IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 208

Originating Summons No 980 of 2018

Between

Republic of India

… *Plaintiff*

And

Vedanta Resources plc

… *Defendant*

GROUNDS OF DECISION

[Arbitration] — [Confidentiality] — [Documents]
[Arbitration] — [Confidentiality] — [Evidence used in other proceedings]
[Arbitration] — [Interlocutory order or direction] — [Court's power]
[Arbitration] — [Arbitral tribunal] — [Competence]
[Arbitration] — [Conduct of arbitration] — [Preliminary issues]
[Arbitration] — [Declaratory relief]

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This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Republic of India
v
Vedanta Resources plc

[2020] SGHC 208

High Court — Originating Summons 980 of 2018
Vinodh Coomaraswamy J
21 February; 4, 7 October 2019, 24 February 2020

8 October 2020

Vinodh Coomaraswamy J:

Introduction

1 Singapore's arbitration law imposes a general obligation on the parties to an arbitration to keep the documents and proceedings in that arbitration confidential. Does this general obligation of confidentiality extend to *all* species of arbitration? In particular, does this general obligation extend to an *investment-treaty* arbitration? And if a party to an arbitration puts this question of law to the tribunal in an investment-treaty arbitration and receives an answer it does not like, can that party put the question again to a Singapore court in an application for declaratory relief? These are the principal questions raised by the application before me.

2 The plaintiff in this application is the Republic of India, a sovereign state. The defendant is a company incorporated in the United Kingdom.[1] The plaintiff and the defendant are now the respondent and the claimant respectively in an investment-treaty arbitration seated in Singapore. For convenience, I will refer to it this arbitration as the Vedanta Arbitration. The plaintiff is also the respondent in a related but separate investment-treaty arbitration seated in the Netherlands. The claimants in that separate arbitration are members of the Cairn Group of companies. I shall therefore refer to those claimants as Cairn, and to that arbitration as the Cairn Arbitration.

3 By this application, the plaintiff seeks two declarations as to Singapore's arbitration law. The declarations are intended to pave the way for the plaintiff to cross-disclose documents between the Vedanta Arbitration and the Cairn Arbitration. The two declarations are framed as follows:[2]

(a) a declaration that documents disclosed or generated in the Vedanta Arbitration are not "confidential or private"; and

(b) a declaration that the plaintiff will not breach any obligation of confidentiality or privacy if it were to disclose for the purposes of the Cairn Arbitration any of the documents which were disclosed or generated in the Vedanta Arbitration.

4 The plaintiff seeks these two declarations both cumulatively and in the alternative. The plaintiff seeks the first declaration to establish that the general

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1 Deepak Kumar's 1st Affidavit at para 1

2 Dr Rishi Kumar's 1st Affidavit at paras 5 and 22

obligation of confidentiality in Singapore's arbitration law does not extend to investment-treaty arbitration. If the plaintiff succeeds on the first declaration, the second declaration follows automatically, as it does no more than declare the effect of applying the first general declaration to the specific case of the Vedanta Arbitration. But if the first declaration fails, the second declaration does not automatically fall away. The plaintiff still seeks the second declaration in order to establish that cross-disclosure between the two arbitrations comes within an exception to the general obligation established on the first declaration.[3] It is therefore necessary to consider both declarations in turn.

5 The defendant raises a preliminary question on the plaintiff's application. Its submission is that the application should be dismissed *in limin*e because it amounts to an abuse of the process of the court or a collateral attack on a decision of the Vedanta tribunal, principally because the Vedanta tribunal has already decided – upon the plaintiff's own application – that that the general obligation of confidentiality in Singapore's arbitration extends to investment-treaty arbitration. In the alternative, if it fails on the preliminary question, the defendant submits that the court should not exercise its discretion to grant the declaratory relief which the plaintiff now seeks.

6 I have answered the preliminary question in favour of the plaintiff. I do not consider that the plaintiff's application to be either an abuse of process or an impermissible collateral attack on any decision of the Vedanta tribunal. But I have declined to exercise my discretion to grant the plaintiff the declaratory

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[3] Notes of Argument, 21 February 2019, p6(20) to 6(22)

relief which it seeks, principally because I do not consider the declaratory relief to be either necessary or justified in the circumstances of this case.

7 I have accordingly dismissed the plaintiff's application. The plaintiff has appealed against my decision. I now set out my reasons.

Background facts

The Cairn Group restructuring

8 In 2006, a group of companies known as the Cairn Group restructured its Indian assets. As part of that restructuring, a British company known as Cairn UK Holdings Ltd ("CUHL") transferred most of those assets to an Indian company known as Cairn India Limited ("CIL"). The Cairn Group carried out the restructuring by having CIL undergo an initial public offering ("IPO") in India and then use the proceeds to acquire the Cairn Group's Indian assets from CUHL through a series of share purchases and share swaps.

9 The plaintiff's position has always been that this restructuring is a tax abusive transaction and that the resulting capital gain of about US$3.9bn in CUHL's hands has been subject to Indian capital gains tax from 2006.

India issues assessment orders

10 Under Indian revenue law, the plaintiff is entitled to recover the tax which it claims to be due either from CUHL as a capital gains tax or from CIL as a withholding tax. In any event, neither company has paid the tax. The

plaintiff has accordingly treated both CUHL and CIL as assessees-in-default since 2006.[4]

11 In 2011, the Cairn Group sold 100% of CIL to the defendant and its group of companies.

12 In 2015, the Indian revenue authorities issued a tax assessment order against CUHL and another against CIL (the "Assessment Orders").[5]

Commencement of the arbitrations

13 The Vedanta Arbitration and the Cairn Arbitration are the direct result of the Assessment Orders. The two arbitrations have a number of common features. Both arbitrations arise from the same underlying transaction. Both are brought under the bilateral investment treaty ("BIT") known as the Agreement between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments signed on 14 March 1994 ("India-UK BIT").[6] Both are administered by the Permanent Court of Arbitration ("PCA"). Both are conducted in accordance with the United Nations Commission on International Trade Law Arbitration Rules 1976 ("UNCITRAL Rules").[7]

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4 Dr Rishi Kumar's 1st Affidavit at para 13

5 Dr Rishi Kumar's 1st Affidavit at para 14

6 Dr Rishi Kumar's 1st Affidavit at para 4

7 Dr Rishi Kumar's 1st Affidavit at para 4

14 But, because CIL changed ownership in 2011, after the plaintiff alleges that the tax liability arose, the two arbitrations were commenced separately and have proceeded along different paths before different tribunals in different seats.

15 Cairn commenced arbitration against the plaintiff first, in September 2015. The Cairn Arbitration is seated in the Netherlands. Cairn's case is that the Assessment Order against CUHL is contrary to CUHL's legitimate expectations in 2006 that the Cairn Group's restructuring that year did not attract any liability for capital gains tax under Indian revenue law.[8]

16 The defendant commenced arbitration against the plaintiff in November 2015. The Vedanta Arbitration is seated in Singapore. The defendant's case in the arbitration is that it had a legitimate expectation in 2011 that the Cairn Group's restructuring in 2006 had not attracted any tax liability on a capital gain in the hands of CUHL.

The Arbitral Tribunals issue procedural orders

17 Because both arbitrations arise from the same underlying transaction and under the same BIT, the plaintiff is concerned about the risk of inconsistent findings by the two tribunals. Inconsistent findings are not only a possibility on the merits of the parties' disputes[9] but also on jurisdictional issues common to both arbitrations.[10] The plaintiff's position is that, in order to mitigate this risk,

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8 Dr Rishi Kumar's 1st Affidavit at para 15

9 Dr Rishi Kumar's 1st Affidavit at para 19

10 Dr Rishi Kumar's 1st Affidavit at para 48

a regime is needed in both arbitrations to permit cross-disclosure of documents between the two arbitrations.

18 This application arises out of the plaintiff's efforts to put such a regime in place in both arbitrations. The background to this application therefore requires an examination of four of the many procedural orders in both arbitrations: one procedural order issued in the Cairn Arbitration and three issued in the Vedanta Arbitration. I now summarise these four procedural orders.

Cairn Arbitration Procedural Order No. 10

19 In September 2017, on the plaintiff's application, the Cairn tribunal issued Procedural Order No. 10 ("CPO 10"). CPO 10 set out the Cairn tribunal's cross-disclosure regime. CPO 10 allows cross-disclosure with the consent of the opposing party or with the permission of the tribunal.

20 One of the premises of CPO 10 is that the parties to an investment-treaty arbitration are subject to *no* general obligation of confidentiality under the law of the Netherlands as the Cairn Arbitration's *lex arbitri*.[11] As a result, CPO 10 is premised on a regime of open document disclosure. It therefore includes express language that the Cairn tribunal will uphold objections to disclosure only rarely. In particular, in describing a party's right to object to disclosure, CPO 10 provides as follows at para 24(b):[12]

> Within seven business days … the other Party may raise

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11 Muhammed Ismail Bin KO Noordin's 1st Affidavit, MI-3, Tab 9, para 38

12 Muhammed Ismail Bin KO Noordin's 1st Affidavit, MI-3, Tab 12, para 24(b)

> objections to such a disclosure, redact any sensitive information, or specify any special confidentiality requirements relative to the [Vedanta Arbitration] (for instance, the requirement that Vedanta agree to keep the documents confidential), *it being understood that any such objections or redactions would need to be well-justified and would constitute a rare exception to the principle of open document disclosures.* The Tribunal shall be copied in this correspondence.
>
> [emphasis added]

Vedanta Arbitration Procedural Order No. 3

21 In May 2018, also on the plaintiff's application, the Vedanta tribunal issued Procedural Order No. 3 ("VPO 3"). VPO 3 is the Vedanta tribunal's analogue of CPO 10. VPO 3, like CPO 10, allows cross-disclosure with the consent of the opposing party or with the permission of the tribunal. VPO 3, however, proceeds on a slightly different premise to CPO 10.

22 One of the premises of VPO 3 is that the parties to an investment-treaty arbitration *are* subject to a general obligation of confidentiality under Singapore law as the Vedanta Arbitration's *lex arbitri*.[13] The Vedanta tribunal nevertheless held in VPO 3 that the general obligation of confidentiality under Singapore law is subject to an exception which permits the tribunal to consider cross-disclosure on a case-by-case basis.[14] The Vedanta tribunal preferred a case-by-case approach to the approach advocated by the plaintiff, which would have given the parties a general licence to make cross-disclosures.[15]

23 Consistent with these holdings, paras 129.3 and 129.4 of VPO 3 set out the general rule and then the exception:[16]

> 129.3 The Parties **shall not make public**, in part or in whole, any other document submitted, produced or created in connection with this proceeding, including but not limited to the Notice of Arbitration, the Response to the Notice of Arbitration, the Statement of Claim, the Statement of Defence, any other written applications, statements, submissions and/or memorials, any and all witness statements and expert

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13 Muhammed Ismail Bin KO Noordin's 1st Affidavit, MI-2, Tab 25 at para 65

14 Muhammed Ismail Bin KO Noordin's 1st Affidavit, MI-2, Tab 25 at para 67

15 Notes of Argument, 21 February 2019, p16(14) to 17(6)

16 Muhammed Ismail Bin KO Noordin's 1st Affidavit, MI-2, Tab 25 at p32

> reports, all documentary exhibits, the transcripts of hearings and all procedural correspondence.
>
> 129.4 The Parties **are at liberty to apply** (supported by brief reasons) for the disclosure of any specific, identified document to the Cairn Arbitration, after having first consulted the other Party with a view to reach a mutual agreement on such disclosure and/or any redactions. If a Party makes frivolous, unnecessary, and/or excessive requests for cross-disclosures or if the other Party unreasonably or unjustifiably withholds its consent to a request for cross-disclosure, the Tribunal will take such conduct into account in the allocation of costs, at the appropriate stage of the arbitration.
>
> [emphasis in original]

24 The cross-disclosure regime in VPO 3 is quite similar to that in CPO 10 (see [19] above).[17] Both regimes eschew a general licence to both parties to make cross-disclosure in favour of a case-by-case approach. Both regimes thus require a party seeking to make cross-disclosure, in the event of opposition, to apply to the tribunal for permission to make the cross-disclosure. The sole difference between CPO 10 and VPO 3 is who carries the burden on any such application. Cross-disclosure under CPO 10 takes place within what the Cairn tribunal found to be the general rule. The burden in an application under CPO 10 therefore lies on the party *opposing* cross-disclosure. Cross-disclosure under VPO 3, on the other hand, takes place within what the Vedanta Tribunal found to be an exception to the general rule. The burden in an application under VPO 3 therefore lies on the party *seeking* cross-disclosure.

Vedanta Arbitration Procedural Order No. 6

25 In May 2018, the plaintiff applied to the Vedanta tribunal under VPO 3 for permission to make cross-disclosure of three categories of documents: (a) a

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17 Notes of Argument, 21 February 2019, p16(14) to 17(6)

decision issued by the Vedanta tribunal in December 2017 rejecting some of the plaintiff's jurisdictional objections ("the DPO"); (b) memorials and materials related to that decision, with the accompanying evidence; and (c) the transcripts of the arguments leading to the that decision.

26 In June 2018, the Vedanta tribunal issued Procedural Order No. 6 ("VPO 6") determining the plaintiff's application. VPO 6 permitted cross-disclosure of the DPO subject to redaction as agreed between the parties. But the tribunal rejected cross-disclosure of the other two categories of documents as lacking specificity[18] and being too wide.[19] In the event, the parties were unable to agree on the redactions to the DPO. So even the DPO has yet to be cross-disclosed.[20]

27 The plaintiff now lists, in a schedule to the application before me, the DPO as well as fourteen specific documents said to fall within the two rejected categories in VPO 6. The purpose of the schedule is to set out a non-exhaustive list of documents which the plaintiff is inviting the court to declare under the second declaration (see [3(b)] above) it may cross-disclose without breaching any obligation of confidentiality or privacy.

Vedanta Arbitration Procedural Order No. 7

28 In August 2018, the plaintiff applied urgently in the Vedanta Arbitration under VPO 3 for permission to cross-disclose into the Cairn Arbitration a section of a transcript in the Vedanta Arbitration recording the parties'

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18 Muhammed Ismail Bin KO Noordin's 1st Affidavit, MI-2, Tab 27 at para 40

19 Muhammed Ismail Bin KO Noordin's 1st Affidavit, MI-2, Tab 27 at para 34

20 Deepak Kumar's 1st Affidavit at paras 36 and 37

submissions on jurisdiction. The plaintiff submitted that the purpose of cross-disclosure was to show the Cairn tribunal that Vedanta and Cairn – at that time represented in the two arbitrations by the same senior advocate from the Indian bar – were taking inconsistent positions in the two arbitrations on the same issue of Indian constitutional law.[21]

29 In September 2018, the Vedanta tribunal issued Procedural Order No. 7 ("VPO 7") rejecting the plaintiff's application. It held that cross-disclosure was not warranted because there was nothing remarkable about a single advocate acting on different instructions for different clients in different arbitrations taking different positions, even on the same issue of law.[22]

30 In August 2018, while waiting for the Vedanta tribunal to issue VPO 7, the plaintiff filed this application.[23]

The preliminary question

The parties' cases on the preliminary question

31 The defendant's case on the preliminary question is as follows. The International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), by s 3(1), gives the force of law in Singapore to the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") as set out in the First Schedule of the IAA. The IAA and the Model Law make the plaintiff's application both an abuse of process of the court and a collateral attack on the

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21 Deepak Kumar's 1st Affidavit at p205

22 Deepak Kumar's 1st Affidavit at p213, para 23

23 Dr Rishi Kumar's 1st Affidavit at para 59

Vedanta tribunal's decisions in the VPOs.[24] The plaintiff's application is an abuse of process because the Model Law prohibits a court from intervening in an arbitration on procedural matters, whether by granting declarations or otherwise. It is a collateral attack because the application seeks impermissibly to nullify, undermine or circumvent the VPOs. It is, in substance, an appeal against them.[25] On either or both grounds, this application ought to be dismissed.[26]

32 The plaintiff responds as follows. This application is not an abuse of process because nothing in the IAA or the Model Law takes away this court's broad power to grant declarations under the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and under O 15 r 16 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).[27] Even the defendant does not suggest that the court lacks the jurisdiction to grant the declaratory relief which the plaintiff seeks.[28] The application is not a collateral attack because it does not ask the court to reverse or overrule any decision of the Vedanta tribunal. The application merely asks the court to make authoritative declarations of Singapore law.[29] There is nothing impermissible about that. The declarations could certainly provide the plaintiff a basis on which to ask the Vedanta tribunal to reconsider or revise the VPOs.[30]

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24 Deepak Kumar's 2nd Affidavit at para 6

25 Deepak Kumar's 2nd Affidavit at para 7

26 Defendant's Skeletal Submissions at para 49

27 Plaintiff's Skeletal Submissions at para 48

28 Notes of Argument, 4 October 2019, p56(27) to 57(9)

29 Notes of Argument, 21 February 2019, p38(10) to 38(14)

30 Notes of Argument, 21 February 2019, p38(10) to 38(14)

But that too is not impermissible. The VPOs are merely procedural orders and carry no finality.[31]

33 In analysing the defendant's arguments on the preliminary question, I consider it appropriate first to make some general observations on the nature of procedural orders in arbitration before analysing the defendant's arguments in detail.

The nature of a procedural order

A tribunal is the master of its own procedure

34 It is common ground between the parties that the VPOs are procedural orders.

35 Article 19 of the Model Law gives a tribunal its procedural powers, subject only to the parties' agreement and the Model Law itself:

> Article 19. Determination of rules of procedure
>
> (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

36 Article 19(2) of the Model Law is cast in wide terms: "in such manner as it considers appropriate". This is deliberate. Article 19(2) was intended

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[31] Notes of Argument, 21 February 2019, p68(32) to 69(6) and 75(28) to 75(31)

specifically to enable a tribunal to display initiative in procedural matters which were not otherwise agreed or regulated (see para 35 of the *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006* (UNCITRAL, 2008)).

37 In addition to the parties' agreement and the Model Law, a tribunal's mastery of its own procedure is also subject to mandatory procedural norms under the *lex arbitri*. As Tay Yong Kwang J (as he then was) held in *Anwar Siraj and another v Ting Kang Chung and another* [2003] 2 SLR(R) 287 at [41]–[42]:

> The arbitrator is, subject to any procedure otherwise agreed between the parties as applying to the arbitration in question, *master of his own procedure and has a wide discretionary power to conduct the arbitration proceedings* in the way he sees fit, so long as what he is doing is not manifestly unfair or contrary to natural justice (see the *Handbook of Arbitration Practice* (3rd Ed, 1998)). …
>
> It is therefore plain that the *Court's supervisory role is to be exercised with a light hand and that arbitrators' discretionary powers should be circumscribed only by the law and by the parties' agreement.*
>
> [emphasis added]

38 Article 19(2) and the common law are the positive aspect of the tribunal's mastery of its own procedure. There is also a negative aspect to this mastery. There is no provision in any of our arbitration legislation which permits a court to nullify a tribunal's procedural order by way of an application to set aside, let alone by way of appeal. A provision of this sort would set at nought the principle of minimal curial intervention. It would enable the court to encroach on the tribunal's domain for no countervailing benefit. As Lee Seiu Kin J pointed out in *PT Pukuafu Indah and others v Newmont Indonesia Ltd and another* [2012] 4 SLR 1157 ("*PT Pukuafu*"), a recalcitrant party could use

such a provision to obstruct an arbitration with tactical challenges on matters of mere procedure (at [25]).

A tribunal has the power to reconsider and revise a procedural order

39 A tribunal may at any time reconsider an earlier procedural order, revising it or even setting it aside entirely (Gary Born, *International Commercial Arbitration* vol III (Kluwer Law International, 2nd Ed, 2014) at p 2929). This is the result of two well-established principles in the law of arbitration.

40 First, as I have explained in the preceding section, a tribunal is the master of its own procedure. That must include the procedural power to reconsider and revise its own procedural decisions.

41 Second, and more importantly, a procedural order carries no finality. Of course, a procedural order is final in the sense that it draws a line under the parties' arguments and obliges the parties to comply with the tribunal's decision. But there is no doctrine of *functus officio* or of issue estoppel in procedural matters. It is these doctrines which render an award, once issued, final in the sense that the tribunal no longer has the jurisdiction to alter the substance or content of the award. Only an award carries finality in the true sense of the word, as set out in s 19B of the IAA.

42 Thus, for example, in *Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd ('The Smaro')* [1999] CLC 301 ("*The Smaro*"), a tribunal issued a procedural order granting a claimant leave to make a number of amendments to its points of claim. Upon reconsideration, the tribunal issued a further procedural order denying the claimant leave to make one of the

amendments. The claimant sought a declaration that the tribunal had issued the further procedural order without jurisdiction. The claimant argued that the tribunal's initial procedural order created an issue estoppel in the claimant's favour, thereby rendering the tribunal *functus officio* on whether the amendment should be allowed.

43 Rix J (as he then was) rejected the claimant's argument. He held that there was no doctrine of issue estoppel or of *functus officio* in procedural matters. A tribunal which has ruled on a procedural issue retains the jurisdiction to rule on it again (*The Smaro* at 326 to 328):

> In my judgment, however, there is nothing in these passages to suggest that the doctrine of issue estoppel can apply to mere questions of procedure, as distinct from issues on the final merits. On the contrary, the whole context in which these remarks occurred was concerned with plainly substantive matters such as cesser of liability and waiver. That Diplock LJ was speaking with that context in mind is in my view well exemplified by the opening sentences of the passage cited above, where Diplock LJ speaks of 'The final resolution of a dispute', or in the closing passage cited above where he refers to an arbitrator's 'final award' or to an 'interim award' which is determinative of certain issues. …
>
> …
>
> In my judgment, the decision to allow the … amendment was not a decision on the merits, but was a matter of pure procedure, involving no more than issues of discretion. In such circumstances, I cannot see how there can be any question of an issue estoppel. It follows that Mr Berry's submission that the tribunal was functus officio on the ground of there being an issue estoppel must fail. …

44 Similarly, in *Flame SA v Glory Wealth Shipping PTE Ltd* [2014] QB 1080, the English High Court had to consider whether a serious irregularity within the meaning of s 68 of the English Arbitration Act 1996 (c 23) (UK) had occurred in an arbitration. One of the irregularities alleged was that the tribunal

had repeatedly refused to order certain disclosure but had changed its mind and ordered the disclosure shortly before the hearing. Teare J dismissed the application, holding there to have been no serious irregularity. He found that the tribunal's change of mind did not, in and of itself, amount to a serious irregularity. As he put it, there "are instances both in court and in arbitration when disclosure is initially not seen to be appropriate but is later recognised to be appropriate". He held that, at best, the tribunal's "initial decision may be said to have been wrong, but making a wrong decision is not a serious irregularity" (at [103]).

45 Another English case, *Compton Beauchamp Estates Limited v James William Mills Spence* [2013] EWHC 1101 (Ch), is to similar effect (at [83]–[84]).

46 The position is the same in Singapore. In *PT Pukuafu* ([38] *supra*), Lee J expressly considered that it was possible for a tribunal to modify or terminate a procedural order in the course of an arbitration (at [26]).

47 All of this is entirely in keeping with the nature of a procedural order. After all, the purpose of a procedural order is not to *determine* the parties' substantive legal rights and obligations. Its purpose is merely to *regulate* how the tribunal is to go about determining those rights and obligations. In that sense, a tribunal's procedural orders are incidental to the substance of the exercise and must be subject to change in the course of the arbitration. In the world of effective dispute-resolution, this is neither surprising nor exceptional.

Conclusion on procedural orders

48 So where does that leave a procedural order? A procedural order (as opposed to an award) is not final and may be reconsidered and revised by a tribunal *but* cannot be nullified by a court. This is not a contradiction. This is merely an aspect of the tribunal being the exclusive master of its own procedure (*PT Pufuaku* at [26]).

49 Does this mean that a party may repeatedly ask a tribunal to reconsider and revise its procedural orders? In theory yes. As the cases make clear, until the tribunal issues its final award and becomes *functus officio*, it has the jurisdiction to reconsider and revise earlier procedural orders. And a party does nothing wrong by inviting a tribunal to do so. It is simply invoking another facet of the tribunal's mastery of its own procedure.

50 No doubt, a rational and efficient tribunal will not even agree to *consider* an application of this nature, let alone to accede to it, unless it is satisfied that there has been a change in the underlying circumstances or that there is some other compelling reason to do so. But these are factors which go to the exercise of the tribunal's discretion to reconsider and revise a procedural order, not to its jurisdiction to do so. There is no need to deny that such a jurisdiction exists in order to prevent procedural abuse. There are sufficient other deterrents, including the procedural common sense of tribunals and the availability of costs orders.

Abuse of process and collateral attack

51 Counsel for the defendant, Mr Andre Yeap SC ("Mr Yeap"), argues that the plaintiff's application is an abuse of process on two grounds.

52 First, it is an abuse of process because the court lacks the power to grant the relief sought.[32] The subject-matter of the declarations is expressly regulated by the IAA and the Model Law. Save as expressly provided by statute, the court has no power to intervene in an arbitration in relation to matters – whether of substance or of procedure – that come within the tribunal's domain and which the tribunal has dealt with or could deal with in the course of the arbitration.[33] For this limb of his abuse of process argument, Mr Yeap relies on Arts 5 and 19 of the Model Law and the case law on the court's limited power to grant declaratory relief in the context of arbitration.

53 Second, Mr Yeap submits that the plaintiff's application is an abuse of process because it is an attempt to challenge a procedural order when the IAA provides no avenue for such a challenge. He therefore characterises the application as an impermissible collateral attack on the VPOs. The collateral attack ground can therefore be seen as merely a facet of his argument on abuse of process. Crucially, however, Mr Yeap confirms that he would argue that this application is an abuse of process even if the plaintiff had sought these declarations *before* it made its application to the Vedanta tribunal which led to VPO 3.[34] In that sense, his argument on abuse of process is distinct from the argument on collateral attack.

54 To analyse the defendant's arguments, I have to consider three issues: (a) the scope of the court's power to grant declaratory relief in the context of

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32 Notes of Argument, 4 October 2019, p56(27) to 57(9)

33 Notes of Argument, 4 October 2019, p61(12) to 61(18) and p66(21) to 66(23); 4 October 2019, p66(8) to 66(17)

34 Notes of Argument, 4 October 2019, p75(26) to 76(3)

arbitration; (b) whether the Model Law applies to investment-treaty arbitrations such that Arts 5 and 19 of the Model Law apply to the Vedanta Arbitration; and (c) if so, whether Arts 5 and 19 deprive the court of the power it would otherwise have to grant the declaratory relief which the plaintiff seeks. I now turn to these three issues.

Declaratory relief in the context of arbitration

55 The only general limits on the court's power to grant declaratory relief are that doing so must not exceed the court's general jurisdiction or contravene any express statutory provision (*Wing Joo Loong Ginseng (Hong) Singapore Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd and another and another appeal* [2009] 2 SLR(R) 814 ("*Wing Joo Loong*") at [176], citing Lord Woolf & Jeremy Woolf, *The Declaratory Judgment* (Sweet & Maxwell, 3rd Ed, 2002) ("*The Declaratory Judgment*") at para 3.005).

56 This principle means that a court is deprived of the power to grant a declaration in the context of arbitration if the subject-matter of the declaration is expressly regulated by the applicable arbitration legislation. The most broad-ranging express regulation is found in Art 5 of the Model Law. As the Court of Appeal held in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 ("*Sun Travels*") at [134]:

> … In the context of arbitration, Art 5 of the Model Law provides that '[i]n matters governed by [the Model Law], no court shall intervene except where so provided in [the Model Law]'. The *raison d'être* of this rule is not to promote hostility toward judicial intervention but to satisfy the need for certainty as to when court action is permissible: *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 ("*LW Infrastructure*") at [36]. This court in *LW Infrastructure* found that certain provisions, such as s 47 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") should be read consistently with

> Art 5. The upshot of this is that *in situations that are expressly regulated by the Act, the courts should only intervene where so provided in the Act* (at [39]) (this position should similarly apply in the IAA context). … [emphasis added]

57 The Court of Appeal went on to hold that the court below had had the power to make the following declarations: that (a) certain arbitral awards were final, valid and binding on the parties; and (b) that the appellant's claims in the Maldivian suit and consequential proceedings resulting from it were in breach of the arbitration agreements. This is because there is "no specific provision in the IAA or Model Law which addresses the specific declarations … [N]othing in the IAA and the Model Law circumscribes the court's power to grant the declaratory relief sought by [the plaintiff]" (*Sun Travels* at [135]).

58 The clearest example of express statutory regulation circumscribing the court's power to grant declaratory relief is the statutory power to set aside an award. Section 24 of the IAA and Art 34(2) of the Model Law together set out exhaustively the court's power to nullify an award issued in a Singapore-seated arbitration. That power is only by setting aside the award, and even then, only on the specific grounds provided in those two provisions. It follows that a court has no residual or concurrent non-statutory power to grant a declaration (or indeed, any other relief) which purports to nullify an award in any other way or which purports to set it aside on any other ground (see *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") at [42], albeit in the context of the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA"), and *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush and another* [2004] 2 SLR(R) 14).

59 These principles are common ground between the parties. The difference between the parties is whether the subject-matter of the declaratory

relief which the plaintiff seeks is expressly regulated by the applicable arbitration legislation. The defendant relies on Arts 5 and 19 of the Model Law to say that it is. The first question which then arises whether those provisions apply to the Vedanta Arbitration.

Investment-treaty arbitration and the Model Law

60 It is not strictly speaking necessary for me to decide this issue in order to decide this application. This is because I have found that, even if the Model Law does apply, Arts 5 and 19 of the Model Law do not deprive the court of the power to grant the declaratory relief which the plaintiff seeks. However, the parties have made extensive submissions on this issue, and I will venture brief observations on it.

61 Art 1(1) of the Model Law establishes its scope:

> Article 1. Scope of application
>
> (1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State and or States.

62 The footnote to Art 1(1) stipulates that the term "commercial" is to be interpreted as covering matters arising from all relationships of a commercial nature including specifically "investment":

> The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; *investment*; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of

> industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road. [emphasis added]

63 The defendant submits that the Vedanta Arbitration falls within the meaning of "international commercial arbitration" in Art 1(1) of the Model Law. The term "commercial", it argues, encompasses investments coming within the protection of an investment treaty. This interpretation finds support from (a) a plain reading of the footnote of Art 1(1) of the Model Law; (b) from the *travaux préparatoires* for the Model Law; and (c) several judicial decisions to that effect.[35]

64 The plaintiff accepts that the Vedanta Arbitration falls within the IAA but argues that it falls outside the Model Law.[36] It submits that the subject-matter of the Vedanta Arbitration is the enactment and enforcement of a state's revenue law, which in turn is an exercise of a sovereign authority. That is not a "relationship of a commercial nature" within the meaning of Art 1(1), even if it arises out of an investment. The dispute in the Vedanta Arbitration is therefore outside the scope of the Model Law.[37]

65 The authorities cited to me appear to establish a judicial and academic consensus that investment-treaty arbitration does come within the meaning of "international commercial arbitration" in Art 1(1) of the Model Law.

66 It has been held in Singapore, albeit *sub silentio*, that the Model Law applies to an arbitration seated in Singapore under an investment treaty. In

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35 Defendant's Further Skeletal Submissions at paras 6, 7 and 23

36 Notes of Argument, 24 February 2020, p36(9)

37 Plaintiff's Further Skeletal Submissions at paras 8 to 10

Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho [2019] 1 SLR 263 ("*Lesotho CA*"), the Kingdom of Lesotho succeeded at first instance in setting aside in part a final award issued in an arbitration under an investment treaty. The Court of Appeal dismissed the investors' appeal. In doing so, the Court of Appeal held that Art 34(2)(*a*)(*iii*) of the Model Law gave the Singapore courts the jurisdiction to hear and determine the setting-aside application. The Court of Appeal held, further, that Art 34 is "intended to prescribe an exhaustive mechanism in relation to the setting aside of *all* types of awards" [emphasis added] (at [80]). I consider this authority binding on me that investment-treaty arbitration is "international commercial arbitration" within the meaning of Art 1(1) of the Model Law.

67 This is the result also of the Canadian case of *The United Mexican States v Metalclad Corporation,* 2001 BSCS 664 ("*Metalclad*"), an authority on which the defendant relies. In *Metalclad*, the Supreme Court of British Columbia considered an application to set aside an award issued in an arbitration under an investment treaty. Mexico argued that the British Columbia's arbitration legislation, which is modelled on the Model Law, did not apply to the arbitration because it arose out of a regulatory relationship rather than a commercial one. To determine this question, Tysoe J took as his starting point Art 1(1) of the Model Law and its footnote, as it appeared in the legislation. He noted that there was an express reference to "investment" and held that the phrase "relationships of a commercial nature" extended to a relationship of investment. He held, further, that the arbitration in *Metalclad* arose out of an investment. The subject-matter of the dispute was the investment which Metalclad made in Mexico when it acquired a Mexican company and constructed a landfill facility there. The

arbitration arose out of that relationship between them and was therefore within the scope of the Art 1(1) read with the footnote (*Metalclad* at [44]).

68 This broad interpretation of Art 1(1) also has academic support. Professor August Reinisch in the chapter "Enforcement of Investment Treaty Awards" in *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Katia Yannaca-Small ed) (Oxford University Press, 2nd Ed, 2018) relies on the word "investment" in the footnote to Art 1(1) to express the view that an arbitration under an international investment treaty falls within the scope of the Model Law even though it takes place between a state and a private party and may touch upon sovereign interests (at para 29.07):

> The New York Convention permits states to make a reservation to the effect that they apply the Convention 'only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration'. One might question whether investment awards can be qualified as awards in 'commercial disputes' for these purposes, since – a form of mixed arbitration between states and private parties – BIAT arbitration in particular often touches upon sovereign interests and in effect leads to judicial review of state acts … the 1985 UNCITRAL Model Law on International Commercial Arbitration contains a wide definition of the notion 'commercial arbitration', which expressly includes a reference to 'investment'. Thus, *for the purposes of the Model Law, investment awards should be viewed as awards should be viewed as awards in 'commercial disputes'. This view was shared by national courts in set aside proceedings concerning investment awards rendered pursuant to the UNCITRAL Arbitration Rules.* [emphasis added]

69 If I had had to decide the question, therefore, I would have considered myself bound by *Lesotho CA* and held in favour of the defendant that the Vedanta Arbitration does fall within the scope of the Model Law.

Arts 5 and 19 of the Model Law

70 I agree with the defendant that the starting point on this question is Art 5 of the Model Law.[38] The Court of Appeal in *Sun Travels* ([56] *supra*) adopted the same approach. It first considered whether the declaratory relief sought would be contrary to Art 5 of the Model Law because the application was made in the context of arbitration: at [132]–[134].

71 Article 5 of the Model Law provides as follows:

> Article 5. Extent of court intervention
>
> In matters governed by this Law, no court shall intervene except where so provided in this Law.

72 The defendant argues that the Vedanta tribunal made the VPOs in the exercise of its procedural powers under Art 15(1) of the UNCITRAL Rules and Art 19(2) of the Model Law. Article 19(2) confers upon the Vedanta tribunal broad statutory powers on procedural matters in an arbitration.[39] All such matters, including the subject-matter of the VPOs, are therefore matters governed by the Model Law within the meaning of Art 5.[40] Article 5 therefore deprives the court of the power to grant the declaratory relief which the plaintiff seeks. Further, granting the declarations sought is an intervention in the arbitration, also impermissible under Art 5.

73 The plaintiff submits in response that the subject-matter of the declaratory relief which the plaintiff seeks is the obligation of confidentiality in

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38 Notes of Argument, 4 October 2019, p91(2) to 81((10)

39 Notes of Argument, 24 February 2020, p15(19) to 15(32)

40 Defendant's Skeletal Submissions at paras 45 and 46

arbitration. Confidentiality in arbitration is not governed by the IAA or the Model Law. It is governed by the common law, as the decision in *AAY and others v AAZ* [2011] 1 SLR 1093 ("*AAY*") makes clear. Further, Art 19 of the Model Law is neither a specific provision nor express regulation of the obligation of confidentiality in arbitration.[41] The subject-matter of the VPOs and of the declaratory relief which the plaintiff seeks is therefore not governed by the Model Law within the meaning of Art 5.[42] Further, granting the declarations which the plaintiff seeks will not amount to the court intervening in the Vedanta Arbitration within the meaning of Art 5. Article 5 therefore does not deprive the court of the power to grant the declaratory relief which the plaintiff seeks.

74 I begin by making two observations. First, the parties agree that there are limits on the court's power to grant declaratory relief in the context of international arbitration. They even agree on the test to ascertain those limits. The difference between the parties is on the proper characterisation of the subject-matter of the declaratory relief which the plaintiff seeks. The defendant characterises the subject-matter broadly: as an issue of procedure. The plaintiff, on the other hand, characterises the same subject-matter narrowly: as an issue of the obligation of confidentiality in arbitration. The answer on the preliminary question turns on which characterisation is correct.

75 Second, the plaintiff accepts that the Vedanta tribunal's procedural orders were made within its jurisdiction and binds the parties to the arbitration. This must be the case. The VPOs arise out of a proper exercise of the Vedanta

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41 Plaintiff's Reply Submissions at para 27

42 Plaintiff's Reply Submissions at para 26

tribunal's procedural powers under Art 15(1) of the UNCITRAL Rules.[43] Further, the plaintiff accepts the VPOs as valid, even though it submits that the Vedanta tribunal exceeded its jurisdiction when deciding VPO 3 by taking it upon itself to develop and extend the common law of Singapore. I have rejected this argument for the reasons I give below at [134] to [161]. Nevertheless, the point for present purposes is that the plaintiff does not go so far as to argue that this point alone frees the plaintiff from the Vedanta tribunal's procedural orders.

76 I begin my analysis by noting that Art 5 of the Model Law does not operate to deprive the court of power to grant declaratory relief for *all* purposes in *all* matters related howsoever to arbitration. It does so if and only if the two conditions found within it are satisfied:

(a) first, if the declaration sought is on a matter *governed* by the Model Law; and

(b) second, if granting the declaration amounts to the court *intervening* in such a matter.

77 I make a general point on both elements before discussing each element in turn.

(1) The plaintiff offers an undertaking

78 I had a serious initial concern about the plaintiff's application. The concern was that granting the plaintiff the declaratory relief it seeks would mean that the plaintiff could ignore the VPOs without consequence, even while the

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43 Muhammed Ismail Bin KO Noordin's 1st Affidavit, MI-2, Tab 25 at p21

VPOs remained in force in the Vedanta Arbitration. Enabling the plaintiff to do that would, to my mind, clearly amount to intervening in the Vedanta Arbitration in a matter governed by the Model Law. Further, granting either declaration would mean that the plaintiff would face no civil liability in Singapore law for making cross-disclosure despite the Vedanta tribunal's rejection of the plaintiff's requests for permission under VPO 3 in VPO 6 and VPO 7 and without a fresh application under VPO 3. It was also common ground that para 129.3 of VPO 3 (see [23] above) does not operate as an injunction restraining cross-disclosure. The plaintiff would therefore not even incur any procedural liability in the Vedanta Arbitration by ignoring para 129.3 of VPO 3.

79 To address my concern, counsel for the plaintiff, Mr Cavinder Bull SC ("Mr Bull") offered the plaintiff's undertaking that – if I were to grant the plaintiff the declaratory relief that it seeks – it would take the declaration back to the Vedanta tribunal and argue there that the Vedanta tribunal ought to reconsider and revise the VPOs in light of my declarations as to Singapore law.[44] In other words, the plaintiff was prepared to undertake not to act unilaterally or pre-emptively by relying on my declarations alone to make cross-disclosure, thereby bypassing the Vedanta tribunal entirely. It is on the basis of this undertaking that I analyse the requirements of Art 5 of the Model Law.

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44 Notes of Argument, 7 October 2019, p109(30) to 109(12)

(2) Does this application concern a matter governed by the Model Law?

80 For the reasons which follow, I accept the plaintiff's submission that the subject-matter of the VPOs and of the declaratory relief which it seeks is not governed by the Model Law within the meaning of Art 5.

81 I begin by accepting that Art 19(2) of the Model Law is an express provision *governing* (to use the language of Art 5) or *regulating* (to use the language of *Sun Travels* ([56] *supra*)) the entire domain of procedure in arbitration. It is true that, when the Vedanta tribunal issued the VPOs, it was exercising the broad procedural power granted to it under Art 15(1) of the UNCITRAL Rules. And it is true that Art 19(2) of the Model Law places those very procedural powers squarely within the domain of the tribunal. But I do not accept that a broad inquiry at that high a level of generality suffices to conclude that the subject-matter of the declaratory relief which the plaintiff seeks is a matter governed by the Model Law within the meaning of Art 5. The inquiry is more subtle than that.

82 Article 19(2) of the Model Law may place all matters of procedure within the domain of the Vedanta tribunal. But the plaintiff has, as it is entitled to, framed both declarations to ask questions of substantive Singapore law rather than on matters of procedure in arbitration. Those questions are: (i) whether the general obligation of confidentiality in arbitration extends to investment-treaty arbitration; and (ii) whether the plaintiff is at liberty to cross-disclose the documents in the Vedanta Arbitration, either because the documents come within a general principle of transparency in investment-treaty arbitration or within an exception to a general obligation of confidentiality in investment-treaty arbitration. The matter on which the plaintiff seeks declaratory relief,

properly characterised, is the question of confidentiality under substantive Singapore law. That is not a matter governed either by the IAA or by the Model Law within the meaning of Art 5.

83 Given this finding, it is not necessary for me to consider the second element of Art 5 *ie*, whether granting the declaratory relief which the plaintiff seeks amounts to intervening in the arbitration contrary to Art 5. I nevertheless to do so as additional support for my decision.

(3) Does the present application constitute an intervention by the court?

84 On the second element of Art 19(2) of the Model Law, the plaintiff submits that the declaratory relief it seeks in this application will have no direct effect on the Vedanta tribunal's procedural orders. The plaintiff disavows any intention to invite the court to encroach on the Vedanta tribunal's domain. The effect of a declaration, if granted, will merely be to declare judicially an answer to a substantive question on Singapore's law of arbitration. For that declaration to have any effect on the VPOs, the plaintiff will have to – and intends to – take the declaration back to the Vedanta tribunal as a basis to invite it to reconsider and revise the VPOs. It is well within the Vedanta tribunal's jurisdiction to do that[45] (see [48]–[50] above). By undertaking to take the declarations back to the Vedanta tribunal, the plaintiff is respecting fully the Vedanta tribunal's mastery of its own procedure.

85 The defendant says that granting the declaratory relief amounts to the court intervening with the Vedanta tribunal's procedural orders. In support of

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45 Notes of Argument, 24 February 2020, p27(12) to 27(20)

its argument, the defendant relies on an excerpt in *Singapore International Arbitration: Law and Practice* (David Joseph QC and David Foxton QC gen eds) (LexisNexis, 2014) to argue that the only proper course for the plaintiff is to ask the Vedanta tribunal to reconsider its earlier decision and not to invite this court to decide a matter which the Vedanta tribunal has already decided (at 210):[46]

> 5.3 If a party is dissatisfied with procedural orders or directions made by the tribunal there exists no right to have the order or direction set aside by the Singapore courts. That is for two reasons. First, Article 5 of the Model Law provides that '*In matters governed by this Law, no court shall intervene except where so provided in this Law*', and … Article 19(2) provides that the tribunal may conduct the arbitration in such manner as it considers appropriate (subject to contrary agreement of the parties, and to the terms of Model Law). Secondly, procedural orders are not an 'award' within the meaning of Article 34 of the Model Law or s 24 of the IAA, and therefore cannot be set aside under those provisions.
>
> 5.4 **Where a party is dissatisfied with procedural orders or directions made by the tribunal, the proper course is to invite the tribunal to reconsider its decision**. If the making of the disputed orders or directions is to be relied upon as a ground for challenging the eventual Award, it will usually be necessary for the disaffected party to clearly state its objections at the time, for the right to complain later may otherwise be lost by waiver.
>
> [emphasis in original in italics; emphasis added in bold]

86 This passage, however, merely states the uncontroversial proposition that a tribunal remains entitled to reconsider a procedural order any time before it becomes *functus officio*. The plaintiff accepts that. This proposition does not respond to the plaintiff's submission that the declaratory relief is intended

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46 Defendant's Skeletal Submissions at para 31

merely to be a first but necessary step to inviting the Vedanta tribunal itself to reconsider and revise the VPOs.

87 In *Sun Travels* ([56] *supra*), the Court of Appeal upheld the High Court's decision to grant the declaratory relief sought by the applicant, in the terms described at [57] above. The defendant argues that the decision in *Sun Travels* can be distinguished on two grounds. First, the arbitration in *Sun Travels* had concluded. The final award had been rendered and the tribunal had become *functus officio*. The declaratory relief which the applicant sought was aimed only at regulating the conduct of its opponent in civil proceedings in the Maldives. Second, the declaration sought in *Sun Travels reiterated* the decision of the tribunal rather than undermining or contradicting it. On both grounds, the declarations did not intervene in the arbitration. Both grounds are absent in this case.

88 *Sun Travels* is a good example of when relief granted by a court does not intervene with an arbitration. But *Sun Travels* does not stand for the proposition that granting declaratory relief does not amount to intervening in the arbitration *only* if the arbitration has concluded or *only* if the relief reiterates a decision of the tribunal. It is important to appreciate that *Sun Travels* concerned an award, not a procedural order. The finality which attaches to an award makes it far more difficult for a party to seek a declaration that may have the effect of undermining or circumventing the award. The present case is clearly different, as I explain.

89 For the same reason, the defendant's reliance on the English case of *K/S A/S Bill Biakh and K/S A/S Bill Biali v Hyundai Corporation* [1988] 1 Lloyd's Rep 187 is misplaced. There, the applicant sought a declaration or an injunction

to correct a procedural order by the tribunal which they alleged to be wrong. In other words, the applicants explicitly sought to *nullify* the procedural order. Along with *The Smaro* ([42] *supra*) this line of cases merely confirms that the courts do not have the power to grant relief which nullifies a tribunal's procedural orders. This is also the position in Malaysia (see *Ranhill Bersekutu Sdn Bhd v Safege Consulting Engineers & Anor* [2004] 3 MLJ 554) and in Singapore (see [38] above).

90 It is true that the IAA and the Model Law make no provision for a party to nullify a procedural order. But the absence of such a provision cannot be determinative of whether the plaintiff is barred from applying for declaratory relief which may, only indirectly, have that effect. The court's declaratory jurisdiction is, after all, an "exception to the general principle" that a claim must be founded on a reasonable cause of action, given that declaratory relief is generally superfluous where a cause of action subsists (*Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR(R) 112 ("*Karaha Bodas*") at [13], citing *Gouriet v Union of Post Office Workers* [1978] AC 435 at 501 *per* Lord Diplock). It is therefore necessary to enquire specifically whether granting the declaratory relief which a plaintiff seeks is barred by Art 5 of the Model Law.

91 In my view, granting the declaratory relief which the plaintiff seeks would not amount to the court to intervening in the Vedanta Arbitration contrary to Art 5. The plaintiff, by this application, is merely asking the court to decide a question of Singapore's substantive law on arbitration as any litigant could, on the ordinary principles which apply to the exercise of the court's declaratory jurisdiction.

92 In fact, as Mr Yeap fairly conceded, quite apart from this application, it remains open for the plaintiff to make a new application to the Vedanta tribunal under the liberty to apply provision in VPO 3 seeking exactly the same relief which the Vedanta tribunal has already rejected in the plaintiff's past applications (see [23] above).[47] And I have found that the tribunal is even at liberty to reconsider and revise VPO 3, it being a mere procedural order. If all that is correct – which it is – bringing the application which is now before me to my mind cannot amount to inviting the court to intervene in the arbitration simply because it may provide the plaintiff an additional line of argument in a renewed application of that type. Given the plaintiff's undertaking, the declarations if granted will have no effect in the Vedanta Arbitration unless the plaintiff is able first to persuade the Vedanta tribunal to reconsider the VPOs and even then, only if it is also able to persuade the Vedanta tribunal to revise the VPOs. The final decision on both issues is and continues to be ultimately the Vedanta tribunal's to make.

93 The only way in which the plaintiff's application could amount to intervening in the arbitration if it were the plaintiff's intent to rely on the declarations to ignore the VPOs and to act unilaterally. The plaintiff has addressed that concern of mine by its undertaking. This is therefore distinguishable from the situation in *L W Infrastructure* ([58] *supra*), where the substantive effect of granting the declaration sought would have been to *nullify* an *award*.

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47 Notes of Argument, 7 October 2019, p43(26) to 44(9)

(4) Indirect intervention

94 I also do not consider that "intervene" within the meaning of Art 5 of the Model Law can be interpreted so broadly as to encompass the sort of *indirect* impact on an arbitration that the present application, if granted subject to the plaintiff's undertaking. I give two examples to illustrate that.

95 First, assume that the Cairn Arbitration were seated in Singapore rather than in the Netherlands. Assume further that, even before the Cairn tribunal had been invited to consider a cross-disclosure regime, the Vedanta tribunal had decided that the general obligation of confidentiality in arbitration under Singapore law extended to investment-treaty arbitration. Assume then that the plaintiff brings an application against both Cairn and Vedanta to this court, seeking the same declaratory relief which it does now: (a) in order to place the declarations before the Cairn tribunal when inviting it to decide on the cross-disclosure regime for the first time; and (b) in order to place the declarations before the Vedanta tribunal when inviting it to reconsider and revise the VPOs. Could Vedanta credibly argue that the court had no power to grant the relief sought because it would amount to the court intervening in the Vedanta Arbitration contrary to Art 5 of the Model Law?

96 Second, assume that the application for declaratory relief before me was brought – not by the parties to the Vedanta Arbitration – but by two parties wholly unrelated to the Vedanta Arbitration who also have a dispute under the same BIT and who have not yet even commenced arbitration but intend to do so shortly in Singapore. Assume further that in pre-arbitration correspondence, these two parties have taken opposing positions on whether the proceedings in their intended arbitration would be subject to a general obligation of

confidentiality under Singapore law. Could it be credibly argued that the court has no power to grant the declaration because it would amount to the court intervening in the Vedanta Arbitration by giving Vedanta a legal basis on which to invite the Vedanta tribunal to reconsider and revise the VPOs?

97 To my mind, it would be absurd to argue that the prohibition on a court intervening in an arbitration in Art 5 of the Model Law deprives the court of the power to grant the declarations in both illustrations. I find force in the argument advanced by Mr Bull, that the logical conclusion of the defendant's argument on power leads to an absurd result. The result is that the court has the power to grant the declaratory relief which the plaintiff seeks on the application of the whole world except for – and except *only* for – the plaintiff. That suggests to me that the real issue on this application is not whether the court has the power to grant a declaration in these circumstances but whether the power should be exercised in favour of the plaintiff in these circumstances.

98 The defendant argues that the result of its analysis as argued by Mr Bull is not absurd. The plaintiff is the *only* party in the whole world in whose favour this court lacks the power to grant this declaratory relief because the plaintiff chose to put this very question of law before the Vedanta tribunal and invited them to decide it in making VPO 3.[48]

99 This does not change my analysis. The VPOs are interlocutory and procedural. They carry no finality of any kind whatsoever. They are incapable of creating an issue estoppel. Issue estoppel is one of three overlapping

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48 Notes of Argument, 4 October 2019, p97(23) to 97(24)

principles which together comprise the doctrine of *res judicata* (*The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 at [98], citing *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [17]–[25]). The rationale of the doctrine of *res judicata* is to uphold finality in dispute-resolution by ensuring that a litigant is not twice vexed in the same matter. A procedural order does not implicate that rationale.

100 There is accordingly no procedural bar to the plaintiff rearguing before a court a question of law which the tribunal decided in VPO 3. Furthermore, the Vedanta tribunal is accordingly not barred from reconsidering and revising its answer on this question of law. The defendant's point, to my mind, goes not to towards power but to the discretionary question of whether granting the declaratory relief is justified or necessary (see [173] below).

Conclusion on the preliminary question

101 For the reasons I have given, therefore, I answer the preliminary question in the plaintiff's favour. I do not consider the plaintiff's application to constitute an abuse of process or a collateral attack on the VPOs on any ground advanced by the defendant. The declaratory relief which the plaintiff seeks (see [3] above) does not engage a matter governed by the Model Law and does not amount to inviting the court to intervene in the arbitration. The VPOs create no issue estoppel. The mere fact that the relief restates a question of law which the plaintiff put before the Vedanta tribunal and which it answered in VPO 3 does not make this application in and of itself an abuse of process or an impermissible collateral attack.

102 I consider this to be the position whether or not the Model Law applies to the Vedanta Arbitration. As Mr Bull accepts, the principle of minimal curial intervention applies to the Vedanta Arbitration even if the Model Law, in strict terms, does not.

103 Finally, I note in passing a concern raised by Mr Yeap as to the logical consequence of finding that the plaintiff's application is not barred as an abuse of process or a collateral attack. It is that this approach might lead to a deluge of applications from dissatisfied parties in arbitration seeking declaratory relief aimed at challenging a tribunal's procedural orders by targeting questions of law underlying those orders.

104 I find this concern to be overstated. The procedural order in this case rests on a single question of substantive Singapore law as the *lex arbitri.* It is also arguably a novel question of Singapore law. That is a rare confluence of factors. The vast majority of procedural orders do not raise questions of law, let alone substantive questions, let alone substantive and arguably novel questions. Further, my decision on the preliminary question does not mean that an applicant will secure the declaratory relief. It simply means that the court can entertain the application. The applicant is not absolved of the duty to satisfy the requirements which apply to all litigants seeking declaratory relief. Those requirements, coupled with the costs consequences of a failed application, are in my view a sufficient deterrent to prevent a deluge of similar applications.

105 I turn now to the discretionary question.

The discretionary question

106 The court's power to grant declaratory relief is discretionary (*Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30 at [74]). The principles governing the exercise of that discretion are well-established. In *Karaha Bodas* ([90] *supra*), the Court of Appeal set out the following requirements (at [14]):

(a) the court must have jurisdiction and power to award the remedy;

(b) the matter must be justiciable;

(c) the exercise of the discretion must be justified by the circumstances of the case;

(d) the plaintiff must have *locus standi* and there must be a real controversy for the court to resolve;

(e) any person whose interests might be affected by the declaration must be before the court; and

(f) there must be some ambiguity or uncertainty about the issue in respect of which the declaration is asked for so that the court's determination would have the effect of laying such doubts to rest.

107 In addition, the remedy of a declaration should also provide "relief" in a real sense (*Salijah bte Ab Latef v Mohd Irwan bin Abdullah Teo* [1995] 3 SLR(R) 233 at [17]). In other words, a declaration must serve some useful or practical purpose (*Tok Ee Cheng v Jardin Smith International Pte Ltd* [2020] SGHC 111 at [10]).

108 These requirements show that – although the court has a wide discretionary power to grant declaratory relief – the discretion must be exercised cautiously. This is because, "[i]f employed incautiously it might encourage people unnecessarily to claim declarations of their rights, involving unjustifiable, costly litigation and causing excessive embarrassment for defendants" (*The Declaratory Judgment* at para 4.015).

109 Mr Bull, in the course of his oral submissions, addressed these requirements for declaratory relief. Mr Yeap did not seriously challenge the plaintiff's *locus standi* and the justiciability requirement, either in his written or oral submissions. As I have mentioned, he also took no issue with the court's jurisdiction to grant the relief.[49]

110 I therefore concentrate my analysis on the requirements which are in contention: (a) whether there is an ambiguity or uncertainty to be resolved; (b) whether the there is a real controversy for the court to resolve; and (c) whether the circumstances of the case justify the exercise of the discretion. Before doing so, I make some observations on the obligation of confidentiality in arbitration under Singapore law.

The law on confidentiality in arbitration

111 Confidentiality in arbitration remains a significant attraction of arbitration over litigation. The IAA and the Model Law, however, do not contain any provision imposing an obligation of confidentiality on the parties to an international arbitration. In Singapore law, the obligation of confidentiality

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[49] Notes of Argument, 4 October 2019, p56(16) to 56(29)

arises at common law. Chan Seng Onn J's decision in *AAY* ([73] *supra*) has established that, unless the parties agree otherwise, a general obligation of confidentiality arises in arbitration under Singapore law. This obligation is imposed by Singapore law and does not arise from the parties' agreement *eg,* as an implied term of their arbitration agreement (*AAY* at [54] and [55]).

112 This general obligation of confidentiality is, of course, subject to exceptions. Although the list of exceptions is not closed, a number are well-established. These are: (a) where there is express or implied consent to disclosure; (b) where disclosure is permitted by the tribunal order, or with the leave of court; (c) where disclosure is reasonably necessary for the protection of the legitimate interests of a party to the arbitration; and (d) where the interests of justice require disclosure. Disclosure in the public interest is a possible addition to this list of exceptions (*AAY* at [64], citing *John Forster Emmott v Michael Wilson & Partners* [2008] 2 All ER (Comm) 1931 ("*Emmott*") at [107] *per* Lawrence Collins LJ).

Ambiguity or uncertainty

113 On the requirement that a declaration must resolve some ambiguity or uncertainty, the plaintiff submits that its application raises a novel issue of law which has yet to be considered, let alone resolved, by the Singapore courts. The question is whether the general obligation of confidentiality which Singapore law imposes on the parties to a private arbitration extends to investment-treaty arbitration.

114 The defendant argues that the plaintiff's application does not raise a novel question of law. Chan J in *AAY* drew no distinction between a private

commercial arbitration and investment-treaty arbitration. The defendant also relies on the decision of Kan Ting Chiu J in *Myanma Yaung Chi Oo Co Ltd v Win Win Nu and another* [2003] 2 SLR(R) 547 ("*Myanma*") to the same effect.

115 I am minded to give the benefit of the doubt to the plaintiff on this requirement. The question of law raised in this application is at least *arguably* novel. To my mind, that suffices to satisfy this requirement.

116 *AAY* ([73] *supra*), as the plaintiff points out, did not arise from an arbitration under an investment treaty. Therefore, the precise question of law which the plaintiff poses by this application did not arise in *AAY* and was therefore not argued before Chan J. Further, while *Myanma* did arise from an arbitration under an investment treaty,[50] it rested its finding as to the existence of an obligation of confidentiality on an implied term in law. Chan J rejected this analysis in *AAY.* He pointed out that *Myanma* had been decided before *Emmott* ([112] *supra*) and that Kan J was not referred to the Privy Council's deprecation of the implied term analysis in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 104 (*AAY* at [50]).

117 It is true, as the defendant submits, that the decision in *AAY* held that Singapore's common law of arbitration imposes a general obligation of confidentiality on arbitration in Singapore generally *ie*, without drawing any distinction between private arbitration and investment-treaty arbitration. But it is certainly true that the considerations which apply to a private arbitration do

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50 Notes of Argument, 7 October 2019, p15(17) to 17(23)

not apply with equal force to investment-treaty arbitrations. The latter raises important issues of public interest and public policy involving a sovereign which is ultimately accountable to its people.[51] A different approach may well be warranted in investment-treaty arbitration, given the different stakeholders and the sovereign and public interests implicated. The significance of these distinctions were not in contention in *AAY* and were not argued in *Myanma*.

118 I therefore consider that the plaintiff has satisfied this requirement for declaratory relief.

Real controversy

119 On the requirement that there be a real controversy for the court to consider, the defendant argues that the declaratory relief which the plaintiff seeks has been rendered moot. The hearings in both the Vedanta Arbitration and the Cairn Arbitration are now concluded.[52] There is no suggestion that the plaintiff has made any application to the Cairn tribunal to receive and consider documents cross-disclosed from the Vedanta Arbitration,[53] let alone that the Cairn tribunal is willing to hold any further hearings or to receive any further submissions or evidence without a hearing.

120 The plaintiff responds that the declaratory relief it seeks will nevertheless resolve a real controversy. Even though hearings in both arbitrations have concluded, it remains possible for the Cairn tribunal to receive

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51 Plaintiff's Skeletal Submissions at para 64

52 Deepak Kumar's 1st Affidavit at paras 10 and 13

53 Defendant's Skeletal Submissions at para 72

further evidence or submissions.[54] And it remains possible for the Vedanta tribunal to deal with an application to reconsider and revise the VPOs.

121 I accept the plaintiff's submission. It is not correct to say that the declaratory relief which the plaintiff seeks will serve no practical purpose or address no real controversy simply because the hearings in both Arbitrations have concluded. I say so for two reasons.

122 First, the window of opportunity for the plaintiff to secure permission in the Vedanta Arbitration to make cross-disclosure and in the Cairn Arbitration to receive that cross-disclosure has not yet closed. Neither the Vedanta tribunal nor the Cairn tribunal has issued its final award. A tribunal is not *functus officio* until its final award is issued and published to the parties (*Anwar Siraj and another v Teo Hee Lai Building Construction Pte Ltd* [2007] 2 SLR(R) 500 at [45]).

123 Further, Art 29(2) of the UNCITRAL Rules – which are the rules governing both arbitrations – allow each tribunal, "if it considers it necessary owing to exceptional circumstances, to decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made". Art 24(3) empowers the tribunal, at "*any time during the arbitral proceedings* … [to] require the parties to produce documents, exhibits or other evidence within such period of time as the tribunal shall determine" [emphasis

54 Notes of Argument, 21 February 2019, p16(1) to 16(5)

added]. Indeed, the Cairn tribunal has already exercised these very powers once: to hold an additional hearing in the Cairn Arbitration in December 2018.[55]

124 It does not take the defendant very far to observe that the plaintiff has produced no evidence that there are to be further hearings in the Cairn Arbitration to receive cross-disclosure. This puts the cart before the horse. Until the plaintiff secures the declaratory relief which it seeks by this application, any such steps in the Cairn Arbitration would be premature and speculative.

125 Second, I agree with the plaintiff that a real controversy will remain even after the Cairn tribunal becomes *functus officio*. Cross-disclosure may be necessary in post-award litigation over the Cairn award, whether to set it aside or to enforce it. The specific category of documents which the plaintiff has listed in its schedule to this application (see [27] above) relate to jurisdictional issues. Cross-disclosure of documents relating to jurisdiction may be of assistance in post-award litigation in any country which adopts a *de novo* standard of review on jurisdictional challenges. That is the approach in Singapore (*PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International NV and others and another appeal* [2014] 1 SLR 372 at [163], citing *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [30], and affirmed in *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [42]).

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55 Plaintiff's Skeletal Submissions at para 71

126 On this requirement therefore, I accept the plaintiff's argument. The Vedanta tribunal retains the power to order cross-disclosure and the Cairn tribunal retains the power to receive it. In any event, the documents may be of use in post-award litigation arising from the Cairn Arbitration. It thus cannot be said that the declarations which the plaintiff seeks are moot.

Justified by the circumstances of the case

The power of a tribunal to develop Singapore's substantive common law

127 A critical plank of the plaintiff's case on the discretionary question is that declaratory relief is justified by the circumstances of the case. The plaintiff complains that the Vedanta tribunal in VPO 3 developed Singapore's common law of arbitration beyond *AAY* ([73] *supra*) by extending the application of the general obligation of confidentiality for which *AAY* is authority to *all* arbitrations, including investment-treaty arbitrations. Mr Bull's cause for complaint is that "arbitrators cannot develop the rules of the seat".[56] Put differently, he argues that the Vedanta tribunal went beyond its mandate by developing Singapore's law of arbitration in this way when the Singapore courts themselves have yet to pronounce on the issue. It follows that the court should grant the declaratory relief which the plaintiff seeks because such a novel question of law should not have been decided by the Vedanta tribunal.[57] The question can, and should, be determined *only* by the Singapore courts,[58] in whom the power to develop Singapore law *exclusively* resides.

128 I note that this argument has more than an impression of the afterthought to it. First, it is the plaintiff who put this very question to the Vedanta tribunal when it made its initial application for a cross-disclosure regime to be put in place. When it did so, it did not suggest to the tribunal that it was under any disability in answering the question in the fullness of the common law tradition.

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56 Plaintiff's Skeletal Submissions at para 41

57 Plaintiff's Skeletal Submissions at para 47

58 Plaintiff's Skeletal Submissions at paras 42 and 64

It is surprising that the plaintiff would choose to ask a question of the Vedanta tribunal which the plaintiff believed the tribunal was under a disability in answering. It is even more surprising that plaintiff, if it believed that, would not have explained to the Vedanta tribunal at that time the nature of the disability.

129 Furthermore, if the plaintiff was then of the view that the Vedanta tribunal was disabled from answering this question in the fullness of the common law tradition, I would have expected the plaintiff to ask the Vedanta tribunal to hold the Vedanta Arbitration in abeyance while it sought a declaration on this very question from the court. That the plaintiff did not do so suggests that the motive behind the application before me is an attempt to have a second bite of the cherry. None of this, of course, is intended as criticism.

130 In any event, the defendant's response to the plaintiff's argument on this requirement is straightforward. The Vedanta tribunal did not develop Singapore law as the plaintiff complains. *AAY* draws no distinction between private arbitration and investment-treaty arbitration. Even if the Vedanta tribunal did develop Singapore law, a tribunal is perfectly entitled and empowered to do so. Finally, even if the tribunal fell into error in developing Singapore law, an error of law is no ground for a dissatisfied party to challenge an *award* under the IAA or the Model Law. *A fortiori*, it is no ground for a party to challenge a mere procedural order and to do so in this indirect way.[59]

131 The Vedanta tribunal made the VPOs in the exercise of its procedural powers. But in doing so, it rested its decision, albeit only in part, on its view of

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[59] Notes of Argument, 7 October 2019, p53(4) to 53(19)

Singapore's substantive law *ie,* its law of arbitration.[60] I assume in the plaintiff's favour that the Vedanta tribunal developed Singapore's law of arbitration in doing so. The plaintiff says that that justifies the court's intervention by declaration. The defendant says it does not. The question which the parties raise on this limb of the argument therefore is whether a tribunal is entitled and empowered to develop Singapore's law of arbitration. It is to this issue which I now turn. I first consider a tribunal's power to develop Singapore's substantive common law before considering whether its power to develop Singapore's law of arbitration is any different.

(1) The legal framework for an international investment-treaty arbitration

132 Singapore's arbitration law governs the Vedanta Arbitration as the *lex arbitri*. There are two sources of the *lex arbitri* in Singapore. The first is *statute ie,* the AA or the IAA and the Model Law as applicable. The second source is the common law. The general obligation of confidentiality in Singapore-seated arbitration is an obligation which has developed at common law (see [111] above).

133 Mr Bull submits that a distinction must be drawn between an issue which arises under the law applicable to resolving the substantive dispute between the parties and an issue which arises under the *lex arbitri*, as in the present case. Mr Bull submits that the *lex arbitri* is the law which the courts use to hold tribunals to account. He submits that, because the *lex arbitri* operates to constrain a tribunal, a tribunal cannot develop the *lex arbitri* and vary those constraints. A

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60 Notes of Argument, 21 February 2019, p34(24) to 34(27)

tribunal can do no more than simply ascertain and apply the *lex arbitri* as it exists.[61] I consider this argument by a number of steps.

(2) A tribunal's role

134 I first consider the role of an adjudicator in resolving a substantive dispute between the parties in the common law tradition. I use the general term "adjudicator" deliberately. In my view, an adjudicator fulfils either or both of two roles:

(a) One role is to adjudicate and determine the dispute before him on the merits. This is necessarily a composite task. It entails finding the facts, ascertaining the law, developing the law if necessary and applying the law as ascertained or developed to the facts as found to resolve the parties' dispute. I call this the "Adjudicatory Role".

(b) Another role is to contribute to a coherent *corpus* of common law by generating judgments recording the adjudicator's legal reasoning which are then published and form the basis for other decisions, either as binding or persuasive authority. I call this the "Precedential Role".

135 There can be little doubt that a common law judge performs both an Adjudicatory Role as well as a Precedential Role. A judge has a duty to decide cases put before him by applying the relevant legal principles to the facts at hand. And the reasoned grounds for the judge's decision contribute to the *corpus*

[61] Notes of Argument, 21 February 2019, p65(15) to 66(2) and 68(1) to 68(10)

of common law and have binding or persuasive value as precedent in accordance with the doctrine of *stare decisis*.

136 In fulfilling the Precedential Role, it is now universally acknowledged that a common law judge makes law. After all, Sir William Blackstone's declaratory theory of law – namely, the hypothesis that judges do not make law, but rather discover and hence declare what the law is – has been characterised as a "fiction" by the Court of Appeal in *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 at [241]. Lord Reid, in his famous extra-judicial lecture to the Society of Public Teachers of Law, "The Judge as Lawmaker" (1972) 12 JSPTL 22, went so far as to describe the declaratory theory as a "fairy tale". The purpose of the fairy tale is to disguise the very real law-making power that judges wield. The modern view of the common law has abandoned the fairy tale.

137 It remains the case, however, that a common law judge makes law within strict limits: by developing the common law incrementally, by analogy with past decisions, in accordance with professional, institutional and constitutional constraints. As Lord Reed PSC put it in *Regina (Elgizouli) v Secretary of State for the Home Department (Information Commissioner and others intervening)* [2020] 2 WLR 857 at [170]:

> … I fully accept that the common law is subject to judicial development, but such development builds incrementally on existing principles. That follows from two considerations. The first is that judicial decisions are normally backward-looking in the sense that they decide what the law was at the time which is relevant to the dispute between the parties. In order to preserve legal certainty, judicial development of the common law must therefore be based on established principles, building on them incrementally rather than making the more dramatic changes which are the prerogative of the legislature. Following that approach, new rules may be introduced or existing rules

> may be reformulated or departed from, but the courts continue to apply principles which formed an established part of the law at the time of the events in question. The judges are then faithful to their oath to 'do right to all manner of people after the laws and usages of this Realm'. Secondly, that constraint on judicial law-making is also compatible with the pre-eminent constitutional role of Parliament in making new law, and with the procedural and institutional limitations which restrict the ability of litigation before the courts to act as an engine of law reform.

138 Because the common law develops incrementally and organically – by evolution rather than revolution – a common law judge makes law by filling gaps and extending established principles, not by creating new areas of the law out of whole cloth. This is the flexible and pragmatic way in which the common law copes with changes in society and effects change in the law without defeating settled expectations and with retrospective effect. Bottom up rather than top down. As Richard Malanjum CJ (Sabah and Sarawak) similarly put it in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 at [39(v)], observing that legal adjudication involves a gap-filling function:

> … It is now universally recognized that the role of a judge is not simply to discover what is already existing. **The formal law is so full of ambiguities, gaps and conflicts that often a judge has to reach out beyond formal rules to seek a solution to the problem at hand**. In a novel situation a judge has to reach out where the light of '*judicial precedent fades and flicker and extract from there some raw materials with which to fashion a signpost to guide the law*'. When the rules run out, as they often do, a judge has to rely on principles, doctrine and standards to assist in the decision. When the declared law leads to unjust result or raises issues of public policy or public interest, judges would try to find ways adding moral colours or public policy so as to complete the picture and do what is just in the circumstances.
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> [emphasis in original in italics; emphasis added in bold]

139 A tribunal in an arbitration has no Precedential Role. A tribunal operates outside the doctrine of *stare decisis*. It is not bound as a matter of law by the

Court of Appeal. And there are no courts which its decisions bind as a matter of law. There is no formal system by which tribunals' awards, redacted or otherwise, are published and disseminated. In international commercial arbitrations especially, a tribunal has no Precedential Role for the obvious reason that disputes generally are confidential (see Lucy Ferguson Reed, "Lawmaking by Arbitrators" in *Evolution and Adaptation: The Future of International Arbitration* (ICCA Congress Series No 20, International Council for Commercial Arbitration) (Jean Engelmayer Kalicki and Mohamed Abdel Raouf, eds) (Kluwer Law International, 2019) ch 3).

140 This is not to discount the importance that a tribunal's awards may have in influencing other tribunals. Even though tribunals operate outside a doctrine of *stare decisis*, the increase in investment-treaty tribunals making their awards public has led to later tribunals referring to and engaging with the legal reasoning in previous awards. This has been described as tribunals practising a "*de facto* doctrine of precedent" (see Alec Stone Sweet, Michael Yunsuck Chung and Adam Saltzman, "Arbitral Lawmaking and State Power: An Empirical Analysis of Investor-State Arbitration" (2017) 8 J Int Disput Settl 579). For example, the Court of Appeal in *Lesotho CA* ([66] *supra*) described the point that domestic law defines and regulates an investor's acquired rights as being "well reflected in the *corpus of investment treaty case law*" [emphasis added] (at [105]).

141 A tribunal's only role is therefore the Adjudicatory Role. The entire and sole purpose of appointing a tribunal is to resolve a dispute in accordance with

the parties' agreement and the *lex arbitri*. Mr Bull accepts this.[62] In *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) ("*Waincymer on P&E"*), Professor Jeffrey Waincymer describes the arbitrator's role as an adjudicator (at 96):

> … It is then necessary to consider what the arbitrator must ultimately do. …
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> … As previously noted, Böckstiegel suggests that the 'fundamental duty of the arbitrators is to come to a reasoned decision on the claims put before them after giving the parties an equal and full opportunity to present their case'. Another way to describe deciding in an adjudicatory or judicial manner is to say it involves deciding the issues between the parties, after hearing arguments of the parties, considering the evidence (written and oral), taking account of the contract terms and trade usages and applying the applicable law or relevant rules. This is in contrast to simply determining what is 'fair' or applying discretion.
>
> … An adjudicatory function … is described as quasi-judicial in nature and involves making determinations of fact under applicable principles of evidence, including burdens and standards of proof and determining the implications of the facts so found under applicable principles of law. An adjudicatory function is essentially a rights-based rather than an interest-based function, and would be described by economists as a zero sum game whereby there is ultimately a winner and a loser on each defended claim and cross-claim.

Sundaresh Menon CJ, in his extra-judicial speech, "The Rule of Law and the SICC", at the Singapore International Chamber of Commerce Distinguished Speaker Series (10 January 2018)[63], also notes that "arbitration is designed to be *ad hoc* and confidential, and is predominantly concerned with resolving the specific disputes between the parties" (at para 28(c)).

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62 Notes of Argument, 21 February 2019, p21(15)

63 Accessible at https://www.sicc.gov.sg/docs/default-source/modules-dicument/news-and-article/b_58692c78-fc83-48e0-8da9-258928974ffc.pdf

142 A tribunal cannot fulfil its Adjudicatory Role without the power to apply legal principles to the facts at hand. Where a tribunal must apply a common law, and is faced with an ambiguity or a lacuna in that law, it is entirely within a tribunal's power to ascertain that principle, develop it in fullness of the common law tradition and to apply it to the facts as found. It is absurd to suggest that, every time a tribunal is faced with a gap in a common law which it must apply, it must throw its hands up in defeat and terminate its legal analysis. This approach does not reflect the reality of the common law. It also does not reflect the demands on arbitration as a dispute-resolution procedure.

143 As Professor Douglas Jones points out in his article, "Arbitrators as Law-Makers" (2018) 6(2) Indian Journal of Arbitration Law 18 at 19 and 28:

> In the strictest sense, arbitrators make '*hard law*' as their awards are binding on parties and are enforceable in law. They are also engaged in a '*softer variant of lawmaking*', which typically occurs in one of two situations. **In one situation, there is a '*gap*' or uncertainty in the legal issue which the courts have not resolved. Arbitrators fill that gap with their own reasoning.** In the other situation, parties have chosen arbitration precisely so that they are not bound by a particular set of national laws. The parties seek a private dispute resolution mechanism with a set of alternative legal rules, therefore providing arbitrators with the legitimacy to make laws.
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> …
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> International commercial arbitrators certainly do make law. They are often tasked with making crucial decisions on complex areas of law. **They espouse principles that are developed to fill gaps in national laws.** They are deeply involved in comparative law and create principles that are useful, or could be useful, to those involved in international commerce. …
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> [emphasis in original in italics; emphasis added in bold]

144 A tribunal in a Singapore-seated arbitration is entitled and empowered – I might even say duty-bound – to ascertain, develop and apply the principles of

a common law where that is necessary for it to resolve the dispute at hand. I say that for a number of reasons.

145 First, Singapore's *lex arbitri* gives a tribunal even wider latitude in deciding issues of law than it gives to a judge. Thus, in international arbitration, there is deliberately no provision to allow a party to appeal against an award on an error of law. An error of law is not even a ground for setting aside an award: "there is no right of recourse to the courts where an arbitrator has simply made an error of law" (*BLC and others v BLB and another* [2014] 4 SLR 79 ("*BLC v BLB"*) at [53]). Enforcing an award which rests on an error of law does not even conflict with Singapore's public policy within the meaning of Art 34(2)(*b*)(ii) of the Model Law. That is so even when the error is one of *Singapore* law (*Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [161]).

146 Second, even in domestic arbitration, a tribunal has wider latitude in deciding issues of law than a judge. Section 49 of the AA gives a dissatisfied party an avenue to appeal against an award to the High Court on a question of law. This is consistent with the court's "wider supervisory role in domestic arbitration" such that the court "will generally play a relatively more interventionist role in domestic arbitration as compared to international arbitration" (*NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [46] and [51]). Even then, a party can appeal on a question of law only with the agreement of parties or with the leave of court, and subject to the substantial restrictions contained in s 49(5) of the AA. Thus, a "question of law" within the meaning of s 49(1) of the AA is "a point of law *in controversy* which has to be resolved after opposing views and arguments have been considered. … If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law

there lies no appeal against that error for there is no question of law which calls for an opinion of the court" [emphasis added] (*Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [1993] 2 SLR(R) 208 at [7], in the context of the former s 28 of the AA). There are no such restrictions on the right of a litigant to appeal to the Court of Appeal against a judgment at first instance.

147 Finally, it is now widely acknowledged that so many tribunals are now developing the common law in so many disputes that it threatens the courts' ability to fulfil the Precedential Role. A number of jurisdictions have reacted to this threat by considering whether to allow a right of appeal on a point of law even in international arbitration. In England and Wales, the then Lord Chief Justice Lord Thomas of Cwmgiedd observed in his Bailii Lecture, "Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration" (9 March 2016)[64] that the increase in the number of disputes resolved in arbitration and the corresponding decrease in the number of disputes resolved in the English Commercial Courts, coupled with the limited right of appeal on a point of law under s 69 of the English Arbitration Act 1996 (c 23) (UK) (having effectively codified the principles articulated in *BTP Tioxide Ltd v Pioneer Shipping, The Nema* [1980] QB 547), "reduces the potential for the courts to develop and explain the [common] law". This, he says, has "provid[ed] fertile ground for transforming the common law from a living instrument into, as Lord Toulson put it in a different context, 'an ossuary'" (at para 22, citing *Kennedy v Charity Commission (Secretary of State for Justice and others intervening)* [2014] 2 WLR 808 at [133]).

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64 Accessible at https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf

148 This is a concern also in Singapore. In April 2019, the Minister of Law, Mr K Shanmugam confirmed that the Ministry of Law would consider introducing an opt-in mechanism under the IAA, allowing parties to appeal to the High Court on a question of law arising out of an award made in the proceedings. This was followed by a public consultation on amendments to the IAA in August 2019. Subsequently in February 2020, the Law Reform Committee published its *Report on the Right of Appeal against International Arbitration Awards on Questions of Law*, in which it proposes amending the IAA to make available the right of appeal by adopting and incorporating (with modifications) ss 49 to 52 of the AA.

149 All of this makes it clear that a tribunal does nothing exceptional in ascertaining the common law, developing it where necessary and applying it to resolve the dispute at hand.

150 This approach may be viewed as going too far. It could be said that this cedes control of the common law, a public good, to private adjudicators who are not bound by the professional, institutional and constitutional constraints under which state-appointed judges operate and who cannot be held accountable for exceeding those constraints, no matter how patently or egregiously. Mr Bull in the course of argument gave this example: if the doctrine of mistake did not exist at all in Singapore's common law of contract, can a tribunal introduce for the first time a doctrine of mistake in its award and apply it to resolve a dispute governed by Singapore law?[65]

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65 Notes of Argument, 21 February 2019, p21(7) to 21(15)

151 I consider this concern to be misplaced for three reasons. First, this is an extreme example that is unlikely to manifest in practice.

152 Second, even if a tribunal were to formulate an entirely new area of the common law out of whole cloth, the damage to the fabric of the common law is confined to that particular dispute. This is simply because the tribunal has no Precedential Role. And party autonomy means that the parties have no basis to complain so long as the tribunal has fulfilled its obligations to accord procedural justice to both parties before arriving at its decision. The narrow grounds available to set aside or refuse the enforcement of an award under the IAA and the Model Law attest to this quite clearly.

153 Third, tribunals do not exercise the power to develop the common law entirely unconstrained. Arbitrators "who are respected in the community for their professionalism and reasoned approach to the law" are appointed by parties "who trust that they will render a fair decision that is viewed as legitimate" (D Brian King and Rahim Moloo, "International Arbitrators as Lawmakers" (2014) 46(3) N Y Univ J Int Law Politics 875 at 908).

The power of a tribunal to develop Singapore's common law of arbitration

154 Should a distinction then be drawn between a tribunal's power to decide and develop Singapore's substantive common law and its power to decide and develop Singapore's common law of arbitration as the *lex arbitri*? I see no reason in principle why it should be. Both these fields of law are subsets of Singapore's common law. A tribunal will encounter questions of law in both fields in resolving a dispute. It should be able to resolve questions of law in both fields in the fullness of the common law tradition.

155 To argue that I should draw such a distinction, Mr Bull cites *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127. In that case, Steyn J (as he then was), described the *lex arbitri* as "a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration" (at 130). He also cites the following passage from *Waincymer on P&E* to argue that the *lex arbitri* establishes framework external to the tribunal within which it is constrained to operate. Thus it is not open to a tribunal to deviate from this framework or to alter it (at 67):[66]

> It is widely accepted that the key jurisdictional basis of an arbitrator's rights, duties and powers is to be found in the arbitration law that is applicable. This will usually be the arbitration law in the Seat of the arbitration. When parties select the place of arbitration within a particular geographical location, this ought to mean that their intention is 'that the arbitration is conducted *within the framework of the law of arbitration of (that location)*'. This is generally described as the *lex arbitri*. A *lex arbitri* might either expand on the powers conferred on a tribunal by consent or *may seek to limit them in some way*. Typically it will do both. [emphasis added]

156 This passage, as well as Steyn J's observation, does not advance the plaintiff's case for two reasons. First, the "limiting" or "external" effect that the *lex arbitri* has on tribunals does not detract from the fact that part of the *lex arbitri* is a body of common law rules, and thus resides in a location which allows a tribunal, like a judge, to develop it in the common law tradition. Second, that effect does not also prevent there being gaps in the *lex arbitri*. Tribunals must have the power to fill those gaps. At the very least, their role as masters of their own procedure surely must entitle them to do so. Indeed, it is not uncommon for arbitrators to have to interpret procedural rules, whether such

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66 Plaintiff's Reply Submissions at para 36

rules are institutional rules or part of the *lex arbitri* (see Dolores Bentolila, *Arbitrators as Lawmakers* (International Arbitration Law Library No 43) (Kluwer Law International, 2017) at paras 274 and 279). Where such gaps or ambiguities exist, a tribunal is merely interpreting and deciding the appropriate procedural framework applicable to the arbitration. It is not accurate to characterise the tribunal as deviating from or altering the framework at all. It continues to operate within its constraints.

157 In an international commercial arbitration for example, a tribunal may in a sense be said to be *obliged* to apply Singapore law if it is the law governing the underlying contract. But this obligation does not mean that the tribunal is precluded from considering and deciding a substantive question of law which Singapore's courts have not. Singapore's common law of arbitration – and more specifically, the obligation of confidentiality in arbitration – being situated within Singapore's common law, is and should be no different. It is well within the remit of a tribunal.

158 There is another telling point. The plaintiff's submission is that *AAY* ([73] *supra*) is silent on whether the general obligation of confidentiality recognised in *AAY* extends to investment-treaty arbitrations. I proceed on the assumption that that is correct. The plaintiff's argument then is that the Vedanta tribunal impermissibly developed Singapore's common law of arbitration in deciding that it did so extend. But the logical endpoint of the plaintiff's submission is that the Vedanta tribunal equally had no power to decide that it did *not* so extend. What then should the Vedanta tribunal have done when faced with this question?

159 To this, Mr Bull offers the following solution: the Vedanta tribunal should have acknowledged that there is no judicial authority to guide it on whether the general obligation of confidentiality under Singapore law extends to investment-treaty arbitration; however, it does not need to decide what Singapore law is in order to dispose of the plaintiff's application. It need only decide what type of cross-disclosure regime would be fair to the parties in the circumstances of the case. And in the *absence* of any judicial authority on the question, there is no obstacle to the tribunal ordering a cross-disclosure regime which it considers to be fair.[67]

160 I cannot agree with this approach. Mr Bull's suggested solution is no different from the approach the tribunal would take if there were *positive* judicial authority for the proposition that the general obligation of confidentiality does *not* extend to investment-treaty arbitrations. This approach in effect makes no distinction between a situation where judicial authority on a particular proposition of Singapore law is absent and a situation where judicial authority exists for the counterproposition. There is no reason that a tribunal faced with a novel question of Singapore's common law of arbitration should proceed in this manner by default. It is far more satisfactory for the tribunal to resolve the question for itself positively, with submissions from the parties, in the fullness of the common law tradition. I have demonstrated that a tribunal has the power to fill gaps and to resolve ambiguities and uncertainties in Singapore's substantive common law. It must have the same power for the same reason to do so for Singapore's common law of arbitration.

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67 Notes of Argument, 21 February 2019, p31(26) to 32(9)

161 Thus, I reject the plaintiff's argument. I do not consider Singapore's common law of arbitration to be an aspect of Singapore's common law which is uniquely beyond a tribunal's domain. It was therefore well within the powers of the Vedanta tribunal to decide this issue of Singapore's common law of arbitration in the same way as a judge would have.

162 For this reason, I do not accept that the Vedanta tribunal's decision to develop Singapore's arbitration law – even if that is indeed what the tribunal did – constitutes a ground justifying the declaratory relief which the plaintiff seeks.

Analytical approach of the Vedanta tribunal

163 A ground which Mr Yeap relies on to argue that declaratory relief is not justified in the circumstances of this case is that the relief, even if granted, will serve no useful purpose given the analytical approach which the Vedanta tribunal took in arriving at its decision in VPO 3.[68]

164 In arriving at its decision in VPO 3, the Vedanta tribunal considered whether there was a general obligation of confidentiality under each of three sources of law applicable to the Vedanta Arbitration: (a) the UNCITRAL Rules; (b) BIT/international law; and (c) Singapore law. The Vedanta tribunal held that there was no obligation of confidentiality under the UNCITRAL Rules. It also held that the trend in BIT/international law was against a general obligation of confidentiality. It then turned to consider Singapore law.

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68 Notes of Argument, 4 October 2019, p122(2) to 122(13) and 132(21) to 132(24)

165 In arriving at its conclusion on Singapore law, the Vedanta tribunal rejected the plaintiff's submission that there was a distinction in Singapore law between private arbitration and investment-treaty arbitration and held that the general obligation of confidentiality under Singapore's law of arbitration extended even to investment-treaty arbitration. Thus the Vedanta tribunal observed that it "is well established in Singapore that in *every arbitration* governed by Singapore procedural law there is an implied obligation of confidentiality which has been spelt out in a series of English cases culminating in *Emmott* … [T]his principle which has been applied in Singapore [in *AAY*] provides that the law of confidentiality is a substantive provision which applies to *all arbitrations* but subject to a list of exceptions which are never closed" [emphasis added].[69]

166 The Vedanta tribunal expressed the conclusion of its analysis of the three sources of law as follows at para 73:[70]

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69 Muhammed Ismail Bin KO Noordin's 1st Affidavit, MI-2, Tab 25 at p18, para 65

70 Muhammed Ismail Bin KO Noordin's 1st Affidavit, MI-2, Tab 25 at p20, para 73

> 73.1 UNCITRAL Rules 1976: The Tribunal is of the view that the Rules do not impose a general obligation of confidentiality, except as expressly defined in Article 25(4) and Article 32(5), the latter of which the Parties have varied by mutual agreement.
>
> 73.2 The BIT/International Law: The Tribunal believes that the body of law is strongly trending towards the view that there is no general obligation of confidentiality that applies to an investment treaty arbitration such as this.
>
> 73.3 Law of the Seat: The Tribunal is of the opinion that the arbitral law of Singapore as the seat of arbitration allows for the application of a public interest exception to an implied duty of confidentiality.
>
> [emphasis in original]

167 The Vedanta tribunal was then faced with the difficulty of reconciling its holding that there was a general obligation of confidentiality under Singapore law with its holding that there was no such obligation under UNCITRAL Rules and under BIT/international law. The Vedanta tribunal expressly acknowledged the strong public interest in a degree of transparency in investment-treaty arbitration and set about formulating a cross-disclosure regime that accommodated that interest without being inconsistent with any mandatory rules of Singapore law.

168 The tribunal considered that such a cross-disclosure regime could be accommodated within a common law exception to the general obligation of confidentiality under Singapore law. The tribunal acknowledged that the trend in the common law was to prefer a narrow interpretation of the "public interest/interest of justice" exception. However, it also held that "new exceptions can be created according to the needs of the situation as well as with

regard to public policy concerns". It then concluded in favour of transparency as follows:[71]

> … For all the reasons set out in the cases cited above, the Tribunal finds that there is a strong public interest in having a degree of transparency with regard to the proceedings in any investment treaty arbitration and it is unnecessary at this point to lay down a narrow and specific definition of the exception. Indeed, the common law exception can be usefully applied together with the Tribunal's inherent power under Article 15.1 to design a confidentiality regime customized for the particular circumstances of the case.

169 Thus, the Vedanta tribunal's conclusion on Singapore law was that Singapore law *could* allow cross-disclosure of documents in an investment-treaty arbitration but only under an exception to the general obligation of confidentiality and therefore on a case by case basis. This holding enabled the tribunal to opine that "there is no conflict between the law of the seat, (in this case, Singapore), with the broader principle of transparency which has attracted the support of previous UNCITRAL tribunals".[72]

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71 Muhammed Ismail Bin KO Noordin's 1st Affidavit, MI-2, Tab 25 at p18, para 67

72 Muhammed Ismail Bin KO Noordin's 1st Affidavit, MI-2, Tab 25 at p18, para 68

170 Moreover, the Vedanta tribunal also applied its mind to the specific measures which the plaintiff sought, in light of the concerns which the plaintiff raised regarding the public interest in investment-treaty arbitrations as well as the risks of inconsistent findings in the two arbitrations. In its view, VPO 3 carefully balanced the respective interests and arrived at a cross-disclosure formula which replicated that which the Cairn tribunal had put in place in CPO 10, even though the *lex arbitri* of the two seats took two diametrically contrary positions on confidentiality in investment-treaty arbitration:[73]

> In view of the determinations and findings above, and having had the benefit of careful consideration of *Cairn*, this Tribunal believes that the tribunal in *Cairn* came to an appropriate balance of the interest of the parties and public interest. With the minor difference that this Tribunal will allow the publication of the names of the members of the Tribunal, the Order seeks to replicate the formula adopted by the *Cairn* tribunal. The Tribunal believes that the order set out in the subsequent section strikes the right balance between the various interests and, ultimately, achieves what is necessary and appropriate in the circumstances of this case.

171 This summary of the analytical exercise which the Vedanta tribunal undertook shows that Singapore's common law was only *one* of three sources of law and only one of the several considerations to which the Vedanta tribunal had regard in arriving at the cross-disclosure regime in VPO 3. In other words, the Vedanta tribunal's holding on Singapore common law did not determine its conclusion on VPO 3. Quite the opposite, in fact. The Vedanta Tribunal instituted a cross-disclosure regime which replicated CPO 10 despite its finding that Singapore law imposed a general obligation of confidence on the parties to investment-treaty arbitrations.

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73 Muhammed Ismail Bin KO Noordin's 1st Affidavit, MI-2, Tab 25 at p31, para 128

172 Given the multipronged approach with the tribunal adopted to formulating its cross-disclosure regime, I do not consider that the declaratory relief which the plaintiff seeks will even be a persuasive tool on which the Vedanta tribunal can be invited to reconsider or revise VPO 3. This is yet another reason to decline to grant the declarations sought.

Minimal curial intervention

173 In coming to my decision on the discretionary question, I am acutely aware of the principle of minimal curial intervention. The principle of minimal curial intervention is relevant now, not as a bar which deprives the court of its power to grant declaratory relief, but rather as a discretionary factor in deciding whether declaratory relief is necessary and justified in the circumstances.

174 The Court of Appeal held in *BLC v BLB* ([145] *supra*) at [51] that it is "now axiomatic that there will be minimal curial intervention in arbitral proceedings". See also *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [60] and *PT Pukuafu* ([38] *supra*) at [22]–[23]. Mr Bull accepts this principle is part of Singapore's common law of arbitration. This is undoubtedly correct. The principle therefore applies to the Vedanta Arbitration even if the Model Law and Art 5 do not.[74]

175 Even though the principle of minimal curial intervention does not suffice to characterise the plaintiff's application for declaratory relief as an abuse of process or an impermissible collateral attack, I do consider that minimal curial intervention to be an especially compelling factor militating against exercising

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74 Notes of Argument, 24 February 2020, p35(19) to 35(26)

the discretion to grant the plaintiff the declaratory relief which it seeks. The plaintiff placed the scope of the general obligation of confidentiality in Singapore's common law of arbitration squarely before the Vedanta tribunal.[75] Even though the plaintiff submits that it merely asked the Vedanta tribunal to determine a protocol for cross-disclosure of documents, it accepts that the question whether the parties were subject to a general obligation of confidentiality under Singapore's arbitration law was a necessary preliminary question posed to the Vedanta tribunal.[76] Both parties made submissions and addressed the Vedanta tribunal on this question.[77] The plaintiff argued before the tribunal, amongst other things, expressly that the obligation did not extend to investment-treaty arbitration.[78] The tribunal considered this question and rejected the plaintiff's submission. And it did so as only one aspect of a comprehensive review of the three applicable sources of law in formulating the cross-disclosure regime set out in VPO 3. The plaintiff then made two applications to the Vedanta tribunal under the VPO 3 regime seeking leave to disclose a series of documents into the Cairn Arbitration. The Vedanta tribunal rejected both applications in VPO 6 and VPO 7. And the only real difference between CPO 10 and VPO 3 is a question of the burden of proof (see [24] above), a difference which is unlikely to make any difference except in marginal cases.

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75 Defendant's Skeletal Submissions at para 40

76 Notes of Argument, 24 February 2020, p39(14) to 39(23)

77 Notes of Argument, 24 February 2020, p41(17) to 41(23)

78 Muhammed Ismail Bin KO Noordin's 1st Affidavit, MI-2, Tab 5 at para 23, Tab 22 at para 16, Tab 24 at paras 47 to 48

Conclusion on the discretionary question

176 As such, on the discretionary question, I find in favour of the defendant. For all of the reasons I have given, I do not think that the circumstances of this case justify the exercise the court's discretion in favour of granting the plaintiff the declaratory relief which it seeks in this application.

Conclusion

177 I have therefore dismissed the plaintiff's application.

178 As costs follow the event, I have ordered the plaintiff to pay the defendant's costs of and incidental to this application, such costs fixed at $50,000 plus disbursements, such disbursements to be taxed if not agreed.

Vinodh Coomaraswamy
Judge

Bull Cavinder SC, Lim Gerui, Tan Yuan Kheng, Amber Estad and Ong Chee Yeow (Drew & Napier LLC) for the plaintiff;
Andre Yeap SC, Kelvin Poon, Alyssa Leong, Matthew Koh, Ryce Lee and Aaron Koh (Rajah & Tann Singapore LLP) for the defendant.