# The Asia-Pacific Arbitration Review 2020

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# The Asia-Pacific Arbitration Review 2020

## A Global Arbitration Review Special Report

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The Asia-Pacific Arbitration Review 2020

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Welcome to *The Asia-Pacific Arbitration Review 2020*, a *Global Arbitration Review* special report. *Global Arbitration Review* is the online home for international arbitration specialists, telling them all they need to know about everything that matters.

Throughout the year, *GAR* delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live banner) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments in each region than our journalistic output is able to. *The Asia-Pacific Arbitration Review*, which you are reading, is part of that series. It contains insight and thought-leadership inspired by recent events, written by pre-eminent practitioners from around Asia.

Across 16 chapters spanning 128 pages, this edition provides an invaluable retrospective, executed by 34 leading figures. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, with footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Australia, China, Hong Kong, India, Japan, Korea, Malaysia, the Philippines, Singapore and Vietnam, has overviews of developments in energy arbitration, investment treaty arbitration, and enforcement, and includes a discussion of the pros and cons of discounted cash-flow as a method of valuing a growth business.

Among the nuggets it contains:

- a description of how China has extended its reporting system – whereby lower courts must notify the Supreme People's Court before taking decisions that may affect awards or arbitrations – to include domestic cases;
- statistics showing a boom in arbitration in Vietnam, plus a review of the most recent cases on annulment and enforcement;
- a full review of all the significant court decisions from Indian in the past year;
- how Malaysia has made it easier for foreign counsel to appear in international arbitrations there; and
- remarkable statistics from Korea showing the growth of international cases at the Korean Commercial Arbitration Board and the extent of the government's development plans.

The review also looks to answer speculative questions facing arbitration in the Asia-Pacific. The retrospective on the Hong Kong International Arbitration Centre on the occasion of the HKIAC's 35th birthday answers 'will Hong Kong will be seen as neutral territory vis-à-vis the mainland in the future?', while 'DCF – gold standard or fool's gold?' questions how arbitrators might attempt to value Spotify Technology were it expropriated by Sweden.

If you have any suggestions for future editions, or want to take part in this annual project, my colleague and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

**David Samuels**
Publisher
May 2019

# Singapore

**Alvin Yeo SC, Chou Sean Yu and Lim Wei Lee**
WongPartnership LLP

### Introduction

International arbitration in Singapore hit new milestones in 2018.

The Singapore International Arbitration Centre (SIAC) reported the receipt of 402 new cases from parties in 65 jurisdictions in 2018 (compared to 452 new cases from 58 jurisdictions in 2017). Out of these, 375 new cases were administered by the SIAC (421 in 2017) with the remaining 27 being ad hoc appointments. Overall, the SIAC's caseload has expanded more than fourfold over the past decade.

In addition, the SIAC's total sum in dispute for all new case filings spiked to US$7.06 billion (against US$4.07 billion in 2017).

The Queen Mary University of London International Arbitration Survey released on 9 May 2018 ranked the SIAC as the most preferred arbitral institution in Asia and the third out of the top five arbitral institutions in the world. Singapore was further identified as the most preferred seat in Asia and the third-most preferred seat worldwide, after London and Paris, and ahead of Hong Kong, Geneva, New York and Stockholm.

### Public consultation by Ministry of Law on third-party funding framework

It may be recalled that, on 1 March 2017, the Civil Law Act (Cap 43, 1999 Rev Ed) was amended to introduce, among other things, a framework to permit third-party funding for Singapore-seated international arbitrations and related proceedings. The Civil Law (Third-Party Funding) Regulations 2017 also came into force on 1 March 2017 and a number of related statutory amendments, rules and guidelines have been issued.

On 3 April 2018, the Ministry of Law initiated a public consultation to seek feedback on the operation of the current third-party funding framework as well as suggestions on how the framework might be improved; its response to the public consultation is pending.

### Memoranda of understanding

In August 2018, September 2018 and October 2018, the SIAC entered into various memoranda of understanding with the Shenzhen Court of International Arbitration, the Xi'an Arbitration Commission, and the China International Economic and Trade Arbitration Commission (CIETAC) to promote international arbitration as a preferred method of dispute resolution for resolving international disputes.

Under the memoranda of understanding, the parties will work together to promote international arbitration to serve the needs of businesses. They will, among other things, hold annual joint signature events on international arbitration in either China or Singapore, co-organise conferences, seminars and workshops on international arbitration, and (upon request and where appropriate) provide recommendations of arbitrators to each other.

In addition, SIAC and CIETAC will conduct training programmes for each other's staff and establish a joint working group to discuss the SIAC's proposed Cross-Institution Consolidation Protocol.

In October 2018, the SIAC also entered into a memorandum of understanding with the Peking University Law School (PKU Law). Under the memorandum of understanding, the parties will work together to place law students from PKU Law in internships at the SIAC, collaborate to incorporate a module entitled 'SIAC and Institutional Arbitration' into PKU Law's programme. Upon request by the SIAC or PKU Law, both parties will also conduct joint training programmes, seminars, workshops or other events in China to promote the development and practice of international arbitration.

### Case Law

We summarise below some of the significant judgments released since our last report (from February 2018 to January 2019).

- In *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* (2019) 1 SLR 263, the Court of Appeal held that it had jurisdiction to set aside an investor-state arbitral award under article 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law).
- In *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services Pte Ltd* (2018) SGHC 78, the High Court held that, where a tribunal ruled on jurisdiction as a preliminary question, section 10 of the International Arbitration Act (Cap 143A) (the IAA) and article 16(3) of the Model Law required the dissatisfied party to challenge that finding in the supervisory court within 30 days of the tribunal's decision. Failure to do so would have a preclusive effect on subsequent setting aside proceedings at the seat.
- In *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd* (2018) 2 SLR 1207, the Court of Appeal found that the commencement of court proceedings by a party bound by an arbitration agreement can constitute prima facie repudiation of the arbitration agreement.
- In *China Machine New Energy Corporation v Jaguar Energy Guatemala LLC* (2018) SGHC 101, the High Court held that the imposition of an 'attorney-eyes-only order' did not amount to a breach of natural justice.
- In *Man Diesel & Turbo SE v IM Skaugen Marine Services Pte Ltd* (2018) SGHC 132, the High Court upheld an order granting leave for the immediate enforcement of an arbitral award even though there was a pending challenge of the award in the seat court.
- In *Sanum Investments Limited v ST Group Co Ltd* (2018) SGHC 141, the High Court interpreted an arbitration clause referring to 'internationally recognised arbitration company in Macau' as requiring parties to arbitrate using an internationally recognised arbitration company, with the seat of the arbitration in Macau.

- In *Sinolanka Hotels & Spa (Private) Limited v Interna Contract SpA* (2018) SGHC 157, the High Court held that a court has no power to determine the arbitral tribunal's jurisdiction under section 10(3) of the IAA or article 16(3) of Model Law, if the arbitral tribunal had decided the issue of its jurisdiction in the final award and not as a preliminary question.
- In *BAZ v BBA and others* (2018) SGHC 275, the High Court set aside an arbitral award issued against, among others, minors on the ground that this went against the public policy of Singapore.

**PCA award set aside under article 34(2)(a)(iii) of the Model Law**

In *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* (2019) SLR 263, the Court of Appeal set aside an investor-state arbitral award under article 34(2)(a)(iii) of the Model Law.

In 2009, a South African national and his associated trusts and companies (the Investors) commenced proceedings against the Kingdom of Lesotho (the State) before a tribunal (the SADC Tribunal) established by a treaty of the Southern African Development Community (the SADC Treaty), of which the State was a member, in respect of the State's alleged expropriation of the Investors' mining leases. The SADC Tribunal was later dissolved by a resolution of the Summit of the Heads of State of the SADC before the Investors' claim was determined.

In 2012, the Investors commenced arbitration proceedings against the State before an ad hoc tribunal constituted under the auspices of the Permanent Court of Arbitration (the PCA Tribunal) pursuant to a Protocol on Finance and Investment of the SADC (the Investment Protocol), alleging that the State had breached various obligations under the SADC Treaty and the Investment Protocol by participating in the dissolution of the SADC Tribunal. The State challenged the jurisdiction of the PCA Tribunal. The PCA Tribunal rejected the State's challenge to its jurisdiction and found that the State had breached its treaty obligations.

The State then commenced court proceedings to set aside the PCA Tribunal's award in its entirety.

In its decision, the Court of Appeal rejected the Investors' contention that article 34(2)(a)(iii) of the Model Law (which provides that an award may be set aside if it 'deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration') did not apply to a situation where (as here) the State was contesting the very existence of the tribunal's jurisdiction. The court held that article 34 should be read flexibly as it was intended to prescribe an exhaustive mechanism for the setting aside of all types of awards.

The court accepted that the arbitration clause in this context was analogous to a unilateral contract, that is, when a state enters into an investment treaty that provides for the submission of disputes to arbitration, it effectively makes a unilateral offer to arbitrate, which is accepted once an investor initiates arbitration proceedings in accordance with those terms. Thus, when an investor purports to rely on an arbitration clause contained in an investment treaty, but the dispute falls outside the scope of that clause, the seat court would have jurisdiction to set aside the award on the basis of article 34(2)(a)(iii).

In considering the question whether the PCA Tribunal could assume jurisdiction over the dispute, the Court of Appeal observed that, to qualify as an 'investment' to be submitted to arbitration, the asset must both satisfy the definition of an 'investment' provided in the investment treaty as well as have a territorial nexus with the host state.

The Court of Appeal also observed that an investment treaty claim is brought not in respect of an investment per se, but in respect of a dispute that arises out of the alleged violation of a right that constitutes, or is part of or attaches to, an investor. An investment is generally not limited to a single right, such as the primary right to exploit the investment, instead it generally encompasses a bundle of rights, which includes, among other things, the secondary right to seek remedies and vitiate the primary right.

Accordingly, the court found that the mining leases comprise a bundle of rights that may, in principle, include the secondary right to bring a claim. However, the Investors' asserted right to refer its dispute to the SADC Tribunal could not have been part of the mining leases' bundle of rights. The right to refer to the SADC Tribunal arose out of the SADC treaty instead, and it did not satisfy the territorial nexus requirement. In addition, the SADC Tribunal could have been dissolved by a majority of the SADC member states and the State acting alone would not have been able to prevent this.

The Court of Appeal, therefore, held that the PCA Tribunal lacked jurisdiction to hear and determine the Investors' claim and upheld the High Court's decision to set aside the PCA Tribunal's award.

**Preclusive effect of failure to challenge preliminary determination of jurisdiction by tribunal within time limit**

*Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services Pte Ltd* (2018) SGHC 78 concerned an application to set aside an award on jurisdiction. In April 2015, the defendant commenced arbitral proceedings against the plaintiff. The plaintiff did not respond to the notice of arbitration and did not participate in the arbitration despite being given notice at various stages and having had ample opportunity to do so.

In dismissing the plaintiff's application, the High Court held that, where the tribunal ruled on jurisdiction as a preliminary question, section 10 of the IAA and article 16(3) of the Model Law required the dissatisfied party to bring that question to the supervisory court within 30 days of having received notice of the tribunal's decision. Article 16(3) was intended as an early avenue for parties to promptly and finally resolve jurisdictional disputes so as to save costs and time, and it would defeat these purposes to allow a party to reserve jurisdictional challenges to the award on the merits.

It was, therefore, intended that a failure to raise a plea within the 30-day limit should have a preclusive effect on subsequent setting aside proceedings at the seat; the dissatisfied party would have lost its right to the active remedy of setting aside. However, that party has not lost its passive remedy of resisting enforcement and may still challenge enforcement on that basis.

**Commencement of court proceedings held to constitute repudiatory breach of arbitration agreement**

In *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd* (2018) 2 SLR 1207, the Court of Appeal found that the commencement of court proceedings by a party bound by an arbitration agreement could constitute prima facie repudiation of the arbitration agreement.

The underlying dispute concerned the respondent's shareholding in its Vietnam subsidiary. In 2008, the Vietnam subsidiary's company charter was revised to include a new article 22, which provided for disputes to be resolved by SIAC arbitration.

In 2014, the respondent, acting through its receiver and manager (the Receiver), commenced court proceedings in the British Virgin Islands (BVI) against the appellant for wrongful deprivation

of the respondent's shareholding in the Vietnam subsidiary (the BVI Action).

In 2015, the Receiver on behalf of the respondent commenced arbitration proceedings at the SIAC for the same cause of action. The Receiver's explanation was that he had only discovered the existence of the new article 22 in 2015. The appellant challenged jurisdiction of the tribunal, contending that, inter alia, the respondent had, by its actions in the BVI Action, waived its right to submit the dispute to arbitration or had repudiated the arbitration agreement.

Later in 2015, the appellant applied to the BVI court for summary judgment or to strike out the BVI Action. While the respondent applied for the BVI Action to be stayed in favour of arbitration, it also took other steps in the BVI Action, including an application to extend an interim injunction granted in support of the litigation. The court and arbitration proceedings continued to run in parallel until the BVI Action was eventually struck out in 2016.

In 2016, when the arbitral tribunal ruled that it had jurisdiction over the dispute, the appellant challenged that decision in the Singapore courts, arguing, among other things, that the respondent had repudiated the arbitration agreement by commencing the BVI Action and taking steps in the litigation even after the arbitration had commenced.

The Court of Appeal held that, like any other contract, an arbitration agreement can be repudiated, giving the innocent party the right to accept the breach and bring the agreement to an end. In the context of arbitration agreements, one relevant factor to determine whether the breaching party has repudiatory intent is whether it has an explanation for commencing litigation other than its rejection of the arbitration agreement. In this regard, whether an agreement has been repudiated is an objective inquiry. Any explanation given by the breaching party for commencing litigation is only relevant if it is manifested in the breaching party's conduct such that it would be apparent to a reasonable person in the position of the innocent party.

The Court of Appeal found that the respondent had committed a repudiatory breach of the arbitration clause, which was accepted by the appellant, holding, inter alia, the following.

- The commencement of the BVI Action alone could constitute a prima facie repudiatory breach. While there are a number of authorities that have expressed a contrary view, the court considered that parties who enter into a contract containing an arbitration agreement are entitled to expect that disputes arising out of the contract would be resolved by arbitration and indeed have a contractual obligation to do so. Thus, where court proceedings are commenced without an accompanying explanation or qualification, the defending party in the court proceedings is entitled to take the view that the claimant no longer intends to be bound by the arbitration agreement.
- It is open to the plaintiff in the court proceedings to displace this prima facie conclusion by giving an explanation for the commencement of court proceedings. However, in this case, the respondent's assertion that it did not know of the existence of the new article 22 at the time it commenced the BVI Action was rejected as it was not substantiated by the evidence. On the contrary, in the BVI Action, the respondent had filed an affidavit, which exhibited an English translation of the entire revised company charter, including article 22. In any event, the alleged lack of knowledge was something only the respondent was aware of; thus, a reasonable person in the appellant's position could not have known that the respondent commenced the BVI Action only because it was ignorant of article 22.
- The innocent party may elect to accept a repudiation and bring the contract to an end, or it may choose to reject the repudiation and affirm the contract. The decision to accept the repudiation is irrevocable; thus, an innocent party is only taken to have accepted the repudiation if its words or actions clearly and unequivocally demonstrate this.
- The appellant accepted the repudiation by taking out its summary judgment application in the BVI Action, which clearly engaged the jurisdiction of the BVI court because it requested the BVI court to determine the claim on the merits. It did not matter that the summary judgment application was made after the Notice of Arbitration. Once a repudiatory breach has been committed, it persists and is capable of acceptance until the breaching party resumes performance of the contract and thus ends any continuing right in the innocence party to accept the repudiation. The respondent could only resume performance of the arbitration agreement by discontinuing the BVI Action. While the respondent did seek a stay of the BVI Action, the stay application was only filed after the summary judgment application, by which time the appellant had already accepted the repudiation.

The Court of Appeal therefore held that the arbitral tribunal lacked jurisdiction over the arbitration.

### Imposition of 'attorney-eyes-only' order held not to amount to breach of natural justice

In *China Machine New Energy Corporation v Jaguar Energy Guatemala LLC* (2018) SGHC 101, the High Court declined to set aside an arbitral award, finding that an 'attorney-eyes-only' (AEO) order did not amount to a breach of natural justice.

The plaintiff and the defendant entered into an engineering, procurement and construction contract (the EPC Contract) under which the plaintiff was to construct a power plant for the defendant. After a number of delays in the project, the defendant terminated the EPC Contract. The parties' relationship became very acrimonious and a violent confrontation between the defendant's guards and the plaintiff's employees also took place.

The defendant then commenced arbitration proceedings. The arbitration clause in the EPC Contract provided for an expedited arbitration. In the arbitral proceedings, the defendant stated that it was withholding a number of documents, which the defendant was willing to provide on an AEO basis. The defendant's position was that those documents contained sensitive information and there was reason to believe the plaintiff would misuse that information.

The arbitral tribunal gave directions for a two-stage disclosure process (the AEO Regime): first, the documents would be disclosed to external counsel only (including the plaintiff's experts); and secondly, the plaintiff would be entitled to apply to the arbitral tribunal for its employees to be given access to the documents for the purpose of giving instructions to counsel. The plaintiff never made any application for its employees to be shown the documents under the second stage of the AEO Regime.

Subsequently, the plaintiff applied to lift the AEO Regime, submitting that the redaction of certain information from the documents would suffice to address the plaintiff's concerns. Some four weeks after the AEO Regime was ordered, the tribunal agreed to lift the AEO Regime and replace it with an order for limited redaction for most of the documents, with the AEO Regime to

remain in place for other documents. Some months later, the plaintiff applied again to lift the AEO Regime. Following discussion and agreement between counsel, the tribunal recorded an order lifting the AEO Regime altogether.

The arbitral tribunal eventually found in favour of the defendant on the merits. The plaintiff then applied to set aside the award in the High Court, alleging, among other things, that the award had been made in breach of the rules of natural justice because the AEO Regime both deprived the plaintiff of a reasonable opportunity to present its case.

The High Court held that the imposition of the AEO Regime did not breach the plaintiff's right to natural justice, finding that the following.

- AEO orders are rare in international arbitrations but are not unheard of, and the tribunal was empowered to impose an AEO order, under the applicable rules, or alternatively pursuant to its broad powers of case management under article 19(2) of the Model Law. There was a possibility that the disclosed documents could be used for improper purposes, which could interfere with the project or the arbitration. In light of the great acrimony between the parties, the arbitral tribunal had basis for imposing the AEO Regime.
- The second stage of the AEO Regime safeguarded the plaintiff's interests as access could be granted to specific employees of the plaintiff for the purpose of taking instructions. In any event, the plaintiff never sought such access.
- The EPC Contract expressly provided for an expedited arbitration. In assessing the plaintiff's claims about prejudice that it allegedly suffered, it must be kept in mind that the tribunal was constrained by the parties' agreement to an expedited arbitration. As such, due process had to be adhered to within the strictures that the parties themselves had imposed on the arbitral tribunal. That agreement required the procedural timelines for the arbitration to be compressed with concomitant implications for the quality of due process that could be afforded to the parties.

Under the circumstances, the High Court dismissed the plaintiff's setting aside application.

**Order for immediate enforcement of arbitral award upheld despite ongoing challenge in seat court**

In *Man Diesel & Turbo SE v IM Skaugen Marine Services Pte Ltd* (2018) SGHC 132, the High Court upheld an order granting leave for the immediate enforcement of an arbitral award, although there were ongoing proceedings challenging the award in the seat of the arbitration in Denmark.

In rejecting the defendant's application to adjourn the proceedings to enforce the arbitral award under section 31(5) of the IAA, the court recognised the tension between promoting the enforceability of foreign arbitral awards and preserving judicial oversight of the award by the curial court; pointing out that the concern most often raised is the award debtor's deployment of an application to set aside an award or an application to resist enforcement of an award as a delay tactic.

The High Court noted that the granting of an adjournment of the enforcement proceedings is a matter of discretion for the enforcing court. In the exercise of this discretion, the court takes a multifactorial approach for which it is not possible to exhaustively list out all the factors to be considered. The enforcing court's task was to weigh in the balance all the factors in favour of and against adjournment to arrive at an outcome that would be the most just or the least unjust.

Having said that, the High Court considered the following factors to be relevant.

- First, the merits of the setting aside application. The applicant must at least show, from the strength of his or her arguments, that he or she is demonstrably pursuing a meritorious application in the seat court. If the setting aside application had no properly arguable basis and was not bona fide or was simply a delay tactic, there would be little prejudice to the award debtor if an adjournment was refused. If foreign law was involved, the enforcing court would normally require expert evidence on the foreign law in question to assess the strength of the arguments before the seat court. However, the enforcing court will not engage in a detailed assessment of the facts or legal bases of the setting aside proceedings.
- Second, the likely consequences caused by an adjournment. In particular, the length of the adjournment. The longer the delay, the greater the prejudicial effect on the award creditor as assets amenable to enforcement might be diminished or transferred out of the jurisdiction.

On the facts of the case, the High Court found that:

- the defendant failed to demonstrate the merits of its case in the Danish challenge proceedings;
- based on the procedural history and the parties' estimated timelines, the Danish proceedings would likely conclude only in 2019 or 2020, resulting in too long a delay that would unfairly prejudice the plaintiff; and
- in light of the defendant's past conduct, as demonstrated by its financial records, there were valid concerns over the risk that undisclosed assets might be dissipated if enforcement was to be further delayed.

The High Court therefore dismissed the defendant's adjournment application.

**Interpretation of arbitration clause referring dispute to 'internationally recognised arbitration company in Macau'**

In *Sanum Investments Limited v ST Group Co Ltd* (2018) SGHC 141, the High Court dealt, inter alia, with an arbitration clause that required parties to arbitrate disputes 'using an internationally recognised mediation and arbitration company in Macau'. The plaintiff had, in reliance on this clause, commenced arbitration in the SIAC, adopting the SIAC Rules.

The High Court emphasised that where parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in particulars, so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party.

Regarding the clause in question, the court considered whether the reference to Macau pointed to the institution chosen by the parties or the parties' chosen seat. The High Court held that properly construed, the clause required parties to arbitrate disputes, using an internationally recognised arbitration company, with the reference to Macau as the parties' chosen seat. The court noted that there was no centre that would qualify as an 'internationally recognised mediation and arbitration company' located

in Macau and so parties could not have intended the reference to Macau to be part of the institution chosen by the parties. The plaintiff's choice of SIAC as the arbitration institution with an international reputation was an acceptable one.

### Setting aside of final award under section 10(3) of IAA or article 16(3) of Model Law not permitted

In *Sinolanka Hotels & Spa (Private) Limited v Interna Contract SpA* [2018] SGHC 157, the High Court held that a party may apply for a jurisdictional ruling under section 10(3) of the IAA or article 16(3) of the Model Law only where the arbitral tribunal has made a finding as to jurisdiction as a preliminary question and not as part of the final award.

The plaintiff and the defendant were parties to a contract for the provision of interior fit-out and furnishing works. After disputes arose, the defendant commenced ICC arbitration in accordance the arbitration clause in a letter issued by the plaintiff, which was one of the documents parties had agreed formed part of the contract between them. In the arbitration, the plaintiff objected to jurisdiction, contending that the parties had instead agreed to arbitration in Sri Lanka, relying on an arbitration clause contained in another document in the tender package. The plaintiff did not ask the tribunal to deal with its objection as a preliminary matter.

The arbitral tribunal addressed the jurisdictional issue as well as the merits of the dispute in a single final award and found against the plaintiff on both matters. The plaintiff then applied to the High Court under section 10(3) and article 16(3) for a ruling on the jurisdiction of an arbitral tribunal.

The High Court ruled that, on a construction of the contractual documents, the ICC arbitration clause applied and the tribunal accordingly had jurisdiction. Even if not, it was clear from the language of both section 10(3) and article 16(3) that an application to the High Court for a jurisdictional ruling is available only if the arbitral tribunal had ruled that it had jurisdiction as a preliminary question. Where (as here) the arbitral tribunal has decided the issue of its own jurisdiction in the final award, which also dealt with the merits of the substantive dispute, the appropriate remedy would be for the plaintiff to seek recourse against the final award in the form of setting aside application.

### Arbitral award against minors set aside on public policy grounds

In *BAZ v BBA and others* [2018] SGHC 275, the High Court set aside an arbitral award that had been issued against, among others, minors on the ground that this went against the public policy of Singapore.

Five minors were between the ages of three and eight when their fathers entered into a share sale and purchase agreement (the SSPA) on their behalf. The SSPA contained an arbitration agreement. Arbitration proceedings were subsequently brought by the counter-party against the minors, among others, for fraudulent misrepresentation. The majority of the arbitration tribunal issued an arbitral award against, among others, the minors for a sum of approximately S$720 million. The minors were between the ages of eight and 12 during the arbitration.

The minors (through their litigation representatives) applied to the High Court to set aside the arbitral award.

Finding in favour of the minors, the High Court held that the principle of protecting the interests of minors in commercial transactions is part of the public policy in Singapore. Minors have limited capacity to enter into binding contracts and the effect of the arbitral award on the minors would be to enforce the SSPA as against them. This would violate the protection given to minors in contractual relationships under Singapore law.

In addition, the arbitral award imposed liability on the minors for the fraudulent misrepresentation of their guardian or principal on matters which the minors had no knowledge of. The High Court found that this violated the protection given to minors under section 35(7) of the Civil Law Act, which protects a minor from liability for the procurement of contracts by fraudulent misrepresentation.

Finally, the High Court held that the arbitral award against the minors, which saddled them with legal liability for an amount exceeding S$720 million, was morally questionable and violated Singapore's most basic notions of justice.

The High Court therefore granted the application to have the arbitral award against the minors set aside.

**Alvin Yeo**
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Alvin Yeo, senior counsel, is the chairman and senior partner of WongPartnership LLP. He is a preeminent arbitration and litigation counsel who has acted for and advised international clients in complex, cross-border disputes and multi-jurisdictional enforcement proceedings.

His extensive experience covers investor–state treaty disputes, banking and corporate disputes, contentious investigations, insolvency and restructuring, construction and civil engineering matters and financial services regulatory matters, including corporate fraud, anti-money laundering and insider trading.

*Chambers Global* describes Alvin as 'the most impressive, as an advocate, out of all the Singapore firms'. *Chambers Asia-Pacific 2018* has said that Alvin 'is hailed as one of the leading names in arbitration in Singapore' who 'regularly advises clients on high-value SIAC and ICC proceedings'. *Who's Who Legal: Arbitration 2017* lauded Alvin as 'a leading light in the market who possesses strong arbitration credentials and experience'.

He is recognised as a leading litigation and arbitration counsel in international legal directories such as *Chambers Asia-Pacific*, *Chambers Global*, *IFLR1000* and *The Legal 500 Asia Pacific*.

Alvin is vice president of the London Court of International Arbitration Asia Pacific's Users' Council and sits on the panel of arbitrators in the Hong Kong International Arbitration Centre, the International Dispute Resolution Centre, the Korean Commercial Arbitration Board, the Kuala Lumpur Regional Centre for Arbitration, the Shenzhen Court of International Arbitration and the Singapore Institute of Arbitrators's (SIArb) Panel for Sports in Singapore. He is also a fellow of SIArb and a member of the Court of the Singapore International Arbitration Centre and the International Chamber of Commerce Commission.

Chou Sean Yu is a partner in the international arbitration practice at WongPartnership LLP. He is also the head of the banking and financial disputes practice, the joint head of the restructuring and insolvency practice and a partner in the financial services regulatory and the Malaysia practices.

Sean Yu graduated with first class honours from the University of Bristol and is admitted to the English Bar (Middle Temple) and to the Singapore Bar.

He is recognised as a leading lawyer for international arbitration in *Best Lawyers 2017*, for dispute resolution and litigation in *Asialaw Leading Lawyers 2017* and was acknowledged as one of the 'Local Disputes Stars' in the inaugural edition of *Benchmark Asia Pacific*.

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Lim Wei Lee is a partner in the international arbitration and banking and financial disputes practices.

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Wei Lee is very active in regional arbitrations, and in arbitration-related court proceedings. She is the co-author of the Singapore chapters for the *Asia Arbitration Handbook*, the *IBA Arbitration Guide* and *Arbitration of M&A Transactions* (Oxford University Publishing, the International Bar Association, and Globe Law and Business) and the forthcoming *Practitioner's Handbook on International Commercial Arbitration* (Oxford University Publishing), as well as the chapter on arbitrators in *Arbitration in Singapore: Law and Practice* (Sweet & Maxwell) and the chapter on *Interim Reliefs in Singapore International Arbitration: Law & Practice* (LexisNexis).

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