the divergences which might result from each State's interpretation of its obligations under the New York Convention: *Note of Secretariat on Further Work in Respect of International Commercial Arbitration* (A/CN.9/169, 11 May 1979) at paras 6–9. The mechanism of a model law was intended to create uniform rules to eliminate local peculiarities which stood in the way of international consistency: see John Honnold, "The United Nations Commission on International Trade Law: Mission and Methods" (1979) 27 Am J Comp L 201.

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57 Thus, from the outset, the enforcement regime of the Model Law was intended to be aligned with the New York Convention, save that it would apply not just to foreign awards but also domestic awards arising out of international commercial arbitrations: *Holtzmann & Neuhaus* at pp 1055–1056. Initially, the first draft of the Model Law had separate but closely connected sections for the enforcement of foreign and domestic awards. For foreign awards, the Model Law followed the New York Convention. As for domestic awards, the UNCITRAL Secretariat recommended that the same conditions and procedures as laid down in the New York Convention be adopted: *Note by the Secretariat: Model Law on International Commercial Arbitration: Draft Articles 37 to 41 on Recognition and Enforcement of Award and Recourse Against Award* (A/CN.9/WG.II/WP.42, 25 January 1983) reproduced in (1983) Yearbook of the United Nations Commission on International Trade Law, 1983, vol XIV at pp 92–93, notes 3 and 12.

58 At its Sixth Session, the Working Group decided to consolidate the hitherto separate sections on the recognition and enforcement of foreign and domestic awards into what became the current Art 35 of the Model Law which states:

> **Article 35. Recognition and enforcement**
>
> (1) An arbitral award, *irrespective of the country in which it was made*, shall be recognised as binding and … shall be enforced subject to the provisions of this Article and of Article 36 [which sets out the grounds for refusing recognition or enforcement].
>
> [emphasis added]

59 The consolidation was recommended because the Working Group felt that "there were no cogent reasons for providing different rules for domestic awards and for foreign awards": *Report of the Working Group on International Contract Practices on the Work of its Sixth Session* (A/CN.9/245, 29 August–9 September 1983) ("*Report of the Sixth Session*") at para 139. This was not entirely surprising given that in its first session to discuss the Model Law, the Working Group had noted as follows (*Report of the Working Group on International Contract Practices on the Work of its Third Session* (A/CN.9/216, 23 March 1982)) at para 103:

> There was wide support for the idea of adopting a *uniform system of enforcement for all awards* covered by the model law. This would result in *all awards rendered in international commercial arbitration being uniformly enforced irrespective of where they were made*. [emphasis added]

60 The Working Group noted in the *Report of the Working Group on the Work of its Seventh Session* (A/CN.9/246, 6–17 February 1984) ("*Report of the Seventh Session*") that there was a view which preferred that the Model Law omit any mention of foreign awards completely, for the following reasons (at para 142):

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> … Under one view, it was not appropriate to retain in the model law provisions which would regulate recognition and enforcement of foreign awards, in view of the existence of widely adhered to multilateral treaties such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It was pointed out that those States which had not ratified or acceded to the Convention should be invited to do so but that a State which decided not to adhere to that Convention was unlikely to adopt the almost identical rules laid down in articles 35 and 36. It was further pointed out that provisions on recognition and enforcement of foreign awards were not needed by those States which adhered to the 1958 New York Convention. In addition, such provisions in the model law might cast doubt on the effect of the reciprocity reservation made by many member States and may create other difficulties in the application of this Convention. Yet another advantage of not covering foreign awards was that the remaining provisions could be better tailored to domestic awards without the need for harmony with the 1958 New York Convention.

61 However, the prevailing view was for a combined Article to cover *both* foreign and domestic awards, with the main reason being (*Report of the Seventh Session* at para 143):

> … [I]n international commercial arbitration the place of arbitration (and of the award) should be of limited importance and that, therefore, such awards should be recognized and enforced in a *uniform manner, irrespective of their place of origin*. [emphasis added]

62 This trend towards the uniform treatment of awards generally in fact began with the New York Convention which did away with the double exequatur rule prescribed in the 1927 Geneva Convention, under which leave for enforcement (exequatur and the like) was required from both the court of the seat of arbitration *and* the court of enforcement (when the place of enforcement is different from the seat of arbitration). The seat of arbitration which was influential because of the double exequatur rule therefore became less significant under the New York Convention. In fact, one delegate at the New York Conference considered the New York Convention a "very bold innovation" *because* of its impact on the double exequatur rule (see *Summary Record of the Thirteenth Meeting* (E/CONF.26/SR.13, 28 May 1958) at p 3). As Emmanuel Gaillard observed in "International Arbitration as a Transnational System of Justice" in *Arbitration – The Next Fifty Years* (Albert Jan van den Berg gen ed) (International Council for Commercial Arbitration, Kluwer Law International, 2012) at p 71:

> *The idea that the New York Convention would* ***place the seat of the arbitration at the top of a jurisdictional hierarchy for enforcement purposes is counter to its fundamental objectives****. If accepted, it would shift the focus from the award itself, which is the subject matter of the Convention, to the judicial process surrounding the award in the country where it was rendered, and would fly in the face of one of the greatest achievements of the New York Convention.* Indeed, one must recall that the drafters of the Convention set out to abolish

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> the requirement of double exequatur, which governed enforcement under the 1927 Geneva Convention on the Enforcement and Recognition of Foreign Arbitral Awards. [emphasis added in italics and bold italics]

63 A clear elaboration of the implications of the New York Convention on whether and how the pursuit of active remedies in the seat of arbitration might be relevant to enforcement proceedings can be found in the recent decision of the UK Supreme Court in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 ("*Dallah (SC)*"). There, Lord Mance JSC noted that Art V(1)(*e*) of the New York Convention (see [76] below) accorded some deference and importance to the seat of arbitration, but went on to say (at [28]) the following, with which we are in agreement:

> 28. … But article V(1)(a) and section 103(2)(b) [the section in the English Arbitration Act 1996 (c 23) which gives effect to the New York Convention] are framed as free-standing and categoric alternative grounds to article V(1)(e) of the Convention and section 103(2)(f) for resisting recognition or enforcement. *Neither article V(1)(a) nor section 103(2)(b) hints at any restriction on the nature of the exercise open, either to the person resisting enforcement or to the court asked to enforce an award, when the validity (sc existence) of the supposed arbitration agreement is in issue*. The onus may be on the person resisting recognition or enforcement, but the language enables such person to do so by proving (or furnishing proof) of the non-existence of any arbitration agreement. This language points strongly to ordinary judicial determination of that issue. ***Nor do article VI and section 103(5) contain any suggestion that a person resisting recognition or enforcement in one country has any obligation to seek to set aside the award in the other country where it was made***. [emphasis added in italics and bold italics]

64 The drafters of the Model Law, in aligning the Model Law with the New York Convention, were plainly desirous of continuing this trend of de-emphasising the importance of the seat of arbitration. However, there was and is one significant difference between the New York Convention and the Model Law. Unlike the New York Convention which only dealt with enforcement of awards, the Model Law also dealt with the setting aside of awards made in the seat of arbitration by the courts of that seat. This other avenue to challenge domestic awards resulted in the possibility that the enforcement of awards originating from within the jurisdiction of the supervisory court would be treated differently from that of foreign awards. This is where "choice of remedies" becomes significant and forms the crux of this dispute.

"Choice of remedies"

65 Notwithstanding Mr Joseph's vigorous submissions, we are satisfied that "choice of remedies" is not just a facet of the Model Law enforcement regime; it is the *heart* of its entire design. The *Analytical Commentary on*

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Draft Text of a Model Law on International Commercial Arbitration (A/CN.9/264, 25 March 1985) ("*Analytical Commentary*") states clearly (at p 71) that:

> [t]he application for setting aside constitutes the exclusive recourse to a court against the award in the sense that it is the only means for actively attacking the award … [a] party retains, of course, the right to defend himself against the award, by requesting refusal of recognition or enforcement in proceedings initiated by the other party (articles 35 and 36).

66 Indeed the *Analytical Commentary* deliberately couples the term "recourse" with attacks on the award so as to create a clear distinction from remedies which act as defences to enforcement (*ibid*):

> Existing national laws provide a variety of actions or remedies available to a party for ***attacking*** the award. Often equating arbitral awards with local court decisions, they set varied and sometimes extremely long periods of time and set forth varied and sometimes long lists of grounds on which the award *may be* ***attacked****. Article 34 is designed to ameliorate this situation by providing only one means of* ***recourse*** (paragraph (1)), available during a fairly short period of time (paragraph (3)) and for a rather limited number of reasons (paragraph (2)). … [emphasis added in italics and bold italics]

67 This distinction was delineated after doubts were raised as to whether the word "recourse" might be misleading since other "recourses" could also be found in Arts 36(1) and 16(2) (see *Analytical Compilation of Comments by Governments and International Organisations on the Draft Text of a Model Law on International Commercial Arbitration* (A/CN.9/263, 19 March 1985) ("*Analytical Compilation*") at p 47):

> 5. Mexico expresses doubt about the formulation of paragraph (1), which provides that the setting aside procedure is the only recourse to a court against the arbitral award, since article 36(1) also provides recourse against 'recognition or enforcement of an arbitral award', and article 16(2) gives two other recourses: a plea that the arbitral tribunal does not have jurisdiction and a plea that the arbitral tribunal is exceeding the scope of its authority. It is suggested that this be clarified in article 34(1).

68 The drafters' specificity of language is also manifested in the overall structure of the Model Law. Article 34, which provides for applications to set aside an arbitral award, falls under Ch VII, entitled "Recourse Against Award". Articles 35 and 36, on the other hand, fall under the next Chapter, entitled "Recognition and Enforcement of Awards". It is therefore evident to us that the Model Law recognises both a substantive and linguistic division between active and passive remedies.

69 The question is whether these remedies exist as a menu of choices for the award debtor to choose from. The controversy surrounding choice of remedies was very much alive in the discussions and deliberations amongst members of the Working Group. In its Seventh Session, the Working

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Group considered a proposal to insert the following paragraph in the draft Art 36 (*Report of the Seventh Session* ([60] *supra*) at para 153):

> If an application for setting aside the award has not been made within the time-limit prescribed in article 34(3), the party against whom recognition or enforcement thereafter is sought may not raise any other objections than those referred to in this article, paragraph (1), subparagraphs (*a*)(i) or (v) or (*b*).

70 Not only was the question of "choice of remedies" squarely before the Working Group, a specific proposal to limit the grounds for resisting enforcement to Arts 36(1)(*a*)(i), (v) and (2)(*b*) when an application for setting aside was not made was put before it. Most critically, that proposal was rejected. The ensuing commentary explaining the rejection is instructive and enlightening (*Report of the Seventh Session* at paras 153–154):

> 153. … Divergent views were expressed as to whether such a provision should be incorporated in the model law. *Under one view, it was desirable to adopt a provision along these lines which would reduce the grounds for refusal of recognition and enforcement in those cases where a party had not made an application for setting aside during the time-limit prescribed therefor*. It was pointed out that the provision was both useful in that it induced a party to raise objections based on the procedural irregularities covered by article 34(2)(*a*)(ii), (iii) and (iv) during the relatively short time-limit set forth in article 34(3). *While some proponents of that view thought that such a provision should apply to recognition and enforcement of* ***only domestic awards***, others were in favour of including also foreign awards, in which case the cut-off period was the period of time for requesting setting aside as prescribed in the law of the country where the award was made.
>
> 154. ***The prevailing view, however, was not to adopt such a provision***. It was pointed out that the intended preclusion unduly restricted the freedom of a party to decide on how to raise its objections. *In view of the different purposes and effects of setting aside and of invoking grounds for refusal of recognition or enforcement*, ***a party should be free to avail itself of the alternative system of defences which was recognized by the 1958 New York Convention and should be maintained in the model law***. *It was further pointed out that if the provision were limited to recognition and enforcement of domestic awards* ***it would not be consistent with the policy of the model law to treat awards in a uniform manner irrespective of their place of origin***.
>
> [emphasis added in italics and bold italics]

71 Mr Joseph contended that the description of Art 34 as an "exclusive recourse" (see the extract at [65] above) against an award is inconsistent with the notion of "choice of remedies". We disagree. At the Seventh Session, the Working Group made the very same observation which Mr Joseph made before us, and queried whether this would give the wrong impression that Art 34 "disregard[ed] the right of a party under article 36 to raise objections against the recognition or enforcement of an award"

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(*Report of the Seventh Session* at para 130). The Working Group in fact "agreed that, for the sake of clarity, paragraph (1) [of Art 34] should make reference to *that other type of recourse* [*ie*, Art 36]" [emphasis added] (*ibid*). Ultimately, the Working Group declined to make the amendment that was originally recommended not because they changed their mind about "choice of remedies", but rather for a linguistic reason as it explained in the *Report of the Seventh Session* at para 197:

> The Working Group noted that the term 'recourse' in article 34(1) had, in a number of languages, the connotation of an initiative or action by a party such as an 'appeal'. Since that meaning did not fully correspond with the raising of objections envisaged under article 36, the Working Group decided not to retain the reference to that article in article 34.

Thus, in our view, the *travaux* make it clear beyond argument that the Model Law provides for the system of "choice of remedies", and that this system applies equally to both foreign and domestic awards which are treated uniformly under the Model Law. It follows that under the Model Law, parties that do not actively attack a domestic international award remain able to passively rely on defences to enforcement absent any issues of waiver.

72 Before leaving this point, there is one interesting reference in the *travaux* which might on the face of it be read as supporting Mr Joseph's position and which therefore merits addressing. In the *Report of the Sixth Session* ([59] *supra*), it was noted (see paras 128, 137, 138, 150 and 156) that "choice of remedies" for the purposes of domestic awards was unacceptable. At the time of the Sixth Session, there were separate provisions for recognition and enforcement of domestic and foreign awards. As this was later amalgamated into the current Arts 35 and 36 which drew no distinction between domestic and foreign awards, the view espoused in the Sixth Session became nothing more than a footnote. A suggestion was made in that session to delete the provisions on enforcement of domestic awards such that the only remedy would be in the setting aside provisions (*Report of the Sixth Session* at para 128):

> As regards recognition and enforcement of 'domestic' awards, it was stated that this matter was satisfactorily dealt with in the individual national laws which often treated such awards like court decisions rendered in the State. It was also pointed out that the existing national laws often set less onerous conditions than envisaged in the model law and, for example, did not provide for a special procedure for obtaining recognition or enforcement of 'domestic' awards. *Finally, it was unacceptable to retain the system of double control set forth in articles [36] and [34]*. [emphasis added]

73 It is worth clarifying that the language used in this section of the *travaux* was "double-control", which we understand in the context of the *travaux* as a whole as referring to the system of alternative remedies found in Arts 34 and 36, *ie*, the "choice of remedies" (which also coheres with the

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basis upon which arguments were canvassed before us – see [40] above). Had the proposal been accepted, the only remedy open to a party seeking to challenge a domestic award would be the active remedy of setting aside. That would support Astro's case. However, this suggestion was not adopted because (*ibid* at para 157):

> … it was not justified to deprive a party from raising objections if 'domestic enforcement' was sought after expiration of this time-limit while the same objections could still be raised against enforcement in any other State.

74 Whichever way we look at it, Mr Joseph's arguments on "choice of remedies" cannot be sustained. Fundamentally, the thrust of Mr Joseph's argument was that under the scheme of the Model Law, the party objecting to jurisdiction would lose its right to raise the same jurisdictional objection in enforcement proceedings before the supervisory court if it had foregone an opportunity to actively attack the award either under Art 16(3) if there was a preliminary ruling on jurisdiction, or under Art 34. This is diametrically opposed to the concept of "choice of remedies".

A WIDER NOTION OF "DOUBLE-CONTROL"

75 At this point we depart from the main trunk of our analysis on the underlying philosophy of the Model Law and specifically on the "choice of remedies" to acknowledge that a wider meaning could also be ascribed to the language of "double-control" used in the *travaux*. "Double-control" could also be regarded as a content-neutral rubric which simply sets out the distinction between active and passive remedies without more. Interstitial doctrines would in turn then be required to modulate the relationship between these two remedial layers and, by extension, the relative roles of the supervisory and enforcing courts. It is clear, from our foregoing analysis, that both the New York Convention and the Model Law recognise the "choice of remedies" as one such interstitial doctrine, so that a party is not precluded from resisting the enforcement of an award by virtue of its failure to utilise an available active remedy. There is also authority that the New York Convention permits a party to resist enforcement even after an *unsuccessful* active challenge, save and except for the operation of any issue estoppel recognised by the enforcing court (see *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2009] EWCA Civ 755 at [90] *per* Rix LJ and *Dallah (SC)* ([63] *supra*) at [98] and [103]–[104] *per* Lord Collins of Mapesbury JSC; *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109 at [55]–[65]). In so far as this is accurate of the New York Convention we see no reason to regard the Model Law as any different, given that the objective of uniform treatment of international arbitral awards is common to both instruments. The underlying theme is that "double-control" endorses what Lord Mance JSC described in *Dallah (SC)* (at [28]) as "ordinary judicial determination" in the court of enforcement; it is

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generally for each enforcing court to determine for itself what weight and significance should be ascribed to the omission, progress or success of an active challenge in the court of the seat.

76 We would add one caveat to this general position, which is that we entertain serious doubt as to whether "double-control" extends to the recognition and enforcement of an award which *has been set aside* in the seat by the court of a foreign jurisdiction. We note that French arbitration law appears to have moved down that path. French law appears to recognise a system of "transnational" or "supranational" arbitral awards, whereby awards do not derive their validity and legitimacy from a particular local system of law. Thus, in *Hilmarton Ltd v Omnium de traitement et de valorisation* (1995) XX Yearbook Comm Arb 663–665 ("*Hilmarton*"), the *Cour de Cassation* affirmed the decision of the *Cour d'Appel de Paris* which declared that the subject award was enforceable in France even though it had been set aside in Switzerland. The Swiss court had annulled the award on the basis that it had misconstrued what constituted an affront to morality in Swiss law (see *Omnium de Traitement et de Valorisation – OTV v Hilmarton* (1994) XIX Yearbook Comm Arb 214–222). The apex French court held that the Swiss award, being an international award, was not integrated into the legal order of the seat and therefore continued to exist notwithstanding that it had been set aside. The recognition of the award in accordance with French law was not, therefore, contrary to international public policy. The same result and reasoning also features in the *Cour d'Appel de Paris'* decision of *The Arab Republic of Egypt v Chromalloy Aeroservices, Inc* (1997) XXII Yearbook Comm Arb 691–695. France, of course, is not a Model Law jurisdiction and as the *Cour de Cassation* stated in *Hilmarton*, the relevant French legislation (Art 1502 of the New Code of Civil Procedure) does not contain the equivalent of Art V(1)(*e*) of the New York Convention (the wording of which is identical to Art 36(1)(*a*)(v) of the Model Law), which provides:

> (1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that –
>
> …
>
> (*e*) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

77 While the wording of Art V(1)(*e*) of the New York Convention and Art 36(1)(*a*)(v) of the Model Law arguably contemplates the possibility that an award which has been set aside *may* still be enforced, in the sense that the *refusal* to enforce remains subject to the discretion of the enforcing court, the contemplated *erga omnes* effect of a successful application to set aside an award would generally lead to the conclusion that there is simply

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no award to enforce. What else could it mean to set aside an award? If this avenue of recourse would only ever be of efficacy in relation to enforcement proceedings in the seat court, then it seems to have been devised for little, if any, discernible purpose. As such, we do not think that in principle, even the wider notion of "double-control" can encompass the same approach as has been adopted by the French courts. The refusal to enforce awards which have not been set aside at the seat court may therefore constitute one of the outer-limits of "double-control". However, as this specific issue is not directly engaged in the present appeal, we offer no further comment beyond these tentative thoughts.

Germany and Québec

78 It is apposite to discuss briefly the enforcement regimes of Germany and Québec which the Judge considered and relied on heavily. According to the Judge, these two Model Law jurisdictions do not recognise the policy of "choice of remedies". Turning first to Québec, we respectfully disagree with the Judge's construction of Québec law. She said (at [83] of the Judgment ([2] *supra*)):

> 83 … In Québec, a refusal to recognise and enforce a domestic international award (homologation) is equivalent to a setting aside (annulment) of an award. The correct legal basis for a refusal to enforce is therefore that there is no award to enforce, *ie*, the award has been set aside. Articles 947, 947.1 and 947.2 of [Québec arbitration law] read as follows:
>
> > 947. The *only possible recourse* against an arbitration award *is an application for its annulment*.
> >
> > …
>
> [High Court's emphasis in the Judgment]

79 We agree with Mr Landau's submission that the phrase "the only possible recourse … is annulment" is to be understood as an "attack" against the award through setting aside or, where permissible, an appeal. The language in Art 947 tracks Art 34(1) of the Model Law which, although as we have shown incorporates the policy of "choice of remedies", at the same time provides that setting aside under Art 34(1) is the exclusive recourse against an award. There is no clearer explanation of this than that provided in the *Analytical Commentary* ([65] *supra*) on Art 34(1) which we have extracted and reproduced above at [65] and [71].

80 Indeed, in our view, Québec law is no different from Singapore law in that the courts have a power to refuse the enforcement of a domestic international award. The relevant provision, which is Art 946 and not Art 947 which the Judge referred to, reads:

> An arbitration award cannot be put into compulsory execution until it has been homologated.

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81 While the court may not examine the merits of the dispute (Art 946.2), it may nevertheless refuse homologation on proof that (Art 946.4):

> 1) one of the parties was not qualified to enter into the arbitration agreement;
>
> 2) the arbitration agreement is invalid under the law elected by the parties or, failing any indication in that regard, under the laws of Québec;
>
> 3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
>
> 4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; or
>
> 5) the mode of appointment of arbitrators or the applicable arbitration procedure was not observed.

82 We turn then to the position in Germany. We agree with the Judge that Germany has abandoned the "choice of remedies" and this is reflected in its legislation. However, Germany has not just excluded the operation of Arts 35 and 36 of the Model Law. It has, in addition, legislated extensively for an enforcement regime that is distinctly different from that of the Model Law. This regime is governed by s 1060 of the German Zivilprozessordnung (Tenth Book on the Code of Civil Procedure) (Germany) ("ZPO") which prescribes:

> (1) Enforcement of the award takes place if it has been declared enforceable.
>
> (2) An application for declaration of enforceability shall be refused and the award set aside if one of the grounds for setting aside under section 1059 subs. 2 exists. Grounds for setting aside shall not be taken into account, if at the time when the application for a declaration of enforceability is served, an application for setting aside based on such grounds has been finally rejected. Grounds for setting aside under section 1059 subs. 2, no. 1 shall also not be taken into account if the time-limits set by section 1059 subs. 3 have expired without the party opposing the application having made an application for setting aside the award.

83 In these circumstances, it is difficult to see how the German position can be said to be representative of the approach under the Model Law. Indeed, the authority cited by the Judge (at [82] of the Judgment), Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd Ed, 2007) at para 864 recognised that the German position departs from what has been described as "'dual control' of a domestic award". We do not read this as endorsing the German approach as the appropriate representation of the enforcement regime under the Model Law.

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(2) Populating the power to refuse enforcement under section 19

84 As we have held, the content of the power to refuse enforcement under s 19 must be construed in accordance with the purpose of the IAA which, as we have stated, is to embrace the Model Law. Given that de-emphasising the seat of arbitration by maintaining the award debtor's "choice of remedies" and alignment with the grounds under the New York Convention are the pervading themes under the enforcement regime of the Model Law, the most efficacious method of giving full effect to the Model Law philosophy would, in our view, be to recognise that the same *grounds* for resisting enforcement under Art 36(1) are equally available to a party resisting enforcement under s 19 of the IAA.

85 But what of Mr Joseph's submission that reference may not be made to Arts 35 and 36 because Parliament, by s 3(1) of the IAA, had expressly decided that those articles shall not have the force of law? To begin with, the conclusion that the grounds set out in Art 36(1) are available to guide the discretion conferred by s 19 is not the same as saying that Art 36 has the force of law in Singapore. On our reading of s 3(1), that section in no way constrains the power of the court to determine the grounds upon which it would refuse enforcement of domestic international awards under s 19 and it remains open to the courts to align the exercise of that discretion with the grounds under Art 36. This alone is sufficient to negative Mr Joseph's argument. Nevertheless and in any event, an analysis of the legislative object in excluding Arts 35 and 36 by s 3(1) of the IAA is revealing in that it readily becomes evident that this had nothing to do with constraining or limiting the content of the court's power to refuse enforcement under s 19. Instead, as the background to s 3(1) shows, it was intended only to avoid conflict with the New York Convention regarding the enforcement of foreign awards.

(3) Effect of exclusion of Articles 35 and 36 by section 3(1)

86 The drafting of the IAA was the result of wide consultation. It was first prepared by a sub-committee of the Singapore Academy of Law's Law Reform Committee (*IAA Hansard* ([45] *supra*) at col 627). The sub-committee was appointed by the Attorney-General in 1991 to examine the existing laws relating to commercial arbitration in Singapore and to make recommendations for their reform or revision. In the sub-committee's report, published in *Sub-Committee on Review of Arbitration Laws* (Academy, 1993) ("the *LRC Report*"), it was recommended (at paras 39 and 40) that Arts 35 and 36 should be excluded so that there would not be any conflict between these provisions and the provisions of the New York Convention which are premised on the concept of reciprocity. The IAA Bill contained in the *LRC Report* was subsequently adopted (with amendments which are irrelevant for the present purposes) by the full Law Reform Committee and eventually passed by Parliament as the IAA. It is therefore

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evident that the specific object of Parliament in excluding Ch VIII of the Model Law, *ie*, Arts 35 and 36 of the Model Law, was to enable the enforcement of foreign awards to be governed by only one set of rules, namely, the New York Convention and not have to deal with the question of how to address the matter of reciprocity if Arts 35 and 36 were retained.

87 The *LRC Report* and the subsequent parliamentary debates *never* touched on the issue of whether the exclusion of Arts 35 and 36 would also thereby entail that the High Court would be unable to refuse the recognition and enforcement of domestic international awards which, by definition, are outside the ambit of the New York Convention. In the process of de-conflicting the enforcement regimes under the Model Law and the New York Convention (see [60] and [86] above), Parliament gave no hint of any intention to exclude the "choice of remedies" in relation to domestic international awards where enforcement proceedings are brought in Singapore. However, the effect of the legislative device that was employed in order to enable the enforcement of *foreign* awards to be governed by the New York Convention was that *domestic international awards* were left to be regulated by s 19 of the IAA. The contention that this was meant to and in fact did have the effect of excluding domestic international awards from the scheme of the "choice of remedies" would require the conclusion that Parliament intended domestic international awards which had not been set aside to be enforceable by default in Singapore. In light of the history and clear policy of the Model Law outlined above at [56]–[71], there are at least three reasons to conclude that this was never the case.

88 First, the primary object of the IAA is to give effect to the Model Law. It is therefore clear to us that if there was a shift in 1995 when the IAA came into force, it must be a shift towards rather than away from the Model Law. Given the centrality of "choice of remedies" and the alignment in the treatment of foreign and domestic awards to the philosophy of the Model Law read with the New York Convention, we do not accept that the enactment of s 3(1) was for a completely different purpose and, by that device, that the legislative omission of Art 36 is sufficiently indicative of a legislative intention to deprive award debtors under a domestic international award of passive remedies before the Singapore courts.

89 The second reason is related to the first. A policy of default enforcement for any Singapore awards which have not been set aside would be a significant innovation and if this was the legislative object, then in the context of a detailed Second Reading speech one would have expected to find some express acknowledgement or reference. Of this, there is no trace. When viewed in the context of the pre-1996 English arbitration regime and the pre-1995 Singapore arbitration regime, as well as the policy of the Model Law, default enforcement of domestic international awards must entail a positive decision: (a) to change the previously prevailing position; and (b) to depart from the Model Law. We do not think that such a

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development in relation to domestic international awards was ever contemplated, much less intended, and we are unwilling to accept this as an incidental consequence of Parliament's preference that the New York Convention continue to regulate the enforcement of foreign awards. The fact that a clear reason was ascribed for the exclusion of Arts 35 and 36 which has nothing to do with treating foreign and domestic awards differently strengthens our view that there was never an intention to simultaneously introduce an unstated policy of default enforcement for domestic international awards. Of course, we are not suggesting that States cannot modify the Model Law to their own preferences. Indeed, the German example shows not only what is possible but also how it should be done if modification is desired. But it is only sensible in the end that significant policy decisions which depart not only from international norms but also the avowed purpose of the statute should not be too easily read into the margins of legislative provisions.

90 Moreover, significant practical ramifications would follow if we were to interpret s 3(1) of the IAA as having the effect of excluding the application of "choice of remedies" from domestic international awards. Parties involved in international arbitrations in Singapore would be compelled to engage their active remedies in the Singapore courts, *ie*, by challenging a preliminary ruling under Art 16(3) or initiating setting aside proceedings under Art 34, because the option of exercising a passive remedy of resisting enforcement here would not be open to them. This can have potentially far-reaching implications on the practice and flourishing of arbitration in Singapore. Without venturing into the realm of public policy, the basic point to be made here is that Parliament should not be taken to have silently, and even incidentally, undertaken such a singular and signal decision.

91 We return here to the Working Group's meeting in the Sixth Session where the issue of excluding foreign awards altogether from the Model Law was discussed (see [58]–[60] above). The prevailing view at the time was for the provisions on recognition and enforcement of foreign awards to be included in the Model Law, in addition to those dealing with domestic awards. The general discussion of the Working Group reflects two separate concerns with Art 36 – one pertaining to the overlap with the New York Convention for foreign awards, and the other relating to "choice of remedies". It is telling – particularly since Singapore had a representative in the *travaux* discussions and was therefore apprised of the debates – that Parliament, in excluding Arts 35 and 36, referenced only the former concern and made no mention at all of the latter.

92 Last but not least, we note that the legislature in other states such as Ireland, Austria, Bangladesh, Croatia and Germany have either combined the setting aside regime with the enforcement regime for domestic international awards or have limited the grounds for resisting enforcement

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of those awards to public policy and non-arbitrability. In the paragraphs that follow, we set out our reasons for rejecting Mr Joseph's submission that the Singapore Parliament would therefore not have been alone or acting radically in intending through s 3(1) to contract out of the Model Law philosophy of treating the enforcement of all awards uniformly and preserving the "choice of remedies".

93 First, given our view that s 19 of the IAA is the controlling provision, a view with which Mr Joseph agrees, the only sources of authority which the court should look at are the parliamentary materials against the backdrop of the history and origin of s 19, which we have done (see [34]–[55] above). As a result of that exercise, it is evident that Parliament did not intend to reject or exclude the "choice of remedies" policy of the Model Law. Unless there is evidence to suggest that Parliament had been motivated by the position adopted in the foreign jurisdictions referred to by Mr Joseph, we do not find reference to such jurisdictions to show how *they* might have weighed their policy choices to be of any significant value. In any event, there might have been various reasons why those states excluded Arts 35 and 36. We must therefore resist the urge to reason by analogy without first scrutinising the respective legislations and their background to determine the specific rationale for the exclusion.

94 The exclusion of Arts 35 and 36 is not a new issue. In the Working Group discussions on Arts 35 and 36, certain state representatives did suggest that Arts 35 and 36 should be deleted, on the basis that arbitral awards made in some states are akin to and have the force and effect of a court judgment without the need for further steps to be taken. It was argued that if Arts 35 and 36 had the force of law, such awards would no longer have that "self-enforcing" effect. This argument, however, did not find sufficient favour amongst the majority of the Working Group and Arts 35 and 36 were therefore retained. In the end, some of these states which had wanted Arts 35 and 36 to be deleted from the Model Law nevertheless enacted the Model Law. However, other states, such as Austria and Croatia, excluded Arts 35 and 36 so as to preserve the "self-enforcing" status of their domestic awards.

95 For example, Art 31 of Croatia's Law on Arbitration (Official Gazette no 88/2001) states:

> The award of the arbitral tribunal shall have, in respect of the parties, the *force of a final judgment (res iudicata)*, unless the parties have expressly agreed that the award may be contested by an arbitral tribunal of a higher instance. [emphasis added]

96 Likewise, s 607 of the Austrian Code of Civil Procedure as revised on 13 January 2006 states:

> The award has, between the parties, the effect of a final and binding court judgment.

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97 Thus, one reason for the exclusion of Arts 35 and 36 of the Model Law as shown in the examples of Austria and Croatia is the preservation of the "self-enforcing" nature of domestic international awards. That reason is inapplicable in Singapore as arbitral awards have never been "self-enforcing" (see [34]–[47] above).

98 We can accept Mr Joseph's argument that there are other states such as Germany which have contracted out of "choice of remedies" by excluding Arts 35 and 36. However, the *effect* of such exclusion must depend on its underlying *purpose*. Germany provides a good example. As we have noted above at [82], the German legislature had considered the issue of "choice of remedies" and decided that it was not suitable for them. The same cannot be said here. The German position is therefore not analogous to our local context. We would add, parenthetically, that the German position in fact impliedly acknowledges that barring such carefully and deliberately crafted legislation, the default position under the Model Law is one that upholds the "choice of remedies" even for domestic awards.

99 For these reasons, we do not find that s 3(1) precludes us from interpreting s 19 as permitting a party resisting enforcement of a domestic international award to do so on the same grounds as those in Art 36(1). On the contrary, we consider that this would accord with the objects for which the Model Law was enacted as law in Singapore in 1994 and came into effect in 1995. Our conclusion, we note, is also in line with the views expressed by most commentators on the IAA: see Michael Hwang SC *et al*, "Singapore" in *International Handbook on Commercial Arbitration* vol IV (Jan Paulsson gen ed) (Kluwer, 2011) at p 37; Lim Wei Lee and Alvin Yeo SC, "Singapore" in *Asia Arbitration Handbook* (Michael Moser & John Choong eds) (Oxford University Press, 2011) at para 15-357; but *cf* Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) at p 51.

Article 16(3) and "choice of remedies"

100 FM's attempt to mount a passive defence against the enforcement of the Awards is subject to a second obstacle in that the Joinder Objection had already been the subject of the Tribunal's decision in the Award on Preliminary Issues. FM therefore had an earlier opportunity of appealing to the Singapore court under Art 16(3) which it did not take. Article 16(3) has been reproduced at [20] above.

101 Mr Joseph argued that once an arbitral tribunal decides to make a preliminary ruling on jurisdiction, the *only* option left to an aggrieved party is to invoke the appellate route to the court as provided for in Art 16(3). According to Mr Joseph, if that route is not taken, there can be no further opportunity to revisit the jurisdictional objection at the setting aside stage after the substantive award has been rendered or at the enforcement stage. Mr Joseph submitted that this preference for "instant court control" was

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adopted after extensive and deliberate discussions by the Working Group. An arbitral tribunal has the discretion to defer a decision on a jurisdictional objection to the final award on the merits, but once it chooses to render a preliminary ruling, the operative policy advantages of finality, certainty, preventing dilatory tactics and reducing waste of time and money dictate that those jurisdictional challenges must be challenged under and only under Art 16(3).

102 Last but not least, Mr Joseph pointed out that in construing the nature and effect of Art 16(3), the court should have regard to the construction of Art 13(3) because the remedy in the former was intended to be modelled after the latter. Article 13(3), which sets out the rules governing the challenging of an arbitrator, reads:

> **Article 13. Challenge procedure**
>
> …
>
> (3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this Article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in Article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

103 Mr Joseph submitted that the position under Art 13(3) was that a party that elected not to seek the court's intervention cannot subsequently challenge the validity of the award on grounds similar to those on which it based its initial challenge. This, he contended, should inform how Art 16(3) ought to be construed.

104 Mr Landau's answer to all of Mr Joseph's submissions on this point was short and in keeping with his overarching submission. Mr Landau submitted that Art 16(3) was only ever intended to be an additional active remedy and did not affect the availability of passive remedies built into the Art 36 procedure. Put another way, it was not intended to be carved out of the underlying system of "choice of remedies" built into the Model Law. Nor do the *travaux* reveal otherwise.

105 Our decision that the Model Law undoubtedly subscribes to the notion of "choice of remedies" weakens but does not foreclose Mr Joseph's argument. It is plausible that even within a system of "choice of remedies" only certain active remedies can exist alongside passive remedies. Thus, it is still necessary for us to consider if there is support in the *travaux* or elsewhere for Mr Joseph's proposition that Art 16(3) is a "one-shot remedy" which if not utilised precludes recourse to the passive remedy of resisting enforcement.

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106 At first blush, the *travaux* do not yield an unequivocal answer. There were calls for Art 16(3) to expressly include a reference to Art 36 which were reiterated, but these were eventually placed on hold. In the *Analytical Compilation* ([67] *supra*), it is recorded (at p 29) that Norway was in favour of allowing the flexibility for some form of early court control, and suggested the following draft Art 16(6):

> (6) A ruling by the arbitral tribunal that it has jurisdiction may be contested only in an action referred to in paragraph (4) of this article, in an action for setting aside an award on the merits or as a defence against an action for recognition or enforcement of the award.

107 The International Bar Association was also supportive of an express clarification that a contest by way of defence to recognition or enforcement should be included in Art 16 (*Analytical Compilation* at p 30):

> Norway and [the International Bar Association] suggest that it should be mentioned in article 16(3) that a ruling by an arbitral tribunal that it has jurisdiction could also be contested by way of defence against recognition or enforcement of the award. It is pointed out by IBA that under article 16(3) it appears that questions of jurisdiction may only be raised in an action for setting aside, and not by way of defence to an action for recognition or enforcement of the award. This could lead to an absurd result if the losing party is unable to take an action for setting aside simply because the winner stepped in first with an action for enforcement.

108 In the *Analytical Commentary* ([65] *supra*), the position was recorded as follows (at p 40):

> 12. As noted earlier …, the power of the arbitral tribunal to rule on its own competence is subject to judicial control. Where a ruling by the arbitral tribunal that it has jurisdiction is, exceptionally, included in an award on the merits, it is obvious that the judicial control of that ruling would be exercised upon an application by the objecting party for the setting aside of the award. The less clear, and in fact controversial, case is where such affirmative ruling [on jurisdiction] is made on a plea as a preliminary question. The solution adopted in article 16(3) is that also in this case judicial control may be sought *only after the award on the merits is rendered, namely in setting aside proceedings (and, although this is not immediately clear from the present text [footnote omitted], in any recognition or enforcement proceedings*). [internal citations omitted; emphasis added]

109 Two points may be made. First, at the time of the *Analytical Commentary*, the version of Art 16(3) being considered provided for judicial control of a tribunal's decision on jurisdiction (including preliminary rulings) *only* at the stage of the setting aside of the final award, and not for instant court control. But, and this is the second point, the *Analytical Commentary* then clarified that although the language in Art 16(3) did not expressly say so, it was understood that a party might choose not to challenge the preliminary ruling on jurisdiction at the setting aside stage and yet raise that same challenge in enforcement proceedings.

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The footnote in the above excerpt is particularly revealing (*Analytical Commentary* at p 40):

> The reason for referring in article 16(3) only to the application for setting aside was that the thrust of this provision concerns the faculty of an objecting party to *attack* the arbitral tribunal's ruling by initiating court proceedings for review of that ruling. ***However, the Commission may wish to consider the appropriateness of adding, for the sake of clarity, a reference to recognition and enforcement proceedings, which, although initiated by the other party***, provide a forum for the objecting party to invoke lack of jurisdiction as a ground for refusal (under article 36(1)(a)(i)). [emphasis added in italics and bold italics]

110 This position was maintained, as noted in the *Summary Records for meetings on the UNCITRAL Model Law on International Commercial Arbitration* reproduced in the Yearbook of the United Nations Commission on International Trade Law, 1985, vol XVI ("the *Summary Records*"). At the 315th meeting, the UK representative, Sir Michael Mustill cautioned that the impression that a ruling by the arbitral tribunal in Art 16(3) could only be contested in an action for setting aside the award "was not correct since a party could also apply for refusal of recognition or enforcement of the award under article 36" (the *Summary Records* at p 440). Separately, the US representative, Mr Howard Holtzmann ("Mr Holtzmann") agreed that "challenges to jurisdiction when made should be regarded not simply as actions for setting aside but also as a form of defence in an enforcement action" (the *Summary Records* at p 442). Later that day in the 316th meeting, Mr Holtzmann commented that "no one had spoken against the Norwegian proposal" (the *Summary Records* at p 443) which implied that a challenge against a preliminary ruling could be mounted under both setting aside and resisting enforcement proceedings, to which the Chairman suggested that the matter might be more appropriately discussed in conjunction with Art 36. Two days later at the 320th meeting, Dr Aron Broches, who was the observer for the International Council for Commercial Arbitration, enquired as to what would be the position if a party did not take advantage of its right of recourse to the court under Art 16(3) (the *Summary Records* at p 459). Specifically, he queried whether such failure could be regarded as a waiver which precluded reliance on the same ground in *setting aside proceedings* (*ibid*). The Chairman's reply was that the issue "would be a question of *national procedural law* on … *res judicata*" [emphasis added] (*ibid*).

111 All of this underscores the point that Art 16(3) was not intended to be a "one-shot remedy", much less affect the availability of defences at the stage of recognition and enforcement. Otherwise, the Commission would more likely than not have dealt with the implications for Art 36 there and then. Nothing in the *travaux* suggests that Art 16(3) was an exception to the "choice of remedies" philosophy upon which the treatment of awards was predicated.

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Policy objectives of Article 16(3)

112 Mr Joseph is on somewhat firmer ground when he relies on the discussions of the policy objectives behind Art 16(3) as articulated by the *Report of the United Nations Commission on International Trade Law on the work of its Eighteenth Session* (A/40/17, 3-21 June 1985) ("*Commission Report*") at paras 158–160:

> 158. Under one view, the solution adopted in was appropriate in that it permitted such court control only in setting aside proceedings and, as should be clarified in the text, in the context of recognition and enforcement of awards. That solution was preferred to instant court control since it would prevent abuse by a party for purposes of delay or obstruction of the proceedings.
>
> 159. Under another view, [Art 16(3)] should be modified so as to empower the arbitral tribunal to grant leave for an appeal to the court or in some other way, for instance by making its ruling in the form of an award, permit instant court control. It was stated in support that such flexibility was desirable….
>
> 160. Under yet another view, it was necessary to allow the parties instant resort to the court in order to obtain certainty in the important question of the arbitral tribunal's jurisdiction. Various suggestions were made for achieving that result. One suggestion was to adopt the solution found in article 13(3) and thus to allow immediate court control in each case where the arbitral tribunal ruled on the issue of its jurisdiction as a preliminary question. …

113 However, it is important to note the context in which the policy objectives were raised in order to understand their significance. The debate on Art 16(3) centred predominantly on whether jurisdictional objections should be subject to immediate court control, or whether such review should be postponed till after the final award had been rendered. It was thus the question of *when* an active remedy could be exercised that the drafters were grappling with; not whether a jurisdictional challenge might instead be ventilated at the time of enforcement as a passive remedy.

114 There were two divergent threads. Some members of the Working Group were of the view that court control over jurisdictional challenges should not be delayed until the eventual setting aside proceedings, which had been the position in the earlier drafts of Art 16(3). They did not want awards to become redundant at the very end of the process when a jurisdictional challenge had already been raised at the outset before the tribunal. The solution of enabling earlier (or instant) court control on preliminary rulings was thus born. This solution was inherently more time and cost efficient relative to the previous solution of allowing jurisdictional challenges to be raised only at the end of the arbitration proceedings. On the other hand, the drafters were aware of the potential for parties to delay the arbitration by challenging preliminary rulings even if they were likely to fail. The solution which was finally agreed on was to enable the tribunal to

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determine, in its discretion, whether the question of jurisdiction should be subject to court control earlier in the arbitration or only at the end.

115 The policy objectives relied on by Mr Joseph can therefore be explained by and within this context. These are achieved by empowering the tribunal to decide *when* its decision could be made subject to active court control. There is no need and neither was there any impetus evident in the *travaux* to imply that Art 16(3) was also intended to be a "one-shot remedy" so that the passive remedy of raising the issue at the enforcement stage was lost or excluded simply by the inclusion of Art 16(3). In our judgment, Mr Joseph's characterisation of "instant court control" as the "final and only" mode of court control is not borne out by the materials. From the way Art 16(3) evolved over the course of the Working Group discussions, the reference in the *travaux* to "instant court control" is an expression that was juxtaposed against the alternative approach of only being able to raise a jurisdictional challenge before the courts *after* the award on the merits had been rendered.

116 Of course, it can meaningfully be argued that if certainty and time and cost efficiency are the paramount objectives, Art 16(3) ought to be the one and only opportunity for raising a jurisdictional objection which has already been decided as a preliminary ruling. The question is whether the drafters placed these undoubtedly important objectives at the apex of their considerations so as to contemplate Art 16(3) being a "one-shot remedy"; or whether, while the drafters recognised that certainty and efficiency were important, they never intended to pursue this at the expense of the overarching theme of uniformity in the treatment of foreign and domestic awards and the co-existence of active and passive remedies to be pursued at the choice of the award debtor. In our judgment, the line was drawn in favour of the latter.

117 The architecture of Art 16(3) is not certainty-centric. The fact that Art 16(3) gives the tribunal an untrammelled discretion to determine whether to decide a jurisdictional challenge in a preliminary ruling which is subject to immediate court control or in a final award together with the merits suggests that Art 16(3) is not fixated with certainty. If certainty was paramount, one might have expected that all jurisdictional objections must be decided preliminarily and be subject to instant and exclusive court control. Moreover, the fact that the tribunal can proceed to determine the merits while the appeal to the court is pending also does not augur well for the argument from unconditional certainty. Certainty was important and was indeed achieved in so far as the parties were permitted, if the tribunal so chose to exercise its discretion and provide a preliminary ruling, to challenge that decision instantly before the appropriate courts (see *Commission Report* at para 160 which is reproduced at [112] above). It did not extend to precluding subsequent recourse to passive remedies.

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118 In this way and to this extent, Art 16(3) was meant to render the arbitration process more efficient as compared to the earlier alternative draft of only being able to challenge jurisdictional rulings after the award on the merits was rendered. We do not see how precluding access to passive remedies after the arbitration process has been completed contributes to this objective save in so far as a court subsequently comes to a different view from that of the tribunal on the question of jurisdiction. As unfortunate as that might be, it would usually be the party that took an exuberant view of the tribunal's jurisdiction that suffers the prejudice and this is to be weighed against the prejudice to a party, who on the enforcing court's view, was never subject to the tribunal's jurisdiction in the first place.

119 Our scepticism over Mr Joseph's position is also strengthened by the permissive wording of Art 16(3), which states that the dissatisfied party "may request" the supervising court to review the matter on appeal. This suggests that Art 16(3) was meant to provide parties with an additional option rather than to confine them to a particular course of action.

120 In the final analysis, the secondary materials placed before us, while evincing a range of views, support our reading of the *travaux*. Mr Landau relies on the following commentary from *Holtzmann & Neuhaus* ([52] *supra*) at p 479:

> It should be noted, however, that the power provided in Article 16(1) is circumscribed by other provisions of the Law. The arbitral tribunal's power is neither exclusive nor final. Its decision is subject, first, to immediate review by a court under Articles 16(3), second, to later court review in a setting aside procedure under Article 34, and, third, *to still later review in an action for recognition and enforcement under Article 36*. In addition, the issue frequently will arise and be ruled on by a court in a proceeding brought under Article 8. [emphasis added]

121 Further support may be found in the opinion of Dr Aron Broches in *International Handbook on Commercial Arbitration* vol V (Jan Paulsson gen ed) (Wolters Kluwer, Suppl 11, January 1990) at p 84:

> 48. … The arguments in favour of a negative reply are even stronger than in the case of failure to raise the plea [of lack of jurisdiction] with the arbitral tribunal. I submit that after having raised the plea before the arbitral tribunal the party in question has a choice between either seeking a decision from the Art. 6 court under paragraph (3) or raising the issue in proceedings under Arts. 34 and 36.

122 Against this, Mr Joseph refers to an article by Prof Dr Alan Uzelac ("Prof Uzelac") entitled "Jurisdiction of the Arbitral Tribunal: Current Jurisprudence and Problem Areas under the UNCITRAL Model Law" [2005] Int ALR 154 at p 163, which was also cited by the Judge (at [161] of the Judgment ([2] *supra*)) in which he states:

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> … the original concept of the MAL 16(3) certainly did not envisage multiple (double or even triple) court proceedings controlling one and the same arbitral decision on jurisdiction as the main matter – one under Art. 16(3); the other, independent setting aside of the award on jurisdiction; and, eventually, another setting aside of the award on the merits for the reasons stated in Art. 34(2)(i). If such practice would develop, it could have a discouraging effect on the arbitrators that would like to resolve jurisdictional issues in their preliminary decisions.

123 On a close reading, however, Prof Uzelac's article does not support Mr Joseph's point. Indeed, Prof Uzelac discussed Art 16(3) entirely within the sphere of active remedies, just as Mr Landau has characterised it. The so-called triple court proceedings consist of Art 16(3) and two applications for setting aside, one for jurisdiction and the other on the merits of the award. The extracted passage therefore says nothing more than that such a multiplicity of active remedies was never intended, from which one cannot imply that the passive remedy of Art 36 should also be excluded.

Article 13(3)

124 We turn now to the construction of Art 13(3) of the Model Law which, in Mr Joseph's submission, offers a useful analogue to the construction of Art 16(3). He argued that Art 13(3) requires the parties to invoke curial assistance for challenges to arbitrators, failing which or if the challenge is dismissed by the court, the affected party is not permitted to raise objections to the appointment of the arbitrator for the purposes of challenging the award. In support of his argument, Mr Joseph referred us to the *Report of the Sixth Session* ([59] *supra*), the *Analytical Commentary* ([65] *supra*) and the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations, 2012) ("*UNCITRAL Digest*"). Article 13(3) has been reproduced at [102] above.

125 While we acknowledge that the *travaux* bear out Mr Joseph's contention that there was thought to be some connection between Arts 13(3) and 16(3), we disagree that the materials justify the construction of Art 13(3) contended for by Mr Joseph. First, the *Report of the Sixth Session* does not show that the Working Group took the view that a party which does not challenge the decision of the arbitral tribunal on its own appointment will lose its right to challenge it subsequently. The focus of that particular meeting was not on the effect of a failure to challenge, but rather, whether resort to the court for challenges against an arbitrator should be allowed when arbitration proceedings are pending.

126 Second, the *Analytical Commentary* does not venture as far as Mr Joseph contends. All it states (at p 33) is that:

> [Article 13] grants any challenging party, who was unsuccessful in the procedure agreed upon by the parties or in the one under paragraph (2), *a last resort* to the Court specified in article 6. The provision, in its most crucial

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> part, adopts a compromise solution with regard to the controversy of whether any resort to a court should be allowed ***only*** *after the final award is made or whether a decision during the arbitral proceedings is preferable.* … [emphasis added in italics and bold italics]

127 To be fair to Mr Joseph, the *Analytical Commentary* does speak of "last resort to the court". However, as was apparent in the discussions in the Sixth Session, the operative concern was whether resort to a court should be allowed only after the final award is made or whether this could be had when the arbitration was pending. The solution was a compromise in that recourse during the arbitration was permitted, but the arbitral tribunal was allowed to proceed with the arbitration concurrently. The *Analytical Commentary* does not conclude that a party which is aggrieved by the appointment of an arbitrator is *obliged* to mount a challenge under Art 13(3) and that failing which it will be unable to raise this ground subsequently in enforcement proceedings.

128 In the course of the hearing, we drew Mr Joseph's attention to the suggestion in *Holtzmann & Neuhaus* ([52] *supra* at pp 408–410) that a party would be able to raise objections in Art 34 and Art 36 proceedings (both active and passive remedies) based on allegations of impartiality even if that party was aware of the asserted failing during the arbitration but did not bring a timely challenge. We have some reservations whether the active remedy of setting aside remains open to such an objecting party, but leaving that aside, if the rest of the suggestion presented in *Holtzmann & Neuhaus* is accepted, it must follow *a fortiori* that a failure to appeal to the court against the tribunal's ruling on a challenge against an arbitrator does not preclude the passive remedy being exercised later in Art 36 proceedings. A converse view would be entirely irrational since it would mean that a party that challenged the appointment of an arbitrator but decided not to appeal against the tribunal's ruling until after the arbitration in enforcement proceedings, would be worse off than one who knew that grounds for challenge existed but decided not to initiate any challenge until after the arbitration. Indeed, we asked Mr Joseph during the hearing if there was anything in the *travaux* which states that a failure to challenge under Art 13(3) precludes the raising of the same objection subsequently either as an active remedy in setting aside or as a passive remedy in enforcement proceedings. Mr Joseph candidly conceded that there was none.

129 The *Commission Report* ([112] *supra*) clearly demonstrates that Art 16(3) was modelled after Art 13(3) in the sense that both instruments regulate court control of the arbitration (at paras 157 and 160–161):

> 157. The Commission adopted the principle underlying paragraph (3), namely that the competence of the arbitral tribunal to rule on its own jurisdiction was subject to court control. However, there was a divergence of views as to when and under what circumstances such resort to a court should be available.

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> …
>
> 160. Under yet another view, it was *necessary to* ***allow*** *the parties instant resort to the court* in order to obtain certainty in the important question of the arbitral tribunal's jurisdiction. Various suggestions were made for achieving that result. *One suggestion was to adopt the solution found in article 13(3) and* ***thus to allow*** *immediate court control in each case* ***where the arbitral tribunal ruled on the issue of its jurisdiction as a preliminary question***. … Yet another suggestion was to reintroduce in the text previous draft article 17. …
>
> 161. The Commission, after deliberation, decided not to reintroduce previous draft article 17 but to provide for instant court control in article 16(3) along the lines of the solution adopted in article 13(3). …
>
> [emphasis added in italics and bold italics]

130 "Instant court control" is therefore more aptly understood as *immediate* court control over pending arbitration proceedings, as opposed to delayed court control over the arbitration award. Both forms of control lie exclusively within the purview of the supervisory court, which in a system of "choice of remedies" is distinct from the control of the enforcing court over recognition and enforcement of the award. Therefore the prescription of "instant court control" does not, contrary to what Mr Joseph contended, imply *sole* court control. The more pertinent controversy is whether a party's active remedy under Art 34 remains available to it if it fails to trigger the instant controls available under Arts 13(3) or 16(3). In the light of the *travaux* which we have examined, it appears to us that there is a policy of the Model Law to achieve certainty and finality in the *seat of arbitration*. This is further borne out by the strict timeline of 30 days imposed under both Arts 13(3) and 16(3), the design of which seems to be to precipitate an early determination on issues of composition and jurisdiction so that the arbitration can continue. We would therefore be surprised if a party retained the right to bring an application to set aside a final award on the merits under Art 34 on a ground which they could have raised via other active remedies before the supervising court at an earlier stage when the arbitration process was still ongoing. But, as we have noted, whatever the position is with regard to the availability of a later active remedy following the failure to trigger earlier active remedies in Arts 13(3) and 16(3), it has no effect or bearing on a party's ability to invoke its passive remedies at the time of enforcement.

131 For completeness, we will also address Mr Joseph's reliance on the *UNCITRAL Digest* ([124] *supra*). In our view, the *UNCITRAL Digest* is ambivalent, at best. It only states (at p 69) that Art 13(3) was necessary to avoid unnecessary waste of time and delay. This does not help us one way or the other on the critical question of whether Art 13(3) was intended to be a "one-shot remedy". Even if we were to ignore the ambivalence of the *UNCITRAL Digest* on Art 13(3), the same commentary on Art 16(3) frankly acknowledged (at p 82) that the Model Law "does not indicate" whether a

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party's failure to challenge the preliminary ruling precludes a subsequent challenge under both Art 34 and Art 36 proceedings. This corroborates the *travaux* and our view that the drafters did not intend Art 13(3) to be a "one-shot remedy".

132 On the totality of the above considerations, we are compelled to conclude that Art 16(3) is neither an exception to the "choice of remedies" policy of the Model Law, nor a "one-shot remedy". Parties who elect not to challenge the tribunal's preliminary ruling on its jurisdiction are not thereby precluded from relying on its passive remedy to resist recognition and enforcement on the grounds set out in Art 36(1). That having been said, we are of the tentative view, as noted above, that the position might not be the same in relation to whether such a party may raise such a ground to initiate setting aside proceedings under Art 34.

Section 19B

133 Although our analysis above is sufficient to dispose of the threshold issues, we make some brief observations on the construction of s 19B of the IAA which the Judge used to support her decision. Section 19B reads:

> **Effect of award**
>
> **19B.**—(1) An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.
>
> (2) Except as provided in Articles 33 and 34(4) of the Model Law, upon an award being made, including an award made in accordance with section 19A, the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award.
>
> (3) For the purposes of subsection (2), an award is made when it has been signed and delivered in accordance with Article 31 of the Model Law.
>
> (4) This section shall not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Act and the Model Law.

134 The Judge held (at [14]–[15] and [78] of the Judgment ([2] *supra*)) that where a court is prepared to grant enforcement of an award under s 19, it will do so because it has *recognised* the award as final and binding. Tying recognition of the award to its enforcement, the Judge reasoned that in order to resist enforcement, the award debtor must first resist the recognition of the award, and the terms for doing so are provided in s 19B(4) of the IAA which she interpreted as referring only to setting aside proceedings.

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135 She held (at [79] of the Judgment):

> This means that the *final and binding effect* of a domestic international award *is qualified by the ability to set it aside* on the grounds prescribed in Art 34 of the Model Law and s 24 of the IAA. *Should such grounds exist, this court may refuse to recognise the award in question as final and binding* ***and set it aside instead; enforcement would then be moot***. [emphasis added in italics and bold italics]

She further added (at [82] of the Judgment) that:

> [r]efusal of recognition and enforcement cannot be divorced from setting aside – a domestic international award is *either recognised and not set aside, or it is not recognised and is set aside*. [emphasis added; emphasis in original omitted]

The Judge also observed that her construction of the interplay between recognition and enforcement is not new, citing as support the German position pursuant to s 1060 of the ZPO.

136 We have already explained earlier (at [82]–[83] above) why the German position is unhelpful in our context. But in addition to this, we also find ourselves unable to agree with the Judge's reasoning and conclusion on s 19B as a matter of statutory interpretation.

137 In the Second Reading of the International Arbitration (Amendment) Bill ("the Amendment Bill") which became the International Arbitration (Amendment) Act 2001 (Act 38 of 2001) through which s 19B was inserted into the IAA, Assoc Prof Ho gave the following reason for introducing the current ss 19A and 19B which was then cl 14 under the Bill (*Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2222 (Ho Peng Kee, Minister of State for Law)):

> [C]lause 14 provides clarification on the finality of an interim award. Under UK arbitration law and our domestic Arbitration Act, *an interim award, once given, is binding and cannot be reviewed by the arbitrator. The Model Law says nothing about the finality of an interim award but practitioners have long assumed that the position is the same as well.* The Attorney-General, the Chairman of the SIAC and leading arbitrators, including members of the Singapore Institute of Arbitrators, *have recommended that legislation be passed to clarify this position to avoid uncertainty in the law. Thus, clause 14 of the Bill amends the Act to state clearly that the position in Singapore for nternational arbitrations is that interim awards are final and binding.* [emphasis added]

138 Hence, s 19B was concerned with ensuring that interim awards were final and binding. When read together with s 19A – which was enacted at the same time – which permits arbitral tribunals to make awards at various points in the arbitration on various issues, it is clear that Parliament was grappling with the nature and effect of interim awards. This, in turn, is an entirely different issue from that which the Judge found. In this regard,

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although it was not expressly stated in the Second Reading, the view expressed by Tay Kay Kheng in "Of Interim Awards: Their Effect *Prior To and After* the International Arbitration (Amendment) Act 2001" (2002) 14 SAcLJ 143 that the insertion of ss 19A and 19B was meant to legislatively overrule *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley* [2001] 2 SLR(R) 273 ("*Jeffrey Tang*") is persuasive.

139 In that case, the arbitrator made an award dismissing the respondent's claim and purportedly, also the appellant's counterclaim. This award was stated to be "final save as to costs". A week later, the arbitrator issued another award in which he acknowledged that in his earlier award, he had in fact omitted to deal with the appellant's counterclaim. After hearing further arguments, the arbitrator issued yet another award in which he allowed the appellant's counterclaim with interest, on the ground that his earlier decision was erroneous. In the third award, the arbitrator also dealt with the issue of interest and costs. The respondent's application to set aside the third award on the basis that the arbitrator was *functus officio* when he made it was initially allowed by the High Court. However, the Court of Appeal reinstated the award, holding that a "final award" had to be one that decided or completed everything that the arbitral tribunal was expected to decide, including the question of costs. Until such a final award was given, the arbitral tribunal's mandate continued and it was not *functus officio*. As the arbitrator had not decided on all the issues, his mandate had not been terminated and he was entitled to reconsider his decision and if he thought fit, as he did here, to reverse himself. It is evident that the outcome in *Jeffrey Tang* could not be reached after the enactment of ss 19A and 19B.

140 It can be seen from Assoc Prof Ho's speech in the Second Reading of the Amendment Bill (see [137] above) that Parliament's intention to align the effect of interim awards with that of final awards was driven by its object of providing that all awards – interim and final – should reflect the principle of finality. What this meant was that an award, once issued, was to be final and conclusive as to the merits of the subject-matter determined under that award; and it could thereafter only be altered in the limited circumstances provided for in Arts 33 and 34(4) of the Model Law. This is nothing more than another way of saying that the issues determined under the award are *res judicata*. This was also how Gloster J interpreted the equivalent provision in the 1996 English Arbitration Act, s 69, in *Shell Egypt West Manzala GmbH v Dana Gas Egypt Limited (formerly Centurion Petroleum Corporation)* [2009] 2 CLC 481. Section 69 provides that "[u]nless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings". As the right of appeal under s 69 can be contracted out, the award creditor submitted that cl 14.3 of the arbitration agreement which

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states that the award shall be "final, conclusive and binding on the parties" manifested the parties' intention to do so.

141 Gloster J rejected that argument, holding (at [38]):

> … Although, on their face, the words 'final, conclusive and binding upon them' are words of considerable width, which might, in an appropriate context, appear to be sufficient to exclude a right of appeal, the reality is that the expression 'final and binding', *in the context of arbitration, and arbitration agreements, has long been used to state the well-recognised rule in relation to arbitration, namely that an award is final and binding in the traditional sense and creates a res judicata between the parties. The expression was used for such purpose in section 16 of the Arbitration Act 1950, which was re-enacted in section 58(1) of the 1996 Act, with the added provision contained in section 58(2), that the finality and binding nature of an award does not exclude the possibility of challenging an award, by any available arbitral process of appeal or review or otherwise in accordance with Part 1 of the 1996 Act.* As stated at page 342 of the *2001 Companion* to Mustill and Boyd's *The Law and Practice of Commercial Arbitration in England* (2nd Edition), this provision was inserted because the reference to finality in section 16 of the Arbitration Act 1950 was sometimes assumed 'wrongly' to exclude the possibility of challenging an award. [emphasis added]

142 In our view, it is clear that s 19B(1) had everything to do with *res judicata* of issues which results in the tribunal being *functus officio* in relation to awards already made, and nothing to do with the availability of curial remedies. While s 19B(4) does talk about curial remedies, its effect was misconstrued by the Judge. We disagree that s 19B(4) imposes a positive obligation on the award debtor to challenge the award in an active manner, *viz*, setting aside, if it wishes to extricate itself from the otherwise "final and binding" consequences of the award. The point of s 19B(4) is a negative one. As Gloster J pointed out, although issues determined under the award are *res judicata*, it was important to dispel the misconception that the award then becomes unimpeachable. On the contrary, it may still be challenged in accordance with the available processes of appeal or review of the *award* permitted by the law governing the arbitration. In short, s 19B(4) in fact clarifies what "final and binding" *does not amount to*.

Conclusion on threshold issues

143 To summarise, we hold that:

(a) the enforcement of domestic international awards is governed by s 19 of the IAA, the construction of which must be consonant with the underlying philosophy of the Model Law (at [53]–[55]);

(b) the overarching scheme of the Model Law was to de-emphasise the importance of the seat of arbitration and facilitate the uniform treatment of international arbitration awards (at [57]–[62] and [64]);

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(c) the "choice of remedies", under which passive defences will still be available to the award debtor who did not utilise his active remedies, is fundamental to the design of the Model Law (at [65]–[68] and [71]);

(d) it follows that the best way to give effect to the philosophy of the Model Law would be to recognise that the same grounds for resisting enforcement under Art 36(1) of the Model Law will be equally available under s 19 of the IAA (at [84]);

(e) s 3(1) of the IAA cannot be understood as having incidentally derogated from the clear philosophy of the Model Law (at [86]–[90]);

(f) Art 16(3) is neither an exception to the "choice of remedies" nor a "one-shot remedy" (at [109] to [123] and [125] to [132]); and as such,

(g) pursuant to s 19 of the IAA, FM may apply to set aside the Enforcement Orders under any of the grounds which are found in Art 36(1) (at [99]).

Our decision on the merits of the Joinder Objection

144 Thus far, we have only concluded that the court has the power under s 19 of the IAA to refuse enforcement of domestic international awards if it is able to establish one of the grounds under Art 36 of the Model Law. It still remains for us to determine whether the Joinder Objection falls within one of the Art 36 grounds, and if so, whether the Joinder Objection should be decided in FM's favour.

The Joinder Objection as a ground for refusing enforcement

145 Mr Landau's case was that the Joinder Objection resulted in there being "no arbitration agreement" between FM and the 6th to 8th Respondents. However, he did not rely on any specific statutory ground either in the IAA or the Model Law to support FM's application that the Enforcement Orders should be set aside. This is perhaps not surprising given that the thrust of his case was that the power to refuse enforcement is to be exercised in a manner which is consistent with generally accepted standards, and not any specific grounds such as Art 36 of the Model Law (see [49] above).

146 In our judgment, the first step of characterising the objection is of vital importance in any effort to resist enforcement. Although Mr Landau has characterised the Joinder Objection as an issue of the existence of an arbitration agreement, there are other possible characterisations. For instance, the Joinder Objection could be seen as an issue of whether the scope of the arbitration agreement in the SSA extends to the 6th to 8th Respondents given that the parties had agreed to a set of institutional

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rules under which the joinder might be proper. Alternatively, it could be viewed as a challenge to an improper procedure undertaken by the Tribunal. Each characterisation falls to be determined under a different ground of Art 36 of the Model Law (or Art V of the New York Convention).

147 In our view, there are three potential bases under the IAA read with the Model Law which permit the refusal to enforce a domestic international award on account of a finding that there was no arbitration agreement between the award creditor and debtor: (a) the opening words of s 19 which requires enforcement to be made "on an arbitration agreement"; (b) the ground in Art 36(1)(*a*)(i); and (c) the ground in Art 36(1)(*a*)(iii).

Award on an arbitration agreement

148 It is a generally accepted rule in international commercial arbitrations that a party may only enforce an award if *that party* can show that the award which it is seeking to enforce was made pursuant to *an arbitration agreement* between itself and the party against whom the award is sought to be enforced. This essentially *party-centric* precondition is prescribed, albeit in varying words, by both the Model Law (Art 35(2)) and New York Convention (Art IV(1)(*b*)). The same concept that an enforceable award must be made pursuant to an arbitration agreement is also found in s 19 of the IAA:

> An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced …

149 In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9 ("*Altain*") where a foreign award was sought to be enforced in Australia, the Victoria Court of Appeal grappled with whether the existence of an arbitration agreement was a precondition for enforcement (Stage One), or, if it was an issue which should be considered under one of the Art V grounds of the New York Convention (Stage Two). The court treated the existence of an arbitration agreement as antecedent to the issue of whether the award debtor was required to establish one of the Art V grounds in the New York Convention, *ie*, a Stage One matter. The burden was therefore on the award creditor to show that there was an existing arbitration agreement between itself and the award debtor. The reasoning by the court in *Altain* can be gleaned from the following example which it gave (at [139]):

> … If the named parties to an arbitration agreement were X and Y, and an award was made in favour of X against Z, production of the arbitration agreement and the award would not suffice for the making of an ex parte order for the enforcement of the award even if the award stated that it was made pursuant to the arbitration agreement. This is because, even though the award [was] purported to have been made under the arbitration agreement, the contents of those documents do not provide any evidence that Z was a party to the arbitration agreement.

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150 Although *Altain* does not stand alone in taking this approach (see *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Stefan Michael Kröll *et al* eds) (Kluwer Law International, 2011) at pp 323–332), there is another view that questions whether this relatively robust interpretation of the obligation to demonstrate an existing arbitration agreement in *Altain* unduly cuts into the defences for resisting enforcement under Stage Two (see, *eg*, *Yukos Oil Company v Dardana Limited* [2002] EWCA Civ 543 ("*Dardana*") at [11]–[12]). The overlap between the two stages of the enforcement process is inevitable but we do not think that this presents undue difficulty. The distinction between a Stage One and Stage Two matter is an issue that goes towards burden of proof of entitlement to enforcement. No doubt in certain cases the burden of proof may prove determinative, for example, where the award creditor cannot even produce an arbitration agreement. However, it is equally true that in very many cases, the award creditor can produce an arbitration agreement. Even if the arbitration agreement is challenged as not having been entered into between the parties, such a challenge would, save in the clearest of cases, almost certainly proceed to Stage Two where the onus is then on the award debtor to make good its assertion that the presented arbitration agreement was in fact never agreed to or formed between the parties. As the authors of *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Herbert Kronke *et al* eds) (Kluwer Law International, 2010) ("*Global Commentary on the New York Convention*") explained (at pp 163–164, and 167):

> The procedural prerequisites to an application for enforcement of an arbitration award are to be distinguished from the several defences to enforcement enumerated in Article V of the New York Convention. Article IV requires an applicant only to 'supply' the document; the text of Article IV does not mention proof of validity. Once the applicant in an enforcement action meets the procedural burden as per Article IV of providing an award and an arbitration agreement in the form prescribed therein, he establishes a prima facie case for enforcement of the award. For purposes of Article IV, it is not relevant whether the agreement is valid. Regarding the validity, the burden of proof then shifts to the defendant to establish a ground for non-enforcement under Article V. Article IV deals only with formal requirements.
>
> However, Article IV(1)(b) and Article V(1)(a) may overlap in some respects. *The prima facie presumption [of enforceability] … arises only if, at least at a first glance, the arbitration agreement to be submitted is between the parties. Submission of an arbitration agreement to which the defendant [award debtor] is obviously not a party would generally not satisfy the requirement [of Article IV(1)(b)].* …
>
> …

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> As a general rule, courts addressing an enforcement petition should not use Article IV to examine the material validity of the arbitration agreement *beyond ascertaining that it was between the parties*. …
>
> [emphasis added]

151 There is no dispute over the burden of proof on the facts before us. Both Astro and FM were content to argue the Joinder Objection in full, with the concomitant understanding that the resolution of the Joinder Objection would determine the outcome of their respective applications. Notably, FM's case was not run on the basis that Astro did not produce an arbitration agreement for the purposes of Stage One. On these premises, we do not have to decide when and under what factual circumstances an assertion that there was no arbitration agreement at all, crosses from being a Stage One matter to a Stage Two matter. What we do have to decide is this: on a Stage Two analysis, should a challenge such as the Joinder Objection properly fall within one of the grounds under Art 36(1) of the Model Law or Art V of the New York Convention (in foreign award cases), namely Arts 36(1)(*a*)(i) and (iii), and Arts V(1)(*a*) and V(1)(*c*) respectively? For ease of reference, we shall refer to Art 36(1)(*a*)(i) and Art V(1)(*a*) as the first ground, and Art 36(1)(*a*)(iii) and Art V(1)(*c*) as the third ground (see [19] above).

Articles 36(1)(a)(i) and 36(1)(a)(iii)

152 There is no settled position on whether the existence of an arbitration agreement between two parties should fall under the first or third ground. Following *Dardana* at [12], and *Dallah (SC)* ([63] *supra*) at [12], it is clear that the English courts consider the *existence* of the arbitration agreement as falling under the umbrella of the *validity* of the arbitration agreement set out in the first ground. The *Global Commentary on the New York Convention* (at pp 277–278), on the other hand, noted that there is authority for the view that the issue falls to be decided under the third ground. Amongst the cases cited in support are the US District Court and Court of Appeals' decisions in *Sarhank Group v Oracle Corp* No 01-civ-1295, 2002 WL 31268635 (SDNY, 2002); 404 F 3d 657 (2nd Cir, 2005).

153 The Singapore High Court has considered this question on two previous occasions. In *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174, an employee of a company was named in an arbitration notice on the basis that the arbitration agreement between his company and the claimant provided that any dispute involving, *inter alios*, their employees, shall be resolved by arbitration which was seated in Arizona. The arbitrator found that the dispute was within his jurisdiction and made an award against the employee. When the award was sought to be enforced in Singapore, the employee challenged the enforcement on the basis that he was not a proper party to the arbitration agreement, and that the award was unenforceable pursuant to Art V(1)(*c*) of the New York

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Convention, *ie*, the third ground. Judith Prakash J held (at [69]) that the third ground covers challenges relating to the *scope* of the arbitration agreement rather than to whether a particular person was a party to that agreement. She therefore rejected Art V(1)(*c*) as an available basis for resisting enforcement on those facts.

154 In *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661 ("*Ultrapolis*"), the award debtor sought to resist enforcement of an award made in Denmark under Art V(1)(*a*) of the New York Convention, *ie*, the first ground. The argument advanced by the award debtor was that the arbitration clause in a standard form was not incorporated into the main agreement between the parties. As such, there was no binding arbitration agreement. Belinda Ang Saw Ean J rejected (at [45]) the award debtor's challenge under the first ground not because it was brought within the wrong ground, but because she found that the standard form terms did form part of the main contract between the parties.

155 The view that the third ground deals more with the *scope* of the arbitration agreement as opposed to its existence has also found favour with Mercédeh Azeredo da Silveira and Laurent Lévy in their chapter "Transgression of the Arbitrators' Authority: Article V(1)(c) of the New York Convention" in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Emmanuel Gaillard & Domenico Di Pietro eds) (Cameron May, 2008) at pp 639–640. Gary Born in his treatise, *International Commercial Arbitration* (Kluwer Law International, 2009) at pp 2777 and 2798 also states that the first ground generally deals with the existence *and* validity of arbitration agreements and that "in contrast", authorities dealing with the interpretation of the *scope* of the arbitration agreement are more appositely dealt with under the third ground. The International Council for Commercial Arbitration also considers the non-existence of an arbitration agreement as a matter falling under the first ground: *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (ICCA, 2011) at p 86.

156 That said, there is no doubt some difficulty with the express language of the first ground. As Lord Collins JSC in *Dallah (SC)* observed at [77], the words used in the first ground suggest that its purpose is limited to issues of validity of an arbitration agreement which at least once existed (in addition to any issue of capacity which is not relevant for present purposes). Nevertheless, in our view, the question of the existence of an arbitration agreement can be subsumed within the issue of the validity of an arbitration agreement. In addition to Lord Collins JSC's observations (at [77]) that this interpretation of the first ground is "consistent international practice", we would add some further observations.

157 The existence or, more accurately, *formation* of a contract has not always been considered as part of the basket of issues concerned with the

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material *validity* of a contract. This is not unexpected as the notion of validity of a contract might be conditioned on the supposition of a contract which at least once existed. However, as the development of the law in the area of the conflict of laws has shown, this fine divide can be bridged. At one point, the choice of law rule for contract formation and material validity were considered separately by the leading treatise on the subject, *Dicey & Morris on The Conflict of Laws* vol 2 (J H C Morris gen ed) (Stevens & Sons Limited, 10th Ed, 1980) at pp 775–778 (on formation) and pp 789–794 (on material or essential validity). In the latest edition of the same treatise, now known as *Dicey, Morris & Collins on The Conflict of Laws* vol 2 (Lord Collins gen ed) (Sweet & Maxwell, 15th Ed, 2012) at para 32-107, r 225 which prescribes the choice of law rule for material validity of a contract is introduced as such:

> This Rule is based on Art. 10 of the [Rome I] Regulation, which is headed 'consent and material validity.' The expression 'material or essential validity' covers situations where something in the nature of the contract makes it wholly or partially invalid. In prior English usage it included cases in which a contract was illegal in inception (e.g. contracts in restraint of trade), and although there were some differences, this was also the approach of civil law systems. *The reference in Art. 10(1) to existence and validity thus includes such matters as formation* (including the effect of silence), absence of consideration, fraud, duress, mistake, and also the legality of a contract. [emphasis added]

The subsequent paragraphs then go on to discuss the old common law cases on contract formation (*Albeko Schuhmaschinen AG v Kamborian Shoe Machine Co Ltd* (1961) 111 LJ 519; *Compania Naviera Micro SA v Shipley International Inc (The Parouth)* [1982] 2 Lloyd's Rep 351).

158 If validity in the first ground is interpreted in this manner (which interpretation we cannot see any strong objections to), the issue of the existence of an arbitration agreement would be capable of being subsumed under the first ground. The question thus is whether the alleged arbitration agreement between FM and the 6th to 8th Respondents is valid in the sense of whether it was ever formed; with the validity of this agreement to be decided in accordance with the law governing the alleged arbitration agreement. As this alleged arbitration agreement between FM and the 6th to 8th Respondents was created, if at all, by the joinder procedure, it falls outside of the SSA and any choice of law clause therein. As such, the applicable law to determine the Joinder Objection must be Singapore law as the law of the place where the Awards were made. Indeed, neither party took any issue with the application of Singapore law to resolve this issue.

Reviewing the Joinder Objection

159 On that basis, we turn to the Joinder Objection. Given that – as the Tribunal itself acknowledged – the 6th to 8th Respondents were not parties to the SSA, there is no doubt that they were technically strangers to the

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arbitration agreement. FM's Joinder Objection rests on the premise that the Tribunal rendered the Awards without jurisdiction as the 2007 SIAC Rules did not vest it with the power to join non-parties to the Arbitration.

160 The merits of FM's challenge turn on the proper construction of r 24(b) of the 2007 SIAC Rules which provides as follows:

> **Rule 24: Additional Powers of the Tribunal**
>
> 24.1 In addition and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have the power to:
>
> …
>
> (b) allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes among the parties to the arbitration.

161 Drilling down to specifics, it is the meaning to be ascribed to "other parties" which will be the principal determinant of whether the joinder was properly ordered.

Standard of review

162 Before analysing the arguments, it is necessary to set out the standard of review to be applied. Mr Landau submitted that this court can and should review the Tribunal's decision *de novo*. He relies in particular on the authority of *Dallah (SC)* ([63] *supra*), and emphasised the following passage from Lord Mance JSC's decision (at [30]):

> The nature of the present exercise is, in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction. There is in law no distinction between these situations. The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. ….

163 The extracted passage represents the leading statement on the standard of curial review to be applied under the New York Convention, and there is no reason in principle for the position under the Model Law to be any different. Significantly, the jurisprudence of the Singapore courts has also evinced the exercise of *de novo* judicial review (see *Ultrapolis* at [38]–[39] and *Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727 at [8]). We affirm these local authorities. In particular, we also agree with Lord Mance JSC that the tribunal's own view of its jurisdiction has no legal or evidential value before a court that has to determine that question.

164 In the light of our decision that a domestic international award can be refused enforcement if one of the grounds reflected in Art 36(1) of the Model Law is established and that the Joinder Objection, if justified, would

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fall within Art 36(1)(*a*)(i), it must follow that we are entitled, indeed obliged, to undertake a fresh examination of the Joinder Objection which was decided in the Award on Preliminary Issues.

The Tribunal's decision

165 The Tribunal's reasons for granting the joinder of the 6th to 8th Respondents can be outlined as follows:

(a) as a matter of construction, a tribunal's power "to allow other parties to be joined in the arbitration" under r 24(b) must be understood as meaning that parties outside of the *arbitration agreement* may be joined into the arbitration;

(b) there is no scope for implying into r 24(b) a further requirement that there should be an expression of consent by *all* the parties to the reference; and

(c) a rule which required further express consent by all parties in an arbitration would have been "merely a statement of the obvious".

166 The Tribunal's most crucial holding was that "other parties" for the purposes of r 24(b) referred to strangers to the agreement to arbitrate, as opposed to others who though party to the agreement to arbitrate had not hitherto joined or been involved in the arbitration. It began its analysis by looking at the meaning of the term "party" within the 2007 SIAC Rules. A distinction was drawn between "the agreement to refer future disputes to arbitration, and the separate agreement arising when an existing dispute becomes the subject of a reference to arbitration". This distinction is constitutive of the doctrine of "double-severability". In *Syska v Vivendi Universal SA* [2009] 1 All ER (Comm) 244 ("*Syska*"), Christopher Clarke J explained the doctrine as such (at [93]):

> This analysis is also consonant with the well-established English law doctrine of 'double-separability', whereby the 'continuous' arbitration agreement and the individual reference to arbitration in a particular case constitute separate contracts, and may be governed by different laws so that the former contract may fail when the latter does not. See eg: *Black Clawson International Ltd v Papierwerke Wladhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446 at 455 (per Mustill J), *Unisys International Services Ltd v Eastern Counties Newspapers Ltd* [1991] 1 Lloyd's Rep 538 at 562 and *Mustill and Boyd Commercial Arbitration* (2nd edn, 1989) at pp 60–62:
>
> > It is now established that when a dispute arises within the scope of an agreement to arbitrate future disputes, and when that agreement is put into effect by the giving of a notice of arbitration, a new set of contractual relationships comes into existence, requiring the parties to arbitrate the individual dispute. Although this obligation springs from the continuous agreement to arbitrate future disputes, it is distinct from it, at least in the sense that events which terminate one group of relationships do not necessarily terminate the other. Thus, the question

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> — 'Has something happened which means that the parties are no longer obliged to submit any of their disputes to arbitration?' is to be answered by reference to different contractual terms from those which govern the question — 'Has something happened which means that the parties are no longer obliged to submit this dispute to this reference?'. Since the questions are different, it would appear to follow that in theory they may have to be answered by reference to different laws.
>
> The principle of double-severability [*sic*] is foreign to most systems of law. But it serves as an example of how the reference can have a life of its own unaffected by the fact that the arbitration agreement is invalid for the purpose of any future proceedings.

167 Having set out this doctrine, the Tribunal proceeded to find that the term "party" is used in the 2007 SIAC Rules to refer only to the subjects in the separate agreement which is independently conceived by the reference to arbitration ("the arbitration reference") and not to the subjects of the agreement to arbitrate. The sole support for this proposition was derived from r 25.2, which provides that:

> A plea that the Tribunal does not have jurisdiction shall be raised not later than in the Statement of Defence. A plea that the Tribunal is exceeding the scope of its authority shall be raised promptly after the Tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its authority. In either case the Tribunal may nevertheless admit a late plea under this Rule if it considers the delay justified. *A party* is not precluded from raising such a plea by the fact that he has nominated, or participated in the nomination of an arbitrator. [emphasis added]

168 The Tribunal reasoned that "a party" that challenges the jurisdiction of a tribunal may assert that it is outside of the agreement to refer future disputes to arbitration, *ie*, the arbitration agreement, but in raising such a challenge it is inescapably a part of the arbitration reference. As such, the "party" referred to in r 25.2 must necessarily be a subject of the arbitration reference rather than the arbitration agreement. The Tribunal then extrapolated that "other parties" in r 24(b) must refer to "parties who are not already parties to the agreement to refer the dispute which is the subject of the reference", and not "other parties to the agreement to refer future disputes".

169 Apart from this textual analysis, the Tribunal also thought that its favoured interpretation was the only way to save r 24(b) from redundancy. The reasoning here (at [104]) is worth setting out in full with the prefatory understanding that FM's argument at the time was r 24(b) should be understood as requiring the consent of not just the party to be joined, but also all other parties to the reference:

> This is the context in which rule 24 b. is to be construed, and demonstrates the object which it was designed to achieve. To have drafted a rule which

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> required, beyond the consent given by agreeing to an arbitration in accordance with the rules, some further express consent by all parties to the arbitration, would have produced a result of little or no practical value. In some cases parties do consent to the joinder of third parties. No rule is required to make this happen, and it is impossible to imagine that the draftsman of the SIAC Rules intended to achieve merely a statement of the obvious, while imposing a further requirement that the arbitration tribunal should have a power to allow (and therefore also to disallow) the joinder of a third party in such circumstances. Indeed it is difficult to conceive circumstances in which an arbitral tribunal would consider it could properly refuse to allow joinder where all parties concerned wished it to take place. On the other hand, to promulgate a rule, as the respondents say SIAC has done, which allowed one party to the proceedings to veto the joinder of a third party with the consent of everyone else concerned would have been simply pointless. That is the position without such a rule, and is precisely the mischief which the international arbitration community has been searching for means to avoid.

Parties' submissions

170 Mr Landau attacked the Tribunal's decision as mistaking r 24(b) for a provision which confers the *jurisdiction* to bring or join non-parties into an arbitration instead of a procedural *power* to effect joinder. On his submission, there is a clear conceptual difference between jurisdiction and power. A tribunal only has jurisdiction over parties to the arbitration agreement, and it is only with the consent of those parties that the power to join non-parties to the arbitration agreement can be exercised. This is presented as a general principle which necessitates unequivocal words of departure. Mr Landau points to the discussions of the Working Group tasked with drafting the 2010 revisions to the UNCITRAL Arbitration Rules as support. The *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Sixth session* (A/CN.9/619, 5-9 February 2007) ("*UNCITRAL Arbitration Rules Report*") records (at para 122) that the proposal to permit the joinder of non-parties was considered and rejected on the basis that it would run counter to the "fundamental principle of consent of parties in arbitration".

171 On the issue of construction, Mr Landau's argument was that the reference to "other parties" was first introduced in the 1997 version of the SIAC Rules, which was in turn derived from r 13(c) of the 1985 London Court of International Arbitration (LCIA) Rules ("the 1985 LCIA Rules"). The 1985 LCIA Rules were subsequently amended in 1998 ("the 1998 LCIA Rules") to allow the joinder of "third persons" under Art 22.1(h). Mr Landau argues that the 1985 LCIA Rules did not permit the joinder of non-parties to the arbitration agreement, but only of other parties to the arbitration agreement. This argument runs by implication from the change of wording between r 13.1(c) of the 1985 LCIA Rules and Art 22.1(h) of the 1998 LCIA Rules, and is supported by Peter Turner and Reza Mohtashami,

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A Guide to the LCIA Arbitration Rules (Oxford University Press, 2009) at para 6.47:

> … ICC tribunals have rejected the power to join third parties (as opposed to extending the scope of the arbitration clause). … It is this difficulty that the provision of Article 22.1(h) seeks to overcome, by providing an express power to join third parties who may not necessarily be parties to the arbitration agreement. This remains, however, a controversial area. …

172 On this point, Mr Joseph relied on an article released contemporaneously with the 1985 LCIA Rules to argue that r 13.1(c) *did* permit the joinder of non-parties to the arbitration. In J Martin Hunter and Jan Paulsson, "A Commentary on the 1985 Rules of the London Court of International Arbitration" published in *Yearbook Commercial Arbitration 1985 vol X* (Pieter Sanders ed) (Kluwer Law International, 1985), the authors state unequivocally that the rules "allow arbitrators to permit non-signatories to the arbitration agreement to join in the arbitration, providing that they are willing to do so, and unless all signatories to the arbitration agreement refuse the joinder" (at p 168). We would add that Mr Joseph's point is also reflected in the exposition in Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2nd Ed, 1991) at p 188:

> The other solution is to incorporate into the arbitration agreement reference to rules of arbitration which enable other parties to be joined. … Amongst the arbitral institutions, the LCIA has provided for joinder of parties, and for a single award, by the following provisions:
>
> > … the Tribunal shall have the power … to:
> >
> > (c) allow other parties to be joined in the arbitration with their express consent, and make a single final award of determining all disputes between them … ;
>
> This provision retains the element of consent usually regarded as essential in international commercial arbitration so far as the party to be joined is concerned. However, it removes that element in relation to the existing parties (or rather, one of them – since it would be impracticable for an arbitral tribunal to join a third party against the wishes of *all* the parties to the existing arbitration).

173 Finally, Mr Landau pointed to the equivalent provision in the latest version of the SIAC Rules (5th Ed, 1 April 2013) ("the 2013 SIAC Rules"), which permits the joinder of "third parties … provided that such person is a party to the arbitration agreement". It is therefore clear that under the 2013 SIAC Rules, only other parties to the arbitration agreement can be joined to the reference. On the premise that it would be improbable for the SIAC Rules to have moved in an illiberal direction, he submitted that the 2007 SIAC Rules could not have been more permissive than the latest iteration of the Rules.

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Whether the joinder was proper

174 We recognise that certain institutional arbitration rules confer on the putative tribunal the power to join third parties who are not party to the arbitration agreement (hereinafter referred to as "non-parties") without first obtaining the consent of all the parties which are part of the extant arbitration. The prime example is Art 22(1)(h) of the 1998 LCIA Rules, which is still in force:

> **Article 22**
>
> **Additional Powers of the Arbitral Tribunal**
>
> 22.1
>
> Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views:
>
> …
>
> (h) *to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party* ***provided any such third person and the applicant party*** *have consented thereto in writing*, and thereafter to *make a single final award, or separate awards*, ***in respect of all parties so implicated in the arbitration***.
>
> [emphasis added in italics and bold italics]

175 Article 4(2) of the Swiss Rules of International Arbitration (June 2012) ("Swiss Rules") is similar but wider in that the tribunal has broad discretion to decide whether to join a "third person" and if the consent of any party to the arbitration is required:

> *Where one or more third persons request to participate* in arbitral proceedings already pending under these Rules *or where a party to pending arbitral proceedings under these Rules requests that one or more third persons participate* in the arbitration, the arbitral tribunal shall decide on such request, *after* ***consulting*** *with all of the parties, including the person or persons to be joined,* ***taking into account all relevant circumstances***. [emphasis added in italics and bold italics]

176 A joinder under the LCIA Rules and the Swiss Rules has, rather aptly, been termed as a "forced joinder", since a joinder under these rules is possible notwithstanding the objections of a party to the arbitration: see Gary Born, *International Arbitration: Law and Practice* vol I (Kluwer Law International, 2012) ("*Born*") at pp 228–229.These rules are not before us and we therefore shall not express any views on them.

177 What is before us is the question of whether by contracting to arbitrate under the 2007 SIAC Rules, the parties had agreed to confer on the putative tribunal the power to order a forced joinder. Although there is

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some divergence in the views expressed in the literature in this area, the basic commonality which is undisputed is the requirement of consent to the forced joinder (see Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) ("*Lew, Mistelis & Kröll*") at para 16-40. If there is consent given in any form, either under the arbitration agreement or through subscription to a set of institutional rules which unambiguously permits forced joinders, that would suffice to negative any subsequent allegation that there was no agreement to arbitrate with the joined party.

(1) Construction of rule 24(b)

178 The Tribunal held that r 24(b) of the 2007 SIAC Rules confers on a tribunal the power to allow parties who are not parties to the arbitration agreement to be joined without first procuring consent from all the other parties who were already part of the arbitration reference. Indeed, it took the view that a party may be joined to the reference "even against the wishes of all the other parties". The only consent necessary was that from the party which was to be joined.

179 It is apposite to note that r 24(b) is silent as to whether a forced joinder will be ordered on the motion of one of the parties to the arbitration agreement, the party or parties to be joined, or the tribunal itself. Therefore, under the Tribunal's construction of the rule, where the process is initiated by the party to be joined, the tribunal's discretion is the only obstacle to forced joinder. Where the process is initiated by the tribunal, the consent of the party to be joined is the only obstacle. In the second possible scenario, r 24(b) comes precariously close to creating on the part of the existing parties to an agreement to arbitrate under the 2007 SIAC Rules, a unilateral offer to arbitrate with an indeterminate class of potential disputants. Indeed, a tribunal's power to join non-parties also appears to be open-ended in that it is subject only to the qualification that it should not be exercised "in derogation of the powers conferred by any applicable law of the arbitration" (at r 24.1). There are no express conditions which need to be fulfilled before a non-party can be joined, nor is there any express mention that parties can modify the tribunal's power to join non-parties to the arbitration.

180 On this reading, r 24(b) stands in marked contrast to Art 22.1(h) of the 1998 LCIA Rules (see [174] above). The latter provision specifies that the joinder should be effected: (a) upon the application of a party to the arbitration reference; (b) that the third person must have consented with the applicant party in writing; (c) that this additional power of joinder is subject to the parties agreeing otherwise in writing; and (d) that parties must be given a reasonable opportunity to state their views. Similarly, Art 4(2) of the Swiss Rules (see [175] above) sets out how a request for joinder might originate and broadly prescribes the necessary procedural

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steps. The relative paucity of detail in the 2007 SIAC Rules suggests to us that r 24(b) might not have been intended to have the same effect as a forced joinder under the 1998 LCIA Rules and the Swiss Rules. If indeed r 24(b) was intended to vest tribunals with such a broad power to join non-parties, we think it scarcely credulous that the language used to convey this should be so unclear. The use of a differentiating term like "third person", as with the 1998 LCIA Rules and the Swiss Rules, would have been a straightforward solution (see also [187] below).

181 Having decided that r 24(b) conferred upon it this broad power to join non-parties to the arbitration, the Tribunal did not then delineate the limits of this power. We cannot see, however, how the power to join non-parties to the arbitration could be exercised outside of the subject-matter of the arbitration reference between the original parties. A tribunal cannot extend its jurisdiction to disputes over which it has no jurisdiction by simply purporting to rely on r 24. To this extent we accept Mr Landau's argument that r 24(b) acts as a procedural power, rather than a means for a tribunal to extend its jurisdiction. It would otherwise be a portal through which a tribunal could exercise unlimited jurisdiction over any dispute which any non-party could have with the parties to the arbitration reference. We do not think that any set of arbitration rules, unless explicitly stated otherwise (and even then, we would reserve our views), could provide for such unlimited jurisdiction. The terms of any arbitration reference must ultimately lie within the limits described by the arbitration agreement, save to the extent that it might be extended with the explicit consent of all the parties. In our judgment, the general position must be that the arbitration agreement sets the parameters of the tribunal's jurisdiction. This follows from the premise that arbitration references spring from the continuous agreement to arbitrate future disputes (see *Syska* above at [166], citing *Mustill & Boyd* ([38] *supra*)).

182 In this regard it is useful to set out the relevant sections of cll 17.1 and 17.4 of the SSA:

> 17.1 Parties' Efforts. The Parties agree to use all reasonable efforts to resolve any dispute under, or in relation to this Agreement quickly and amicably to achieve timely and full performance of the terms of this Agreement.
>
> …
>
> 17.4 Dispute Resolution Procedure. If the Parties in dispute are unable to resolve the subject matter of dispute amicably within thirty (30) days, then any Party in dispute may commence binding arbitration through the Singapore International Arbitration Centre ('SIAC') and in accordance, except as herein stated, with the rules of SIAC. The arbitration proceedings, including the making of an award, shall take place at the Singapore International Arbitration Centre and the award of the arbitrators shall be final and binding upon the Parties. Notwithstanding the provisions and rules

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> set forth in the rules of SIAC, the following procedural provisions shall apply to such arbitration proceedings:
>
> …

183 It is abundantly clear that the dispute resolution mechanism of the SSA does not pertain to disputes outside of the scope of the SSA itself, *ie*, disputes which arise from an entirely different contract. As such, there is nothing in the wording of r 24(b) or the SSA itself which could support a finding of jurisdiction over an unconnected dispute any more than it could support a claim to arbitration by, say, FM's window cleaners. Yet, taken to its logical extreme, the Tribunal's decision would allow r 24(b) to have such an effect, at least notionally. It is disconcerting that the Tribunal's decision could conceivably permit a non-party to apply, on his own motion, to be joined to an arbitration for the purpose of arbitrating a separate dispute with one of the extant parties, which application might then be granted without any consultation with the parties to the arbitration or opportunity given for objections to be raised by those parties. As the Tribunal did not address these other aspects of joinder, and so as not to speculate on its unexpressed views, perhaps it would suffice to say that the Tribunal did not appear to have fully apprehended the potential implications of its construction of r 24(b).

184 It ought to be apparent from the foregoing that the forced joinder of non-parties is a significant procedure which raises issues that go to the very core of the arbitration. Unsurprisingly, the Working Group which considered the inclusion of such a rule in the 2010 UNCITRAL Arbitration Rules thought that it would represent a "major modification": see *UNCITRAL Arbitration Rules Report* ([170] *supra*) at para 126. If the Tribunal's view is to be accepted, such a momentous shift occasioned by the 2007 SIAC Rules was both accompanied by and greeted with silence, until now. Indeed this would have occurred as early as 1991, as the first version of the SIAC Rules is *in pari materia* with the 2007 SIAC Rules on the power of joinder (see r 24.1(c) of the SIAC Rules (1st Ed, 1 September 1991)). More importantly, the shift would have occurred without any clear linguistic signification – indeed the 2007 SIAC Rules would seem to have veiled the true purport of r 24(b) under the generic reference to "other parties".

185 Even if we accept that the 1985 LCIA Rules were intended to permit the joinder of non-parties, it is telling that the 2007 SIAC Rules did not adopt the clarification introduced by the 1998 LCIA Rules, which replaced "other parties" with "third persons". Indeed the trajectory of the SIAC Rules has been in the opposite direction, with the latest iteration of the Rules clearly stating that the party to be joined must be part of the arbitration agreement. In the final analysis, we find it difficult to accept that the 2007 SIAC Rules empowered a tribunal to join a stranger to the arbitration agreement as a party to the reference. This is so for a number of

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reasons, not least among which is that such standard rules are meant to set out clear procedures to facilitate the conduct of arbitration. Given the extent to which the forced joinder of non-parties may expose an arbitrating party to further obligations to arbitrate (in terms of the parties with whom as well as the matters in respect of which), any provision purporting to have this effect would need to be in clear and certain terms; *a fortiori*, where such joinder is provided for in institutional rules which are to be incorporated by a model dispute resolution clause. It is quite evidently the case that such clear language cannot be found in r 24(b).

186 The Tribunal also observed that the 2007 SIAC Rules had to be construed in the context of a long-standing debate over the joinder of non-parties, which requires "solutions which are simple and workable, while preserving the principle of party autonomy and respecting so far as possible the confidentiality of the arbitral process". The Tribunal's preferred interpretation of r 24(b) was thought to meet this stated objective. However, as we have already noted (see [183] above), the full import of this interpretation did not appear to have been factored into the Tribunal's deliberations. We are also inclined to regard the Tribunal as having underestimated the extent to which forced joinder impinges upon party autonomy and confidentiality. The centrality of confidentiality to arbitration in the SIAC is evident from r 34 of the 2007 SIAC Rules, with which the Tribunal's understanding of r 24(b) is at odds:

> **Rule 34: Confidentiality**
>
> 34.1 The parties and the Tribunal shall at all times treat all matters relating to the proceedings, and the award as confidential.
>
> 34.2 A party or any arbitrator shall not, without the prior written consent of all the parties, disclose to a *third party* any such matter except:
>
> a. for the purpose of making an application to any competent court of any State under the applicable law governing the arbitration;
>
> b. for the purpose of making an application to the courts of any State to enforce or challenge the award;
>
> c. pursuant to the order of or a subpoena issued by a court of competent jurisdiction;
>
> d. to a party's legal or other professional advisor for the purpose of pursuing or enforcing a legal right or claim;
>
> e. in compliance with the provisions of the laws of any State which is binding on the party making the disclosure; or
>
> f. in compliance with the request or requirement of any regulatory body or other authority.
>
> …
>
> [emphasis added]

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187 It is important to note that r 34.2 is the only provision in the 2007 SIAC Rules which uses the term "third party". The enumerated instances under r 34.2 make it abundantly clear that "third party" refers to parties outside of the arbitration agreement, such as court officers or legal and professional advisors. Tellingly, the same phrase was not employed in r 24(b).

188 The forced joinder of non-parties is also a major derogation from the principle of party autonomy, which is of foundational importance because all arbitrations must proceed *in limine* from an agreement to arbitrate. Forced joinders carve out a significant exception to this by compelling an arbitration with other persons with whom the parties had not specifically agreed to arbitrate. Even where these other persons are connected to the subject matter of the arbitration, there has been no election of arbitration as the specific dispute resolution mechanism with those other persons. This is not without prejudice to the arbitrating parties, who are presumptively precluded from recourse to the courts in relation to the dispute with the joined parties, and who may find themselves subject to a final award which determines a deeper if not a larger pool of issues and legal liability. The bulk of the damages awarded in the Final Award, for example, pertained to the 6th to 8th Respondents, with only nominal sums awarded to the original parties to the SSA. Indeed the claims of the 6th to 8th Respondents in restitution represented an entirely separate head of claim to that of the 1st to 5th Respondents. As noted above (at [10]), the application to join the 6th to 8th Respondents was filed together with the Notice of Arbitration itself. The Tribunal's interpretation of r 24(b) would effectively allow a principal dispute to be "piggy-backed" on a formal claim filed by the parties to the arbitration agreement and proceed to arbitration. In such circumstances, the original arbitration agreement would function as little more than a Trojan Horse.

189 We should address the two reasons given by the Tribunal in support of its construction, *viz*, the linguistic comparison with r 25.2 and the need to salvage r 24(b) from redundancy.

190 Even on its own terms, the Tribunal's comparative analysis of "party" as employed in r 25.2 gives rise to difficulties. If it is accepted that "party" refers to a subject of the arbitration reference under r 25.2, how is it that "*other* parties" under r 24(b) should refer to parties *other than* those in the agreement to arbitrate? It seems to us that the Tribunal's implicit assumption was that "other" refers to a *different type* of party rather than *another* party of the same type. This is a linguistic election which derives no clear support from the rest of the 2007 SIAC Rules. Rule 24(h), for example, also uses the phrase "other parties" where "other" clearly serves to indicate another party to the arbitration reference as opposed to a different type of party altogether:

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> h. order any party to produce to the Tribunal and to the other parties for inspection, and to supply copies to any document(s) in their possession or control which the Tribunal considers relevant;

191 We have also mentioned that r 34.2 uses "third party" to the exact same effect as the Tribunal's understanding of "other parties" (see [187] above). On the whole, a purely textual analysis of r 24(b) does not take one very far. It is clear that "other parties" was intended to refer to parties outside of the arbitration reference, but the language provides no further guidance on the limits of that general class – *ie*, whether it extends only to the other parties to the agreement to arbitrate or to persons outside of that agreement but sufficiently connected to the subject matter, or even to the world at large. Equally, while accepting that "double-separability" answers one half of the equation in that it tells us what "parties" refers to, *viz*, subjects of the stand-alone arbitration reference, it is completely silent about the scope of the word "other". As such we do not think that the textual reasons given by the Tribunal are sufficient to justify its reading of r 24(b) as permitting the forced joinder of third parties who are not party to the arbitration agreement.

192 The Tribunal's concern with redundancy is also problematic because of the way in which it arose, namely in the context of FM's argument that r 24(b) requires the consent of all parties before a non-party could be joined. The redundancy therefore was thought to arise because r 24(b) would then be stating the obvious. This much we agree with. But if FM were to succeed in the construction of r 24(b) that was put to us, namely that the rule refers to other parties to the agreement to arbitrate who are not yet party to the arbitration reference, then the issue of consent to the joinder and of redundancy would not even be engaged in the first place, as only parties to the arbitration agreement can be joined. This is our preferred interpretation and in our judgment, on this basis, r 24(b) would very much serve a useful purpose. It is not difficult to imagine, for example, a tripartite commercial transaction involving A, B and C with all three parties agreeing to submit any disputes *inter se* to arbitration. Separate disputes between A and B and A and C then arise in short succession. A and B may have already formally commenced arbitration in respect of their dispute. When the dispute between A and C is sought to be resolved, A has two options. The first is to have a separate arbitration to resolve its dispute with C. The other option would be for A to apply in the arbitration between itself and B, for C to be joined into that arbitration. The efficacy of such joinder is palpable, and r 24(b) serves that useful function. As was succinctly summarised in *Born* ([176] *supra*) at p 221:

> Consolidating separate international arbitrations, and permitting joinder or intervention of additional parties into an international arbitration, can provide some obvious advantages. As with litigations, a single arbitration can in some circumstances be more efficient than two or more separate arbitrations. A single proceeding permits the same savings of overall legal

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> fees, arbitrators' fees, witness's time, preparation efforts and other expenses that exist in litigation. Further, a consolidated arbitration reduces the risk of inconsistent results in two or more separate proceedings.

193 It is also sensible that only C's consent would be required in such circumstances, given that all three parties would already have consented to the same arbitration agreement. Mr Landau uses the same factual matrix to demonstrate how it is *precisely because* of the doctrine of "double-separability" that recourse to r 24(b) would be necessary for C to be joined to an arbitration between A and B. As the arbitration reference for the first arbitration between A and B had already been constituted, a procedural mechanism for C to be joined would be necessary, notwithstanding that C had agreed, through the arbitration agreement, to arbitrate its disputes with A and/or B (see *Syska* at [166] above).

194 For completeness, it might also be noted that the Tribunal's assertion of redundancy is somewhat undermined by the fact that r 24(b) has since been amended to unequivocally state the precise proposition which the Tribunal thought to be so obvious as to be unworthy of inclusion in the SIAC Rules (see [173] above).

(2) Agreement to arbitrate under a set of rules

195 Although our construction of r 24(b) is dispositive of the Joinder Objection, we would make one comment on Mr Joseph's principal argument that FM had implicitly consented to the joinder of the 6th to 8th Respondents by agreeing to the 2007 SIAC Rules and, by extension, r 24(b); under those circumstances, no *further* consent by FM was required.

196 We are cognisant of the raging controversy in this area of multiparty arbitrations (for an overview of such situations, see Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (Kluwer Law International, 2006) at pp 163–196) where a prevalent argument is that there is *default* consent to a forced joinder whenever the joinder is properly ordered pursuant to the applicable institutional rules. The reasoning is fairly straightforward. Parties, by agreeing to arbitrate under those rules, are deemed to have consented to the exercise of the power to force a joinder: Tobias Zuberbühler *et al*, "Introductory Rules: Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties (Art 4) in *Swiss Rules of International Arbitration: Commentary* (Tobias Zuberbühler *et al* eds) (Kluwer Law International, 2005) at para 12; *Lew, Mistelis & Kröll* ([177] *supra*) at para 16-42.

197 In principle, this is not objectionable as parties can contractually agree to any rules which they would like to subject their arbitrations to. This may include rules which confer on the tribunal ultimate discretion to order forced joinders without having to obtain further consent from the parties who are already part of the arbitration reference. However, as emphasised

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earlier, the idea of forced joinders is a drastic one. Because the power of the tribunal to join non-parties to an arbitration at any stage without the consent of the existing parties and at the expense of the confidentiality of proceedings is such utter anathema to the internal logic of consensual arbitration, a rule which allows the tribunal to order a forced joinder without obtaining "fresh" consent to the joinder must be decidedly unambiguous. Rule 24(b) is not so. At a more general level, in the face of linguistic ambiguity in the provision which regulates the power to join without obtaining further consent, the consent under an arbitration agreement to arbitrate in accordance with a set of institutional rules cannot be taken as an *ex ante* consent to the forced joinder.

198 In short, the lack of accompanying content in the 2007 SIAC Rules, the overarching imperative of clarity in setting out standard rules, and the internal logic of the consensual basis of an agreement to arbitrate all militate against the Tribunal's construction of r 24(b). Our analysis is also strengthened by the fact that r 24(b) and its ultimate predecessor, r 13(c) of the 1985 LCIA Rules, have not been widely received as solutions to the problem of joinder in international commercial arbitration. We therefore do not accept the Tribunal's construction of r 24(b). The proper construction of this rule is that it permits other parties to the arbitration agreement who are not yet part of the arbitration reference to be joined into an existing arbitration reference. It follows that FM's objection to the Tribunal's assertion of jurisdiction over the claims of the 6th to 8th Respondents is well-founded.

Whether FM had waived its right to raise the Joinder Objection or is otherwise estopped

199 This brings us to the final issue. Notwithstanding the merits of the Joinder Objection, Astro also contends that FM's conduct after the Award on Preliminary Issues constituted an acceptance of it which precludes it from presently arguing otherwise. The gist of this aspect of Astro's case is that, by continuing to participate in the arbitration, FM had waived its objections to the Tribunal's jurisdiction to determine issues pertaining to the 6th to 8th Respondents. In the alternative, Astro argued that FM is estopped from raising these objections having purportedly represented that it will no longer challenge the Tribunal's jurisdiction.

200 At the outset, we make two clarifications. First, the concept of waiver and estoppel are distinct. Broadly speaking, waiver of rights occurs when a party has indicated that it will be relinquishing its rights. Estoppel, however, requires something more. The party invoking the estoppel must typically show that it had relied on the representations of the other party to its detriment (*Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR(R) 273 at [72]; see also, albeit in the context of proprietary estoppel, *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007]

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1 SLR(R) 292 at [170]). The two legal concepts may produce different outcomes when applied to the same factual matrix. Astro accepts, however, that the requirements of estoppel are substantially similar in so far as it must be shown that FM had made a clear representation that it will forego the right to challenge the Award on Preliminary Issues. The evidential assessment of the concurrent pleadings of waiver and estoppel will largely traverse the same grounds.

201 The parties are agreed as to the legal conditions which must be met in order to establish a waiver of rights. Both Mr Landau and Mr Joseph cited Lord Goff of Chieveley's guidance in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 ("*The Kanchenjunga*"), which has been approved in Singapore in *Chai Cher Watt (t/a Chuang Aik Engineering Works) v SDL Technologies Pte Ltd* [2012] 1 SLR 152 as definitive at [33]. In *The Kanchenjunga*, Lord Goff described the operation of waiver as such (at 398):

> … In particular, where with knowledge of the relevant facts a party has acted in a manner which is *consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him* – for example, to determine a contract or alternatively to affirm it – he is held to have made his election accordingly … It can be communicated to the other party by words or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he *will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms* … [emphasis added]

202 The party asserting that otherwise actionable rights have been waived must therefore meet a high threshold of demonstrating that the adversely affected party's conduct is *only* consistent with waiver and that the purported waiver had been communicated in clear and unequivocal terms.

203 Mr Landau's answer to Astro's case on waiver is that there was simply no instance where it could be said that FM's conduct was consistent only with a waiver of its rights. In fact, he avers that FM had reserved its rights on the jurisdictional issue as early as 22 May 2009, and explicitly stated in its Defence that "nothing herein shall be construed as an acceptance by [Ayunda, FM and DV] of the Tribunal's jurisdiction or that [Ayunda, FM and DV] agree or concede that the [6th to 8th Respondents] are valid parties to this Arbitration, and [Ayunda, FM and DV's] rights in this regard are strictly reserved". Moreover, he contended that, doctrinally, an objection needs only to be raised once in order to reserve one's rights in relation to its subject matter. The following passage from Sir Michael Mustill & Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) (at p 578) is singled out:

> … If a party to a commercial dispute has a genuine defence to the claim, and also has a genuine reason for saying that the arbitrator is not the correct tribunal to rule upon it, he should be allowed to take both points … and

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> should not be forced into a position where he must either take pre-emptive action or lose his right to challenge the jurisdiction. Provided the respondent has made a clear protest, and has emphasised that his continued participation in the reference is without prejudice to his case on jurisdiction, we believe that a court should, in the interests of common sense, hold that there has been no waiver. …

204 It is necessary here to undertake a closer examination of how the parties had conducted themselves after the Award on Preliminary Issues. Both parties submitted elaborate recitals of the events which followed, of which these passages feature prominently:

(a) the immediate aftermath of the Award on Preliminary Issues;

(b) the entry of judgment in the UK;

(c) the signing of the Memorandum of Issues ("MOI"); and

(d) the partial satisfaction of the Award on Preliminary Issues.

(1) The immediate aftermath of the Award on Preliminary Issues

205 On 16 May 2009, Astro sought an urgent procedural hearing before the Tribunal to establish an expedited timetable. Ayunda and FM replied on 19 May 2009, disagreeing with the proposed timetable. This is the first correspondence emanating from FM following the Award on Preliminary Issues. In this response it was stated that Ayunda and FM were considering an appeal against that award in the Singapore High Court. It was also asserted that the expedited timetable was unrealistic and allowed insufficient time for preparation. Ayunda and FM also represented that they wanted their counsel who represented them at the hearing of the preliminary issues, Mr Laurence Rabinowitz QC ("Mr Rabinowitz"), to continue acting for them. Finally, Ayunda and FM represented that they were considering their position in relation to counterclaims. At this stage, there was neither an express reservation of rights nor an unequivocal waiver.

206 Ayunda and FM's letter on 20 May 2009 also represented that they were still contemplating the filing of an appeal:

> Our clients are fully entitled to properly consider and take advice on whether they should exercise their statutory right of appeal.

207 Astro evidently did not take this as a waiver. In its reply on the same day, it represented that "[Ayunda] and [FM's] stated intention of considering a challenge to the Courts of Singapore on the question of jurisdiction does not of course change the fact that, as far as [Astro] understand[s] the position, the tribunal itself has finally determined these issues". Astro therefore viewed the Tribunal as having completed its work even though Ayunda and FM might *yet* avail themselves of further avenues of review. Its response was to insist that Ayunda, DV and FM sign a draft order recording the Award on Preliminary Issues. On 20 May 2009, Astro's

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solicitors sent a draft Final Order and Award on Preliminary Issues to Ayunda and FM by e-mail. The purpose of this draft order was "to distinguish between those matters finally determined and those matters left open for determination at the substantive hearing". Some indication of the purport of "finally determined" is discernible in the representation that the draft order set out issues which "were disposed of finally and were not interim rulings". The clear purpose of the draft order was therefore to confirm that the issue of jurisdiction would not be re-visited by the Tribunal at the substantive hearing.

208 On 22 May 2009, Ayunda and FM's solicitors replied to the effect that they saw no need for any further order on the matter, which "could only be justified to the extent that it accurately described the terms of the Award". The specific response to the terms of the draft order is set out in full:

> (1) Without prejudice to their position on any appeal, the First and Second Respondents would – if some further form of order were thought necessary – have no objection to paragraphs 1 and 2 of the proposed draft, since these accurately reflect the Preliminary Award.

209 It is evident that FM's position in relation to the preliminary ruling on jurisdiction was both conditional ("if some further form of order were thought necessary") and qualified ("[w]ithout prejudice to their position on any appeal"). This was subsequently reiterated in a letter dated 25 May 2009 regarding the filing of the defence and counterclaim for the substantive hearing, in which FM's solicitors stated that "none of the steps taken or to be taken by [Ayunda & FM] are to be construed as an acceptance of the Tribunal's jurisdiction". The 30-day limit within which Ayunda and FM would have had to file their notice of appeal against the Award on Preliminary Issues expired the next day. Parties then proceeded to file the statement of case and defence. As stated above at [203] (see also below at [219]), Ayunda, DV and FM expressly reserved their rights in relation to the issue of the Tribunal's jurisdiction in its Defence.

210 Up to this point there could be no question that FM had not waived any of its rights in relation to the Tribunal's jurisdiction and the joinder of the 6th to 8th Respondents. Mr Joseph identified a teleconference with the arbitrators held on 25 June 2009, however, as a marked departure. The teleconference was arranged for the primary purpose of obtaining directions from the Tribunal as to the timetable for the main hearing. The principal arbitrator's first order of business was therefore to obtain an update on whether there was a challenge to the Preliminary Award in Singapore. Mr Rabinowitz replied that "[t]here is no challenge to your award in Singapore".

211 Mr Joseph contended that Mr Rabinowitz's statement constituted a waiver of FM's rights to challenge the Tribunal's jurisdiction. His submission is that Mr Rabinowitz could easily have made an express

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reservation of FM's rights in his reply, but did not do so. Instead, he made a categorical statement that there was no challenge to the Tribunal's award.

212 However, there are other possible interpretations of Mr Rabinowitz's statement. The most straightforward would perhaps be that Mr Rabinowitz had provided the most direct and literal response to the principal arbitrator's question – he was simply updating the Tribunal of the fact that there was no existing challenge to the Award on Preliminary Issues at the time. Another reading of Mr Rabinowitz's answer is that it was intended to communicate that the Tribunal could proceed with the main hearing, being unimpeded by any pending appeal against the Award on Preliminary Issues. This reading is supported by the general administrative purpose of the teleconference, which is also evident from the conversation between the principal arbitrator and Mr Joseph regarding the status of parallel proceedings in Indonesia. The focus of the conversation was on pushing the Arbitration ahead as quickly as possible, encapsulated in Mr Joseph's exhortation that "we are very, very, very anxious ourselves for a date".

213 Yet another, more robust, reading is that Mr Rabinowitz had intended to convey not only, either one or both of the possibilities we have identified in the previous paragraph, but also that Ayunda and FM would not avail themselves of any statutory right they might have under Art 34 as well as any passive remedies at the enforcement stage. What militates against this is that there was no question of invoking any passive remedies at that stage because no substantive award had been made. That issue was not even alive at that stage. In short, in our judgment, it does not follow from Mr Rabinowitz's statement, that Ayunda, DV or FM had accepted that the Tribunal's joinder of the 6th to 8th Respondents was proper. Nor did this statement entail an abandonment of all future avenues to challenge the Tribunal's jurisdiction at the stage of enforcement. We note that Mr Rabinowitz was not asked if Ayunda, DV or FM were thereby accepting the Tribunal's jurisdiction, despite their repeated insistence up to that point that they continued to refute that jurisdiction.

214 Taking FM's conduct in the round, we are unable to accept Mr Joseph's contention that there had been a waiver of its rights, let alone a clear representation that it had accepted the Tribunal's jurisdiction. We note that in Astro's statement of reply to the defence on 1 July 2009 (at [7]–[9]) they objected to the effectiveness of FM's reservation contained in its Defence; but this was informed by Astro's understanding that Art 16(3) represented a "one-shot remedy". Its position, then and now, is that FM could not revisit the issues of joinder and jurisdiction because it only ever had the one opportunity to do so. Hence, it seems to us that Astro never relied on any representation by FM. Instead, it seems that Astro merely relied on its own understanding of the legal consequences of FM not having brought a challenge under Art 16(3). In the final analysis.

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Mr Rabinowitz's concise statement is too slender a peg on which to hang Astro's case for waiver.

215 For the sake of completeness, we also address Mr Joseph's argument that FM had waived its objection by filing a counterclaim in the Arbitration. The counterclaim, advanced on the basis of a breach of fiduciary and good faith obligations under the common law, was framed in reference to the "UT Shareholders", which is defined as "the 3rd and 4th Claimants (later, the 1st and 2nd Claimants)". The short answer therefore, is that the counterclaim did not constitute a waiver of FM's rights in relation to the improper joinder of the 6th to 8th Respondents because it was not directed at them.

(2) Entry of UK judgment

216 On 27 July 2009, Astro applied for and obtained leave to enforce the Award on Preliminary Issues in England. On 24 August 2009, Ayunda and FM's solicitors stated in an e-mail that:

> It is not [Ayunda & FM's] position that [Astro] are not entitled to apply to enforce the [Award on Preliminary Issues]. Rather, the point is that the calculated timing of the Claimant's application to enforce the Jurisdictional Award just before the hearing before the Tribunal in September has put the Respondents in a position where they will be denied natural justice at and in connection with that hearing.

217 Mr Joseph suggested that the first sentence of that e-mail constituted an acceptance of the validity of the Award on Preliminary Issues. The use of the double negative, however, leaves open the possibility that Ayunda and FM, whilst admitting that Astro can *apply* to enforce the award, can also seek to *resist* enforcement on jurisdictional grounds. Indeed, the e-mail is carefully worded so as not to positively accept that the Award on Preliminary Issues is valid. Moreover, when read in full, it is clear that the main point conveyed by the e-mail was not that Ayunda and FM did not object to the Tribunal's jurisdiction but that they had a more specific objection to Astro's application to enforce the Award on Preliminary Issues, *viz*, the denial of natural justice at the substantive hearing. Once again, we do not think that in such a context it would be fair to read a waiver into Ayunda and FM's statement.

(3) Signing of the MOI

218 Astro also places heavy reliance on the fact that FM had signed a MOI on 31 July 2009. The MOI stated that:

> A number of issues in this arbitration, including that of its own jurisdiction, have already been fully and finally determined by the Tribunal in its Award

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> dated 7 May 2009. The remaining claims and issues to be determined by the Tribunal in this arbitration are as follows:
>
> …

219 In our judgment, the MOI cannot be invested with great or particular significance. First, when read as a whole, the main object of the MOI was to frame the issues which were yet to be determined by the Tribunal rather than to categorically bind parties to the preliminary ruling. This may be compared with the draft order which was sent to Ayunda and FM's solicitors on 20 May 2009 (see [207] above), which focused entirely on what had been determined in the Award on Preliminary Issues. It is clear from the correspondence between the parties that the draft order was intended to record the terms of the Award on Preliminary Issues and did not signal Ayunda and FM's acceptance of the Tribunal's jurisdiction. Rather, the MOI was directed to the converse objective of identifying what remained open before the Tribunal. Second, and for good measure, Ayunda and FM continued to reserve its objection to the Tribunal's jurisdiction after signing the MOI. For instance, it was stated in their statement of defence and counterclaim filed on 18 June 2009 that they did not "agree or concede that the [6th to 8th Respondents] are valid parties to this Arbitration" and that their rights in this regard were strictly reserved.

(4) Part satisfaction of the Award on Preliminary Issues

220 On 17 September 2009, the Tribunal ordered Ayunda, DV and FM to pay costs for the Award on Preliminary Issues. Payment was made on 1 October 2009. Mr Joseph argued, on the authority of *Goodman v Sayers* (1820) 2 Jac & W 249 ("*Goodman*"), that part satisfaction of an award constitutes clear and unequivocal acceptance of it. In *Goodman*, the plaintiff agreed to satisfy the debt due from him under the award so long as the defendant discontinued its action for enforcement and referred certain alleged errors back to the arbitrators for further investigation. Having made payment after offsetting the sums in error, the plaintiff then applied to set aside the award. Sir Thomas Plumer MR framed the question before the court as such (at 262–263):

> It comes then to this important question, whether a court of equity can entertain jurisdiction, in a case where an action having been brought to enforce the award, the party voluntarily pays the money, upon an agreement for a reference back as to part, under which an alteration is made, of which he takes the benefit, receiving the £25 as a final settlement of the dispute? Can he, after that, make it the subject of a bill in equity?

221 The Master of the Rolls went on to conclude that this must be answered in the negative (at 263):

> … It is admitted, that at law it is impossible to recover, after a voluntary payment, with a knowledge of all the facts, though under a mistake in point of law; it cannot be disputed … that where an action is brought and is

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> proceeding, and the Defendant having a knowledge of all the circumstances, and having the means of proving them at trial, submits to pay, he has no remedy at law. …

222 Once again we are unable to agree with Mr Joseph's argument. We do not think that the payment of costs to the Tribunal constituted an unequivocal waiver of FM's rights. Rather, it was an acknowledgment that the Tribunal could decide its own jurisdiction and would be entitled to be paid for this decision. This was in line with the doctrine of *kompetenz-kompetenz*, and is distinct from the situation which arose in *Goodman*, where the payment was made pursuant to an express agreement to satisfy the award. We would add that *Goodman* does not strictly stand for the proposition that part payment will or must always constitute waiver. The part payment in that case arose in the context of an agreement that the parties reached to refer certain alleged errors in the initial award back to the arbitrators. Most importantly, the plaintiff in *Goodman* never reserved his rights to raise the very objections which he later attempted to rely on to set aside the award. Indeed, one of the factors which Sir Thomas Plumer MR took into account (at 262) was that the plaintiff in Goodman chose not to "persevere in his resistance". In light of the fact that FM did reserve its rights, we do not think that the payment of costs would constitute a tacit waiver of those reserved rights.

Conclusion on merits of the Joinder Objection

223 Having examined in some detail how the parties had conducted themselves after the Award on Preliminary Issues was handed down, we are unable to accept the Astro's argument that FM had waived or is otherwise estopped from asserting its rights to resist the enforcement of the Awards.

224 In the final analysis we find in favour of FM on the merits of the Joinder Objection:

(a) Given that they were not parties to the SSA, it is a matter to be determined by Singapore law whether the 6th to 8th Respondents were properly joined to the Tribunal's proceedings so as to establish an arbitration agreement with FM (at [158]).

(b) In consideration of its language and lack of substantive content, r 24(b) does not confer on the Tribunal the power to join third parties who are not party to the arbitration agreement, in this case, the SSA, into the Arbitration (at [178]–[185], [191]–[193] and [197]).

(c) Accordingly, the Tribunal's exercise of its power under r 24(b) to join the 6th to 8th Respondents to the Arbitration was improper with the corollary that no express agreement to arbitrate existed between the 6th to 8th Respondents and FM (at [198]).

(d) In addition, FM did not waive its rights or conduct itself in such a way that it is estopped from raising the Joinder Objection:

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(i) FM consistently stated that any further participation in the lead up to the substantive hearing would be without prejudice to its position on any appeal (at [208]–[209]) and later reserved its rights in relation to the Tribunal's jurisdiction in its Defence (at [203], [209] and [219]);

(ii) the statement that "[t]here is no challenge to [the Tribunal's] award in Singapore" made at the teleconference with the arbitrators on 25 June 2009 cannot be taken as a clear representation that FM had accepted the Tribunal's jurisdiction (at [212]–[214]);

(iii) FM's counterclaim was unconnected to the 6th to 8th Respondents (at [215]);

(iv) FM's acceptance of Astro's ability to bring an application to enforce the Award on Preliminary Issues in the UK did not contain any concession as to its validity, and moreover, it instead conveyed the more specific objection that there would be a denial of natural justice as a result of the timing of that application (at [216]–[217]);

(v) the signing of the MOI was intended to frame the issues which were still to be determined by the Tribunal rather than to categorically bind parties to the Award on Preliminary Issues (at [219]); and

(vi) the part satisfaction of the Award on Preliminary Issues on 1 October 2009 cannot be taken as more than FM's acknowledgement that the Tribunal could decide its own jurisdiction and was not sufficient in itself to constitute an acceptance of the Tribunal's jurisdiction (at [222]).

In consequence of the foregoing, FM is fully entitled to resist the enforcement of the Awards pursuant to s 19 of the IAA.

Enforcement by 1st to 5th Respondents

225 It will be recalled that the Enforcement Orders were granted to Astro, *ie*, all eight Respondents, while the collective relief sought in SUM 4065 and SUM 4064 by FM was for the Enforcement Orders to be set aside entirely. Although we have found that the Awards are not enforceable by the 6th to 8th Respondents against FM because there was no arbitration agreement between the former and latter, and to that extent FM's application to set aside the Enforcement Orders is granted, it does not follow that the 1st to 5th Respondents, whom FM did not dispute were proper parties to the SSA and the Arbitration, ought not to be able to enforce the Awards against FM.

226 An arbitral award binds the parties to the arbitration because the parties have consented to be bound by the consequences of agreeing to

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arbitrate their dispute. Their consent is evinced in the arbitration agreement. In a multiparty arbitration agreement, the vitiation of consent between two parties does not *ipso facto* vitiate the consent between other parties. For example, in an arbitration agreement between A, B and C, the subsequent vitiation of the consent between A and B to be bound by the award does not necessarily cause it to lose its binding effect as between A and C, or between B and C. It is only where the circumstances which gave rise to the vitiation of consent between A and B can be said to have infected the consent between the other parties, *ie*, A and C and/or B and C, that the award as between those parties would cease to have binding effect.

227 Partial enforcement is viable here because the orders in the Awards do not intertwine in such a manner as to impede severance. In relation to the Final Award in which most of the substantive orders are found, we find that the Tribunal's orders against the various parties are sufficiently discrete. The Final Award provided that:

> (a) Ayunda, FM and DV are jointly and severally liable to pay the 6th Respondent RM103,333,546;
>
> (b) DV is liable to pay the 6th Respondent RM210,884,780 (less any payment in (a) above);
>
> (c) Ayunda, FM and DV are jointly and severally liable to pay the 7th Respondent US$5,773,134;
>
> (d) DV is liable to pay the 7th Respondent US$15,659,174 (less any payment in (c) above);
>
> (e) Ayunda, FM and DV are jointly and severally liable to pay the 8th Respondent US$59,459,258;
>
> (f) DV is liable to pay the 8th Respondent US$151,281,768 (less any payment in (e) above);
>
> (g) Ayunda and FM are jointly and severally liable to pay the 1st and 2nd Respondents US$608,176.54, GBP22,500, and S$65,000; and
>
> (h) Ayunda and FM are jointly and severally liable to indemnify the 1st and 2nd Respondents for the benefit of the 6th to 8th Respondents in respect of any further losses which may be suffered by the 6th to 8th Respondents by reason of the breach by Ayunda and FM of cl 17.6 of the SSA, including any liability which Ayunda, FM and DV may establish against the 6th to 8th Respondents in the Indonesian Proceedings or any replacement proceedings in so far as they relate to the SSA.

On the face of these orders, FM is not jointly and severally liable to any of the 1st to 5th Respondents *and* any of the 6th to 8th Respondents at the same time. FM's obligations under the Final Award to the 1st to 5th Respondents can therefore be severed cleanly from its obligations to the

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6th to 8th Respondents, with the order at [227(g)] being the only enforceable order by the 1st to 5th Respondents against FM as far as the Final Award is concerned.

228 We have perused the other four awards sought to be enforced and are satisfied that the orders contained therein are either directed at parties other than FM and therefore do not affect the current proceedings, or if they are directed at FM, impose obligations on FM *vis-à-vis* the 6th to 8th Respondents that are severable from the orders as between FM and the 1st to 5th Respondents. As for the costs of the Arbitration as well as the interest for which FM was held by the Tribunal to be liable to the 6th to 8th Respondents – whether jointly and severally with Ayunda and DV or otherwise (see the award dated 5 February 2010 and the award dated 3 August 2010) – those sums shall also be unenforceable.

229 A final clarification is apposite. Both sides in their respective applications have either sought to enforce or refuse enforcement of all five awards. We would point out that one of those awards, the Award on Preliminary Issues, contains, *inter alia*, the Tribunal's preliminary ruling on jurisdiction. In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*"), this court thought it significant that the Model Law adopted a narrow definition of "award", *ie*, "one that does not expressly include a ruling on jurisdiction as an 'award'" (at [62]). Given that certain types of recourse such as setting aside only apply to awards properly so-called, there is an issue as to whether the Singapore courts can enforce or refuse enforcement of preliminary rulings on jurisdiction which are couched as awards. We refrain from expressing any view on this not only because no submissions were made, but also in the light of the fact that neither FM nor Astro contested the other's application on the basis that the Award on Preliminary Issues (or at least the preliminary ruling on jurisdiction) was not subject to recourses only available to awards as construed by *PT Asuransi*. Indeed, Astro sought leave to enforce the Award on Preliminary Issues as well as the other awards. It is also not necessary for us to go further into this because whatever might have been the position in relation to the Award on Preliminary Issues, there was never any question that the remaining awards were entirely amenable to the orders we have made. Those awards prescribe the payment obligations of FM. In so far as they derive their jurisdictional basis from the Award on Preliminary Issues, it is evident from our analysis that the Award on Preliminary Issues was wrong. Accordingly, there was no jurisdictional basis for any of the other awards that were made in favour of the 6th to 8th Respondents.

Conclusion

230 In summary, FM's appeal is therefore allowed to the extent that leave to enforce the Awards in both OS 807/2010 and OS 913/2010 is refused in relation to the Tribunal's orders in the Awards that purport to apply as

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between FM and the 6th to 8th Respondents. The joinder of the 6th to 8th Respondents to the Arbitration had been predicated on a mistaken construction of the 2007 SIAC Rules. The Awards rendered in their favour therefore suffer from a deficit in jurisdiction and are refused enforcement pursuant to s 19 of the IAA. As FM had not waived and is not otherwise estopped from raising its valid objection to the Tribunal's jurisdiction, FM was within its rights to challenge the enforcement of the Awards by the 6th to 8th Respondents. As such, leave to enforce is granted only in relation to the Tribunal's orders which are exclusively directed at the 1st to 5th Respondents, namely those set out at [227(g)] above.

231 If there are disagreements over the exact apportionment of costs and interest awarded in the Arbitration, the parties may apply to this court for clarification. FM will have its costs for these appeals and of the hearing below, to be taxed if not agreed. The usual consequential orders will apply.

232 We record our appreciation to both counsel for the clear, thorough and complete manner in which they assisted us.

Reported by Jonathan Yap and Nicholas Poon.