CHANGAROTH CHAMBERS LLC

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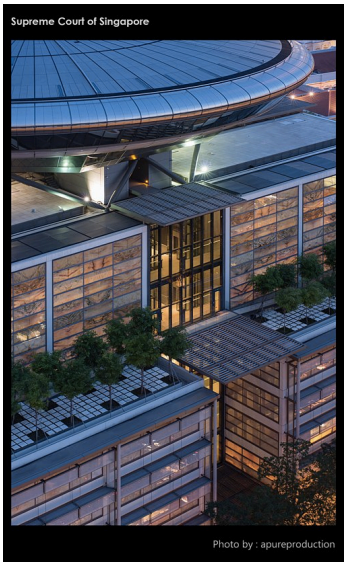
ARBITRATION: RELEASE OF THE SECURITY FOR COSTS PURSUANT TO AN ARBITRATION

***Otto Ventures Pte Ltd v ECYT Law LLC* [2017] SGHC 98**

IN SUMMARY

This Singapore High Court decision of 28 April 2017 discussed the interpretation of a solicitor's undertaking to hold a sum as security for costs in an arbitration and when the said security for costs should be released. This case also touched on the issue of whether the express directions by the Arbitration is required for the release of the security for costs.



FACTS

Otto Ventures Pte Ltd (the "Plaintiff") was the Respondent in an arbitration and ECYT Law LLC ("the "Defendant") was the firm of solicitors representing the Claimants in the arbitration ("the Arbitration Claimants"). The Defendant provided 2 letters of undertaking ("the Undertaking") to the Plaintiff's soclitors, undertaking to hold a total of S$ 100,000.00 from the Arbitration claimants as security for costs. The arbitrator issued his final award (the "Final Award"), in which he ordered that the Arbitration claimants were to bear all legal costs and expenses incurred by the Plaintiff in the arbitration, and such costs was taxed and assessed by the Registrar of the Supreme Court in the amount of S$ 175,200.00.

The Plaintiff's solicitors subsequently sought the release of the security held by the Defendant to the Plaintiff in satisfaction of the costs order. However, the Defendant requested that the payment of costs be held in abeyance until the proceedings for a separate application by the Arbitration Claimants to set aside the Final Award were completed. The Plaintiff did not accede to this request and applied to the Court for the release of the security for costs.

The Defendant contended that the Undertaking, which states "*[the Defendant] undertake that [it] will hold the said [sum] as security for costs in [the Defendant's] Clients' Account*" did not contain any term obliging it to release the security for costs to the Plaintiff once the arbitrator issued the Final Award and therefore the Defendant should hold the money until the arbitrator made an order on how the security for costs should be dealt with. However, the Plaintiff responded that the Undertaking necessarily gave rise to an obligation to pay out the money upon the arbitrator's decision that the Arbitration Claimants were to bear the Plaintiff's costs and as such there was no need to seek a further order from the Arbitrator, who the Plaintiff also argued was *functus officio*.

ISSUES BEFORE THE SINGAPORE HIGH COURT

In light of the Defendant's argument that there was no elaboration concerning the terms governing the release of the security for costs, the issue that arose for determination was whether, on a true construction of the Undertaking, the Defendant is obliged to pay the S$ 100,000.00 over to the Plaintiff.

The Court also examined the Court's powers in relation to the said security, and looked at the issue of whether the matter should be remitted to the Arbitrator for the Arbitrator to make a further order concerning the disposal of the security for costs.

INTERPRETATION OF THE UNDERTAKING

Principles Governing the Construction of Solicitors' Undertaking

Generally, a solicitors' undertaking must be governed by the terms set out in the undertaking itself, and the priciples governing the construction of contracts are also applicable to the construction of the solicitors' undertaking, namely:

(a) interpretation, which is the ascertainment of the meaning which the documents would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract;

(b) implication of terms into a solicitors' undertaking in order to give it business efficacy; and

(c) any ambiguity in a solicitors' undertaking is to be construed in favour of the recipient of the undertaking.

Applying the Principles to the Undertaking in the Present Case

As the Undertaking in the present case does not contain any express term to the effect that the security may only be released to the Plaintiff upon a further order from the Arbitrator, it does not run against the clear and express terms of the Undertaking if the Court were to find that, on its true construction, payment out of the security is not conditional upon a further order from the Arbitrator.

Further, if the Undertaking only obliged the Defendant to hold the money in its clients' account and did not oblige the Defendant to pay the money to the Plaintiff, the phrase "*as security for costs*" in the Undertaking would be rendered otiose.

Therefore, the Court decided the Undertaking should be construed in a manner which gives the phrase "*as security for costs*" some meaningful content, and the meaning to be assigned to the phrase should be the meaning that would be conveyed to a reasonable person having the background knowledge available to the parties at the time the Undertaking was given. To this end, the Court considered the following relevant background knowledge:

(a) the Arbitration Claimants were impecunious;

(b) the Arbitrator had chosen not to prescribe the form and manner for the Arbitration Claimants' provision of security for costs but had left this to be agreed between parties;

(c) it is well known among legal practitioners that the entire rationale of security for costs is so that a successful defendant/respondent will have a fund within jurisdiction against which he can enforce the costs awarded in his favour.

Taking the above relevant background knowledge into consideration, the Court reasoned that in the context of security given by way of a solicitor's undertaking, the entire rationale for security for costs would be defeated if the solicitor who gave the undertaking is under no obligation to release the security to the successful defendant/respondent, leaving the latter unable to recover his costs from the very sum of money that was designed as security for his costs.

As such, a reasonable person in the Plaintiff's position would have understood the phrase "*as security for costs*" in the Undertaking to carry with it the obligation to release the security to satisfy the costs ordered in favour of the Plaintiff should the Plaintiff successfully defend the Arbitration Claimants' claim in the Arbitration.

The next question is whether this obligation is conditional upon a further order by the Arbitrator to releasethe security to the Plaintiff. In this regard, the Court found that there are no words in the Undertaking to the effect that the Defendant's obligations are conditional upon a further order from the Arbitrator, and in the absence of such words, it essentially means that the Defendant's obligation to pay pursuant to the Undertaking is unconditional.

WHETHER THE MATTER SHOULD BE REMITTED BACK TO THE ARBITRATOR

This issue centres around the "*slip-rule*" and whether under the "*slip-rule*", the Court should remit the matter back to the Arbitrator.

The crucial point made is that the Court should not lightly premuse that the Arbitrator had slipped up. In the present case, the Final Award is entirely consistent with the notion that the Arbitrator had committed no error and had all along intended, by his order that costs be taxed by the Registrar of the Supreme Court, to leave all costs-related matters after taxation to be dealt with by the Court.

Ultimately, it is for the party who believes that the Arbitrator has committed an error to invoke the slip-rule to have the error corrected. If the Plaintiff does not consider the Arbitrator to be in error, it is not for the Court to compel the Plaintiff to make an application to the Arbitrator under the slip-rule.

In the circumstances, it is not the role of the Court to presume that the Arbitrator had committed an error. Thus, when the Final Award states that it is "*a Final Award on all issues in dispute in this arbitration including liability for costs and expenses of the arbitration and the Tribunal's fees and expenses*", this ought to be treated as an indication that the Arbitrator had no intention of dealing with the disposal of the security for costs in a further order. Therefore, instead of remitting the matter back to the Arbitrator, the correct course for the Court to adopt would be to support the Arbitration by following throuigh with the consequences flowing from the Final Award in so far as it is within the Court's power to do so.

Concluding Views

This case provides a useful reminder that a solicitor's undertaking should be drafted clearly and carefully to reflect both parties' intention. For example in this present case, the terms of the Undertaking should have expressly provided for the situation is which the undertaking can and/or cannot be released.

In this regard, it should be noted that the Courts will not hesitate to imply terms and/or apply the Contra Proferentum rule in interpreting the terms of the Undertaking, where the situation allows for it.

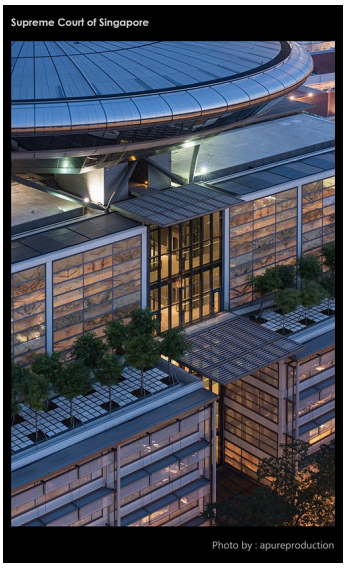
This case also shows that the Court will readily support the Arbitration and will not interefere with the Arbitrator's Final Award when there is no necessity to do so.

ADJUDICATION: WHETHER CROSS CLAIMS OVER MULTIPLE CONTRACTS ARE PERMISSIBLE UNDER THE *SOP ACT*

***Hua Rong Engineering Pte Ltd v Civil Tech Pte Ltd* [2017] SGHC 179**

IN SUMMARY

This Singapore High Court decision of 24 July 2017 deals with the issue of cross-claims in a Payment Response which arises outside the context of the particular contract which is subject of the payment claim in question, and whether an Adjudicator has the power/jurisdiction to decide on the said cross-claim in an adjudication application.



FACTS

Hua Rong Engineering Pte Ltd ("the Claimant") and Civil Tech Pte Ltd ("the Respondent") were involved in two construction projects by the LTA, namely the T211 project (the Bright Hill MRT Station of the Thomson-East Coast Line) and the C933 project (the Jalan Besar MRT station of the Downtown Line). The Respondent was a sub-contractor of the Main Contractor (which is not involved in this proceedings) and the Claimant was a sub-contractor engaged by the Respondent to supply labour for construction relating to both the T211 project and C933 project.

On 6th December 2016, the Claimant submitted Daywork Claim No. 13 for the sum of S$ 601,873.40, which is for work done in respect of T211 contract for the period from 1st April to 30th July 2016. While the Respondent accepted this claim and acknowledged this amount due and owing to the Applicant, the Respondent in its Payment Certificate 9 (which parties agree functioned as a payment response) certified a negative value because the Claimant had allegedly made false and fraudulent payment under the C933 contract, and therefore the Respondent claimed that it had overpaid the Claimant in respect of the C933 contract and sought to withhold the sum of S$ 1,468,276.32.

On 11th January 2017, the Claimant lodged adjudication application in respect of Daywork Claim No. 13. The above dispute was referred to the Adjudicator, who determined that the Respondent could not as a matter of law set off a counterclaim based on another contract. In the Adjudicator's view, the *SOP Act* only allowed him to consider cross-claims, counterclaims and set-offs arising under the same construction contract, and therefore determined that the Respondent had to pay the Claimant the amount of S$ 601,873.40. The Respondent, dissatisfied with the decision of the Adjudicator, applied to court to have the Adjudication Determination set aside.

THE ISSUES BEFORE THE HIGH COURT

The main issue before the Singapore High Court is whether, in an adjudication under the *SOP Act*, a Respondent is entitled to raise, and an adjudicator is entitled to consider, cross-claims, counterclaims and set-offs which arise outside the context of the particular contract which is the subject of the payment claim in question.

Two other issues were also considered by the Court, namely whether the Adjudicator breached *Section 17(3)* of the *SOP Act* and whether the Respondent's allegations of fraud and unjust enrichment are made out.

MAIN ISSUE: WHETHER THE *SOP ACT* ALLOWS FOR CROSS-CONTRACT CROSS-CLAIMS, COUNTER CLAIMS OR SET-OFFS

Overall Purpose of the *SOP Act*

Before addressing the main issue, the Court reiterated the overall purpose of the *SOP Act*, which was to provide the construction industry with a low cost, efficient and quick process for the adjudication of payment disputes so that main contractors do not unfairly or unreasonably delay or withhold payment from their sub-contractors.

It in intended to facilitate cash flow in the building and construction industry by establishing that parties who have done work or supplied goods are entitled to payment as of right and also creates an intervening, provisional process which is final and binding on parties until their differences are ultimately resolved (temporary finality).

Therefore, implicit here is the recognition that in order to fulfil its purpose, an *SOP Act* adjudication cannot be expected to embrace every matter which a party would be entitled to raise in litigation or arbitration.

The Relevant Provisions of the *SOP Act*

The language used in the various provisions within the *SOP Act* (such as *Sections 2, 5, 10 and 12)* casts light on whether the adjudication process was intended to be confined to a single contract, or to potentially encompass matters relating to multiple contracts. In this regard, the Court found that the rule "one payment claim, on contract" applied as there was consistent use of the phrase "a contract" (with the variations thereon similarly adopting the singular form) in dicated that payment claims as well as adjudications under the *SOP Act* are both intended to be confined to a single contract. However, the issue remains that whether a Respondent may rely on withholding reasons that arise in relation to multiple contracts.

In this regard, the Court looked at *Section 15(3) and 17(3)(b)* of the *SOP Act* to see whether the language used indicates that Parliament intended that the same position which applies to payment claims applies as well to withholding reasons which can be considered under the *SOP Act* – namely that they must arise out of a single contract only. The Court found that logically this must be so as the language used in functionally identical (i.e. the *SOP Act* refers to "a" or "the" contract in the provisions concerning adjudication responses and withholding reasons.

Policy Justification for Single-Contract Interpretation

Besides looking purely at the text of the *SOP Act*, the Court also found a convincing reason of policy which militates toward adopting the single-contract interpretation, namely that bringing in multiple contracts as the basis for cross-claims, counterclaims or set-offs would cause unfairness to the Claimant, increase the decision-making burden on the adjudicator and thereby to increase costs and to increase delay in adjudication – which is antithetical to the purposes of the *SOP Act*.

In fact, the Court went further to state that allowing cross-contract claims would open the process up to abuse: an unscrupulous main contractor could, if he wished, bring in a multitude of dubious arguments, including cross-claims, counterclaims and set-offs, in order to enlarge and obfuscate the primary payment dispute, bog down the adjudication process and overwhelm the sub-contractor bringing the claim.

For the above reasons, the Court held that both the language of the *SOP Act* and *SOP Regulations*, and their underlying object and purpose, require the Court to adopt the single-contract interpretation.

SECOND ISSUE: WHETHER THE ADJUDICATOR BREACHED SECTION 17(3) OF THE *SOP ACT*

This issue arose from the Respondent's argument that in finding that the cross-contract set-off should be disregarded, the Adjudicator had breached *Section 17(3)* of the *SOP Act*.

Here, the Respondent's argument centred around the fact that under *Section 17(3)(d)*, the Adjudicator must consider the payment response and the adjudication response, and that the Adjudicator had failed to do so as he had indicated in the Adjudication Determination that he was constrained by *Section 17(3)(b)* (which requires the Adjudicator to focus on the provisions of the contract to which the adjudication application relates).

Court's Decision on this Issue

The Court held that although *Section 17(3)(d)* requires an adjudicator to consider a Respondent's payment response and adjudication response, that directive is still subject to *Section 15(3)*, which concerns the kinds of withholding reasons which may be raised and considered in an adjudication. Thus, if an adjudicator considered a payment response and/or adjudication response (as required under *Section 17(3)(d)*) and found that it included matters which should not be considered under *Section 15(3)*, he would then disregard those matters (but not without having first directed his mind to whether they should properly be considered).

In the present case, the Adjudicator came to the decision that he had to reject the allegations in the payment response and the adjudication response on the combined basis of his interpretation of *Section 15(3)* (as explained above) and the directive of *Section 17(3)(b)* to the Adjudicator to focus on "*the contract to which the adjudication application relates.*"

THIRD ISSUE: WHETHER THE ALLEGATIONS OF FRAUD AND UNJUST ENRICHMENT ARE MADE OUT

For this issue, the Court did not make any findings or observations. Since the Court held that the Adjudicator was right to confine his deliberation to the T211 Contract, it follows that the alleged fraud and unjust enrichment regarding the C933 contract are immaterial, and it is not necessary to consider the various issues (including whether there was in fact fraud) relating to the purported wrong payment claims made under the C933 contract.

Concluding Views

This case clearly demonstrates that the SOP Act is purely for an efficient and quick process to resolve payment disputes, and the Court clearly emphasized that an Adjudication Determination, while binding, only provides temporary finality. Parties are at liberty to pursue any cross-contract cross claims, counterclaims and set-off at the appropriate forum (not Adjudication under the SOP Act).

Further to the above, this case is a further development of the Rong Shun Engineering & Construction Pte Ltd v C.P. Ong Construction Pte Ltd [2017] SGHC 34 (which confirmed that a payment claim and an adjudication application can only arise out of one single contract) and confirms that any cross-claims, counterclaims and set-offs can only arise from a single contract only.

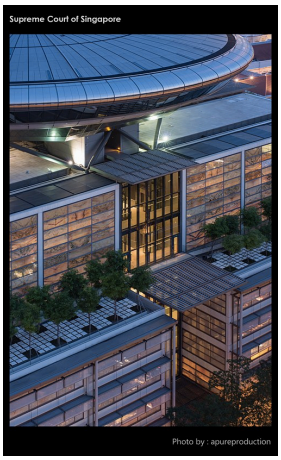
CHANGAROTH **CHAMBERS LLC**

INVESTOR-STATE ARBITRATION: REVIEWING AN ARBITRAL TRIBUNAL'S AWARD ON THE BASIS THAT THE TRIBUNAL EXCEED ITS JURISDICTION

***Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Limited and Others* [2017] SGHC 195**

IN SUMMARY

Following on the recent Singapore Court of Appeal judgment in *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57 (which was covered in Issue No. 5 of 2016), the Singapore High Court in this present case had to deal with another application for setting aside of an investor-State arbitral award on the basis that the tribunal exceed its jurisdiction.



FACTS

Background to the Investment Treaty

The Kingdom of Lesotho ("the Plaintiff") is a member of the Southern African Development Community ("SADC"), in inter-governmental socio-economic organisation comprising 15 Southern African States. The SADC was established by the Treaty of the Southern African Development Community on 17th August 1992 ("the SADC Treaty"). The SADC Treaty also established a Tribunal ("the SADC Tribunal") to ensure adherence to and to interpret the Treaty, with the jurisdiction to adjudicatr disputes and issue advisory opinions.

In 2006, the SADC signed a Protocol on Finance and Investement which granted protections to investors, and under Annex 1 to the Protocol, investors could commence international arbitration (with one of the for a being the SADC Tribunal) against signatory States if the dispute arose after 16 April 2010. The precise scope of the arbitration agreement in Annex 1 to the Protocol extended to "*disputes between an investor and a State Party concerning an obligation of the [State] in relation to an admitted investment … after exhausting local remedies.*"

The Dispute Between Parties

The underlying facts of this present case concerned investments made in the late 1980s by a South African businessman in diamond mines located in Lesotho. The investors alleged that the Plaintiff had expropriated their investments. After unsuccessfully pursuing actions on the Plaintiff's domestic courts, the Defendants commenced proceedings in the SADC Tribunal in 2009. Unfortunately for the Defendant, the SADC Tribunal was dissolved by resolution of the SADC Summit before it had an opportunity to determine the Defendants' claim.

The Arbitration and the Awards

The Defendants the commenced international arbitration proceedings before the Permanent Court of Arbitration ("PCA") against the Plaintiff in 2012 pursuant to Annex 1, on the basis that the Plaintiff, by contributing to or facilitating the shutting down of the SADC Tribunal ("shuttering") without providing alternative means by which the Defendants' expropriation claim might be heard, again breached its obligations under the SADC Treaty. The PCA Tribunal elected Singapore as the seat of arbitration, and rendered 2 awards in the Defendants' favour: a partial final award on jurisdiction and merits on 18th April 2016 ("the Award") and a final award on costs on 20th October 2016 ("the Costs Award"). The Award determined that the Plaintiff had breached various obligations under the SADC Treaty and granted relief by directing the parties to constitute a new tribunal to hear the Defendants' expropriation claims.

The Plaintiff's Application to the Singapore High Court

The Plaintiff applied to the Singapore High Court to set aside the Award in its entirety, on the basis that the PCA Tribunal lacked jurisdiction and/or that the Award exceeded the terms or scope of the submission to arbitration.

ISSUES BEFORE THE SINGAPORE HIGH COURT

The issues before the High Court are as follows:

(a) Whether the PCA Tribunal lacked jurisdiction *ratione temporis* over the dispute, which arose before the entry into force of Annex 1;

(b) Whether the PCA Tribunal lacked jurisdiction *ratione materiae* because the dispute did not have the necessary connection to an investment within the meaning of Article 28(1) of Annex 1, and whether the Defendants' purported investment had been admitted within the meaning of Article 28(1) of Annex 1;

(c) Whether the dispute concerned an obligation of the Plaintiff in relation to the Defendants' purported investment within the meaning of Article 28(1) of Annex 1;

(d) Whether the Defendants had exhausted local remedies as required by Article 28(1) of Annex 1; and

(e) Whether the PCA Tribunal lacked jurisdiction *ratione personae* over the Defendants on the basis that they were not capable of qualifying as investors.

There is also the preliminary issue of whether the Singapore High Court had jurisdiction under *Section 10(3)* of the *IAA* or under *Section 3(1)* of the *IAA* read with *Article 34(2)(a)(iii)* of the Model Law.

HOLDING OF THE SINGAPORE HIGH COURT

The Singapore High Court held that the Award dealt with a dispute not contemplated by and not falling within the terms of the submission to arbitration and thereby fell foul of *Article 34(2)(a)(iii)* of the Model Law and the Award is therefore set aside. Specifically on the issues:

(a) On the preliminary issue, the Court does not have jurisdiction to set aside the Award under *Section 10(3)* of the *IAA*, but has jurisdiction under *Section 3(1)* of the *IAA* read with *Article 34(2)(a)(iii)* of the Model Law;

(b) The dispute that was submitted to arbitration was the shuttering dispute, which was within the PCA Tribunal's jurisdiction *ratione temporis* under Article 28(4) of Annex 1;

(c) The Defendants' right to submit disputes to the SADC Tribunal was not an "investment" within the meaning of Article 28(1) of Annex 1, nor was it "admitted" for the purposes of Article 28(1) of Annex 1;

(d) The shuttering dispute did not concern any obligation of the Plaintiff's in relation to the purported investment (i.e. the Defendants' right to submit disputes to the SADC Tribunal);

(e) The Defendants failed to exhaust local remedies, in particular, an Aquilian action for financial loss; and

(f) Swissbourgh and the Tributees were not "*investors*" for the purposes of Article 28(1) of Annex 1, and this was consistent with the PCA Tribunal's ruling that it lacked jurisdiction over them, although the PCA Tribunal had come to that view on different grounds.

PRELIMINARY ISSUE: WHETHER THE HIGH COURT HAD JURISDICTION UNDER *SECTION 10(3)* OF THE *IAA* OR UNDER *SECTION 3(1)* OF THE *IAA* READ WITH *ARTICLE 34(20(a)(iii)* OF THE MODEL LAW

The High Court held that *Section 10(3)* of the *IAA* does not apply to an award that deals with the merits of the dispute, relying on the case of *AQZ v ARA* [2015] SGHC 49. Therefore, as the Court found that the Award includes the merits (and the jurisdiction) of the dispute, the Court has no jurisdiction to set aside the Award on the basis of *Section 10(3)* of the *IAA*.

However, the Court held that if an Arbitral Tribunal decides on a dispute beyond the terms or scope of the arbitration agreement (more specifically, where the final award deals with a dispute "*not falling within the terms of the submission to arbitration*"), such a decision is liable to be set aside under *Article 34(2)(a)(iii)* of the Model Law (read with *Section 3(1)* of the *IAA*), and therefore the Court has jurisdiction to detemrine the Plaintiff's jurisdictional challenges under this Article.

The Court also reiterated the decision of the Court of Appeal in *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57, which held that the Court must apply a *de novo* standard of review (meaning a fresh review) of the Arbitral Tribunal's jurisdiction, even in relation to an investor-State Arbitration.

WHETHER THE PCA TRIBUNAL LACKED JURISDICTION *RATIONE TEMPORIS* OVER THE DISPUTE

The Issue and the PCA Tribunal's Decision

The critical provision in question here is Article 28(4) of Annex 1 which states that "*[t]he provisions of this Article shall not apply to a dispute, which arose before entry into force of this Annex*". The Plaintiff argued that the Defendants' characterisation of the dispute as one related to the shuttering of the SADC Tribunal was an "artifice" and that the "real dispute" was the expropriation dispute, which was outside the temporal scope of the Investement Protocol (which entered into force in 16 April 2010) as the expropriation dispute had arisen well before April 2010.

The majority of the PCA Tribunal rejected this view, and found that a "*separate and discrete dispute*" had arisen in this case upon the shuttering of the SADC Tribunal by the SADC Member States. While determining the shuttering dispute was a "*necessary prerequisite for deciding the underlying [expropriation] dispute,*" this does not mean that they were the same dispute.

The Court's Decision

The Court held that the true dispute before the PCA Tribunal was the shuttering dispute, which arose after the entry into force of Annex 1. The shuttering dispute is within the PCA Tribunal's jurisdiction *ratione temporis* due to the following reasons:

(a) The two disputes did not involve the same legal conflict (which the Judge found was crucial) – one was whether the Plaintiff's act from 1991 to 1995 constituted an unlawful expropriation of the Mining Leases, which the other is whether the Plaintiff's participation in the SADC Summit's decision to shutter the SADC Tribunal constituted a breach of the Plaintiff's treaty obligations;

(b) The two disputes did not have the same origin in a meaningful sense – the expropriation dispute provided the factual backdrop to the shuttering dispute, but the real cause of the shuttering dispute was the Plaintiff's approach and conduct towards the dispute resolution process and not the alleged expropriation; and

(c) The two disputes involved different conduct, i.e., different acts of alleged wrongdoings, by different actors.

WHETHER THERE WAS AN "INVESTMENT" – JURISDICTION *RATIONE MATERIAE* (SUBJECT MATTER JURISDICTION)

The Issue and the PCA Tribunal's Decision

Under Article 28(1) of Annex 1, the dispute must concern an obligation which relates to "*an admitted investment*". Therefore, the issue here is what in fact is the investment concerning which is alleged that a dispute has arisen. There is also the ancillary issue of whether such investment was admitted.

Once consequence of the Defendants characterising their dispute as the shuttering dispute rather than the expropriation dispute was that the corresponding "investment" was not the Mining Leases, but the right to refer the dispute to the SADC Tribunal.

The Award characterised the investment as "*an international law right to seek compensation for an expropriation of the investment*", "*the right to claim for compensation*", "*the unheard claim*", "*the claim to compensation*", the "*secondary right to seek relief from the SADC Tribunal in respect of the taking of the primary rights*" and an "*international law right to have their claim heard by the SADC tribunal*". Therefore, it is clear that the alleged investment is not the Defendants' claim to compensation per se, but rather a right to claim for compensation before the SADC Tribunal for the expropriation of the Mining Leases ("the secondary right").

The Court's Decision on Whether There Was An "Investment"

The Court decided that the said right is not an investment. To this end, the Court found that the precise terms adopted in the definition of "investment" in Annex 1 ("*purchase, acquisition or establishment of productive and portfolio investment assets*") made the definition more restrictive that "*any kind of asset*". Therefore, the Court was not able to conceptualise how the said right could fit within the restrictive terminology used in the SADC Treaty.

The Court also considered whether the Defendants' secondary right did not constitute a distinct investment under the definition in Article 1(2) of Annex 1, to which the Court held that it could not. The Court explained that the right is not sufficiently connected with the Defendants' core investment (i.e. the Mining Leases) to be considered part of the corresponding bundle of rights, and the secondary right did not derive from the provisions of the Mining Leases themselves but instead arose much later.

Whether the Investment was "Admitted"

Further to the above, there was also an issue of whether the Investment was "Admitted". The Court stated that admission is a matter of compliance with the host State's domestic laws and regulations. The introduction of the requirement of admission in Article 28(1) of Annex 1 is significant, in light of the fact that the concept of admission was absent from the SADC Treaty – i.e. the investment has to be "admitted".

Based on the Court's findings above that the secondary right is not an "Investment", it therefore follows that the secondary right is not an "investment" that can be "admitted" as that term is ordinarily understood.

WHETHER THE DISPUTE CONCERNED AN OBLIGATION OF THE PLAINTIFF IN RELATION TO THE DEFENDANTS' PURPORTED INVESTMENT

The question here is whether the shuttering dispute concerns any obligations which exist "*in relation to*" the purported investment, which on the Defendants' case was the right to present a claim to the SADC Tribunal.

The majority of the PCA Tribunal found that the Plaintiff had several obligations relating to the Defendants' right to refer disputes on expropriation to the SADC Tribunal, and they are:

(a) An obligation to not withdraw the Plaintiff's consent to or otherwise interfere with the SADC Tribunal's jurisdiction;

(b) An obligation to give fair and equitable treatment to the Defendants;

(c) An obligation to refrain from taking any measures likely to jeopardise the sustenance of human rights, democracy and the rules of law; and

(d) An obligation to safeguard the Defendants' right of access to competent courts, tribunals and authorities.

The Court found that none of the four obligations accepted by the majority of the PCA Tribunal were obligations existing "*in relation to*" the admitted investment in question. In fact, the Court found the Defendants' secondary right to refer disputes to the SADC Tribunal was not an investment contemplated in Annex 1, but rather a protection conferred by this instrument. It would be a circular argument to construe the very right to refer disputes to the SADC Tribunal as itself an "*investment*" which could in turn be the subject of obligations arising under the SADC Treaty.

WHETHER THE DEFENDANTS HAD EXHAUSTED LOCAL REMEDIES AS REQUIRED BY ARTICLE 28(1) OF ANNEX 1

While the majority of the PCA Tribunal had found that there was no local remedy available to remedy the violation relating to the shuttering of the SADC Tribunal, the Court found that the Defendants had not exhausted all available local remedies for the Shuttering Dispute.

To this end, the Court held that there was insufficient material before the Court to draw the conclusion that an Aquilian action would have been unavailable or ineffective. It was sufficient that an Aquilian action was an avenue open to the Defendants that could have been capable of providing effective relief, and therefore, the threshold of exhausting local remedies had not been crossed.

WHETHER THE PCA TRIBUNAL LACKED JURISDICTION *RATIONE PERSONAE* ("PERSONAL JURISDICTION") OVER SWISSBOURGH AND THE TRIBUTEES

Another jurisdictional objection raised by the Plaintiff was that the Defendants were not capable of qualifying as investors" for the purposes of Article 28(1) of Annex 1. Although the PCA Tribunal found that all nine Defendants were capable of being "investors" regardless of whether they were domestic or foreign, it was also found that the Swissbourgh and the Tributees had assigned their rights to pursue their claims against the Plaintiff for its alleged expropriation.

As such, the PCA Tribunal found that the second to fourth Defendants were the proper parties to pursue the claim which Swissbourgh and the Tributees were not "investors" for the purposes of Article 28(1) of Annex 1 and their claims were dismissed. Hence there was no basis for the Court to set aside the Award for excess of jurisdiction *ratione personae*.

The Court's Reasoning

Nevertheless, the Court gave its reasons for its view that Swissbourgh and the Tributees were not "*investors*" for the purposes of Article 28(1) of Annex 1. Annex 1 is intended to attract and protect foreign investors. The fact that it was not expressly mentioned in Annex 1 was not so compelling as to outweigh the clear context and object of Annex 1. Therefore, the Court held that the PCA Tribunal lacked jurisdiction over Swissbourgh and the Tributees (do note that while the decision is consistent with the PCA Tribunal's decision, the grounds of the decision are different).

SUMMARY OF COURT'S ANALYSIS

Based on the Court's analysis of this present case, the Court held that the PCA Tribunal's award dealt with a dispute not contemplated by and not falling within the terms of the submission to arbitration, and therefore set aside the Award in its entirety under *Article 34(2)(a)(iii)* of the Model Law (read with *Section 3(1)* of the *IAA*.

Concluding Views

While this is the second investor-state matter that has the confronted the Singapore Courts (following Sanum Investments Ltd v Government of the Lao People's Democratic Republic [2016] 5 SLR 536), as stated in the introduction of the Judgment, this present case "engages intriguing questions of arbitral and international investment law which have yet to be considered by a Singapore court."

Both judgments clear demonstrate the Singapore Courts' willingness and competence in dealing with issues concerning public international law and investment arbitration.

CHANGAROTH **CHAMBERS LLC**

If you would like more information on this or any other area of law, you may wish to contact us.

ANIL **CHANGAROTH**
FCIArb FSIArb
Advocate and Solicitor of Singapore and
Solicitor of England and Wales
Commissioner for Oaths and Notary Public

anil@changarothchambers.com

LIM MUHAMMAD SYAFIQ
Associate
Advocate and Solicitor of Singapore

syafiq@changarothchambers.com