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SINGAPORE CONTENTIOUS COMMENTARY
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CONTENTS

Welcome to the first issue of Singapore contentious commentary for 2021. In this round-up, we cover notable commercial decisions by the Singapore courts from January to April 2021. During this period, the courts have issued several noteworthy judgments in relation to international arbitration, as well as other interesting decisions in the fields of conflicts of law, insolvency and construction.

Arbitration

Award set aside after tribunal denies witness evidence

In *CBS v CBP* [2021] SGCA 4, the Court of Appeal upheld the setting aside of an arbitral award on the basis that the arbitrator had wrongfully denied the respondent in the arbitration the opportunity to present witness evidence at a hearing.

The arbitration was conducted under the Singapore Chamber of Maritime Arbitration Rules (3rd Edition, 2015), rule 28.1 of which provides that an arbitrator "*shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral submissions*" unless parties have agreed to a documents-only arbitration. The arbitrator directed that there would be no witnesses presented at the hearing because the respondent had "*failed to provide witness statements or any evidence of the substantive value of presenting witnesses*."

The award creditor argued that rule 28.1 should be read disjunctively (thereby permitting a hearing for oral submissions alone). However, the Court held that the arbitrator was obliged to hold a hearing to receive oral evidence from witnesses where it was requested by a party and was not empowered to choose what type of hearing to hold in the absence of an agreement by the parties. The arbitrator's denial of the entirety of the respondent's witness evidence constituted a breach of natural justice.

This particular issue may not have presented itself if the arbitral rules had contained witness-gating powers (such as those in the SIAC or LCIA Rules) under which the tribunal may allow, refuse or limit the appearance of witnesses to give oral evidence. Nonetheless, the decision is a reminder that tribunals should generally be cautious to make a direction which bars all of a party's proposed witnesses from giving evidence.

The Court also refused to remit the matter to the tribunal because, pursuant to Article 34(4) of the UNCITRAL Model Law, only the High Court could order a remission. Since the application for remission had not been made before the High Court, the Court of Appeal had no jurisdiction to hear it. Parties seeking remission as plan B in a setting-aside application should not wait until the Court of Appeal stage to make this argument.

Key issues

- Arbitral awards successfully set aside
- Guidance on principles of transnational estoppel
- Conditions for obtaining a post-judgment Mareva
- Burden of proof when obtaining a final garnishee
- Employee's successful claim for wrongful dismissal
- Filing of admiralty writs during a section 211B moratorium
- Guidance on commencement of creditors' voluntary winding-up
- Enforceability of "pay when paid" provisions upon termination
- Compliance with contractual conditions for variation

Three-month setting-aside time-bar is strict even in cases of fraud

The Court of Appeal held that the three-month time limit for setting aside an arbitral award in Article 34(3) of the UNCITRAL Model Law is absolute and cannot be extended even in cases where fraud is discovered after the expiry of this time limit.

In *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] SCGA 9, the appellants sought to set aside an arbitral award made against them, relying on what they claimed was evidence of fraud and/or corruption that was not discoverable until months after the

award was issued. They argued that the three-month time for setting aside an arbitral award could be extended in circumstances where there has been fraud or corruption, and particularly where this was discovered only after the expiry of the time limit.

While the Court did not agree that the award was induced or affected by fraud in this case, it took the opportunity to clarify the procedural question of time-bar as an important one for parties and practitioners. The Court found that Article 34(3) is clear on its face and does not suggest that any exception to the three-month time limit is available for fraud or corruption (or indeed any ground at all). The Court also considered that the specific grounds under section 24 of the International Arbitration Act grounds are in fact a subset of the public policy ground in Article 34(2(b)(ii) of the Model Law and are therefore also subject to the same three-month time limitation.

While recognising that the mention of fraud "*tends to induce an emotive response aimed at avoiding injustice*", the Court did not agree that an absolute time limit in Article 34(3) would cause "*absurd and unjust results*". Although a party who does not act within the time limit will not be able to set aside an arbitral award obtained by fraud, it would still be able to take action to resist enforcement of the award.

Arbitration agreement deemed effective through parties' course of conduct and statements in legal proceedings

The central question in *Cheung Teck Cheong Richard and others v LVND Investments Pte Ltd* [2021] SGHC 28 was whether the parties' course of conduct formed a valid arbitration agreement, in circumstances where the contractual dispute resolution clause did not amount to a valid arbitration agreement.

The claimant parties had commenced arbitration against the defendant by way of a notice of arbitration. Although the respondent took certain procedural objections to the conduct of the proceedings, it did not disagree that the disputes should be arbitrated. The claimant parties subsequently decided that they did not wish to pursue the arbitration and commenced a court action. The respondent sought a stay of proceedings.

The High Court found that the contractual dispute resolution clause (clause 20A.1) was not a valid arbitration agreement, because it did not on its terms objectively show that there was an agreement by the parties to submit disputes to arbitration. However, the Court concluded that, independently of clause 20A.1, the parties had through their conduct and expressed statements in correspondence (which repeatedly referred to an arbitration agreement) agreed to submit their disputes to arbitration seated in Singapore.

The Court also concluded, after exploring in some detail the legislative history of the Arbitration Act and the UNCITRAL Model Law, that an agreement to arbitrate had also arisen by virtue of section 4(6) of the Arbitration Act which provides that "*Where in any arbitral or legal proceedings, a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances in which the assertion calls for a reply and the assertion is not denied, there shall be deemed to be an effective arbitration agreement as between the parties to the proceedings*." The Court took the view that an effective arbitration agreement under section 4(6) not only satisfies the "in writing" requirement under section 4(3) of the Arbitration Act, but also creates the "legal fiction" that there is an existing arbitration agreement which is valid, complete and enforceable – even where an arbitration agreement may not otherwise strictly arise as a matter of contract law.

Partial set-aside following late introduction of a new defence

CAI v CAJ and another [2021] SGHC 21 is another decision which adds to Singapore's body of jurisprudence on principles of natural justice in the context of international arbitration. CAI were the claimants in the underlying ICC arbitration concerning the construction of an industrial park. CAI alleged that the award was tainted by two breaches of natural justice: (i) the tribunal allowed and ruled on an extension of time (EOT) defence without giving CAI a fair and reasonable opportunity to respond, and (ii) the tribunal relied on its own experience (as opposed to the available evidence) to grant a 25-day EOT.

The Court agreed with CAI that the EOT defence was a completely new defence which the respondents in the arbitration had introduced for the first time in their closing submissions, a month after the oral hearing had concluded. This deprived CAI of the opportunity to adduce factual and expert witness evidence and obtain document disclosure which would have allowed them to provide a meaningful response. Even though CAI did not seek leave from the tribunal to put forward further expert evidence or make submissions, the court found that this did not amount to "hedging" (which was cautioned against by the Court of Appeal in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and anor* [2020] SGCA 12) as CAI had flagged their objections to the EOT defence sufficiently clearly and unequivocally in their closing submissions.

The Court also found that the tribunal did not rely on the evidence adduced by the defendants in granting a 25-day EOT and instead relied on its own experience. Without the necessary direct evidence to assist it, the Court found that the tribunal was "ill-equipped" to come to a decision on the length of the EOT and that the parties should have had a chance to comment and provide submissions on the matter.

The Court set aside the tribunal's decision to grant the 25-day EOT and increased the number of days delay (for which liquidated damages were payable) to 99 days. The decision demonstrates that, although "due process paranoia" amongst tribunals is widely regarded to be unjustified, there are nonetheless limits on the wide autonomy that the parties and tribunal have with respect to arbitral procedure.

Limited scope of remission under the Arbitration Act

Remission of arbitration proceedings to the tribunal (so that it has the opportunity to remedy alleged defects in the award) is frequently sought by aggrieved parties as an alternative to setting aside of an award. In dismissing a setting-aside application under the Arbitration Act (AA), the High Court in *CIX v CIY* [2021] SGHC 53 highlighted that where arbitration proceedings are remitted back to the tribunal pursuant to the AA, the arbitral tribunal is not permitted to revisit the issues in question and reach the opposite conclusion.

In other words, upon remission a tribunal under the AA cannot reconsider an issue which it has already decided and is limited to dealing with issues, as appropriate, which may not have been considered or determined during the course of the arbitration.

Interestingly, what the tribunal can do *after* remission appears to differ under the AA and the International Arbitration Act (IAA). Section 44 of the AA provides that upon an award being made, the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award. The IAA, at section 19B, has an equivalent provision to section 44 but this is expressly subject to Art 34(4) of the UNCITRAL Model Law which provides that upon remission, the arbitral tribunal is given "*an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside*." This distinction on remission of awards seems to be a nuanced difference between the domestic and international arbitration regimes.

Award set aside for lack of nexus with parties' arguments

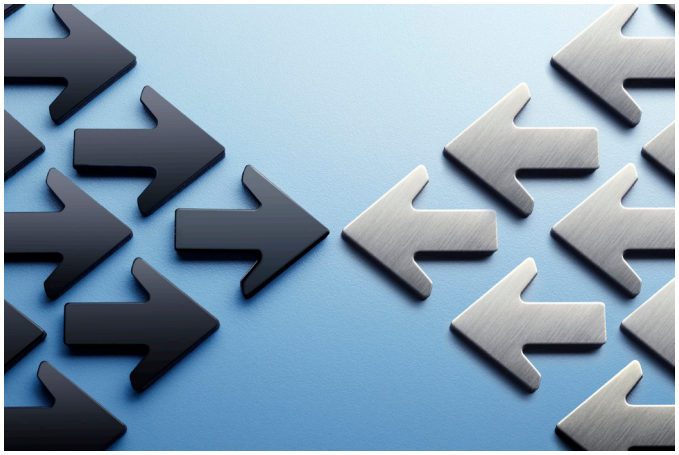
In *BZV v BZW and another* [2021] SGHC 60, the High Court set aside a SIAC award because the tribunal had adopted a chain of reasoning which had no nexus to the parties' cases, in breach of the fair hearing rule. The decision is a reminder that, while an award cannot be set aside based on mere errors of fact or law, an arbitral tribunal does not have *carte blanche* to render an award which is entirely inconsistent with the submissions and issues put before it.

The dispute arose from a shipbuilding contract between the claimant buyer and respondent shipbuilder. In the arbitration, the claimant was asserting two claims against the defendant, for: (i) liquidated damages for delay in delivery of the vessel; and (ii) damages because the vessel's generators were rated IP23 instead of IP44. The three-member SIAC tribunal dismissed both claims (with one arbitrator issuing a dissent on the IP44 issue).

The Court recognised that the law gives the tribunal the benefit of a generous reading of the award when considering its reasoning which it has applied. Despite this, the Court found that the tribunal had clearly not adopted as part of its chain of reasoning on the delay claim any aspect of six of the seven defences raised by the respondent. As for the respondent's seventh defence, which was founded on the prevention principle, the Court accepted (on a generous reading) that the tribunal's finding of "wrongful" prevention amounted to a finding that the claimant did commit at least one act of prevention. However, the Court found that the tribunal had still failed to identify for determination or applied its mind to determine the issue of causation in relation to the prevention defence. This was an essential issue arising from the parties' arguments.

The Court also held that the majority did not rely on a chain of reasoning with a nexus to the defendant's defences on the IP44 claim. Notably, in its award (as originally issued), the tribunal had mistakenly identified one Mr Tan as a member of the claimant's staff, when he was in fact a representative of the respondent. While a patent error, this mistake did on its face support the tribunal's finding that the claimant had made a representation to the defendants, which provided some nexus between the tribunal's chain of reasoning and the respondent's promissory estoppel defence in the IP44 claim. However, when the tribunal subsequently corrected this error in the award (upon application by the claimant) and identified Mr Tan as the respondent's representative, the Court found that the award (as corrected by the addendum) no longer had any nexus to the estoppel defence.

As such, the Court found that the tribunal had rendered its award in breach of the fair hearing rule and in breach of natural justice and set aside set aside the entirety of the award in so far as it dismissed the claimant's claims in the arbitration.



Conflict of laws

Court of Appeal lays down principles on transnational estoppel

Issue estoppel is about precluding parties from re-litigating what a prior competent court of law has already decided about their dispute. A five-member bench of the Court of Appeal in *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14 took the opportunity to review and recalibrate some of the principles governing transnational issue estoppel in Singapore.

The disputes centred around whether the appellant was bound by earlier English court decisions in relation to a 1970 co-existence agreement between the parties' predecessors which, among other things, governed the use of the name "Merck" in various jurisdictions around the world. The English Court of Appeal had interpreted various clauses of the 1970 agreement and found the appellant was in breach of the agreement. In the Singapore proceedings, the respondent and Merck Pte Ltd sued the appellant and three other defendants for trademark infringement, passing off and breach of contract. The High Court held that issue estoppel applied such that the appellant was bound by the English decisions and was estopped from disputing the English Court of Appeal's interpretation of the 1970 agreement.

In dismissing the appeal, the Court offered guidance on some principles which parties embroiled in transnational litigation may wish to bear in mind.

- Foreign judgments are capable of giving rise to issue estoppel. Where there are multiple competing foreign judgments, the foreign judgment that is the first in time should be recognised for the purposes of creating an estoppel. On the other hand, where there is an inconsistent prior or subsequent *local* judgment between the same parties, the foreign judgment should not be recognised (giving priority to the *res judicata* effect of local judgments).
- In order for a foreign judgment to give rise to issue estoppel, not only the foreign judgment as a whole, but also the decision on the specific issue that is said to be the subject matter of the estoppel must be final and conclusive under the law of the foreign judgment's originating jurisdiction. For a foreign judgment to be considered final and conclusive, the foreign legal system in question must have either a doctrine of issue estoppel or equivalent.
- Issue estoppel does not apply to a foreign (or even local) judgment on a "pure" question of law that does not directly affect the parties' rights, liabilities or legal relationship.

In establishing these principles, the Court had one eye on the legislative policy reflected in Singapore's enactment of the Choice of Court Agreements Act (giving effect to the Hague Convention on Choice of Courts Agreements) and Singapore's desired status as an international disputes hub.

No fall-back role *for lex* fori in determining governing law of disputed contract

How is the proper law of an alleged oral contract to be determined in circumstances where the existence of that contract is disputed? This was the main point of interest in the case of *Solomon Lew v Kaikhushru Shiavax Nargolwala & 4 Ors* [2021] SGCA(I).

At the SICC, the judge had dismissed a claim by purported purchaser Mr Lew, holding that no contract of sale to sell shares in BVI company owing rights to a luxury villa in Thailand was validly concluded. The SICC judge treated Singapore law as governing the issue of whether a binding agreement had been reached. Nonetheless, he awarded certain costs against the shares' owners on account of their argument that Thai law applied. In reaching its conclusion, the SICC judge took the view that in cases where the entire contract is disputed and where the court could not reach a "clear" conclusion as to the governing law, the *lex fori* (i.e. Singapore law, in this case) should apply.

The Court of Appeal dismissed Mr Lew's appeal on the substance of the dispute and allowed the shares' owners' appeal on costs. It held that the issue of whether a contract has been validly formed is to be determined by the traditional test in *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 (which first considers whether the governing law can be inferred from the parties' intentions, failing which it determines the law which has the closest and most real

connection with the contract). On the facts, the court held that Thai law applied to govern the issue of whether a valid contract had been formed. This is because the villa was in Thailand, the defendants were in Thailand, and any prudent buyer would be concerned about the Thai legal position in relation to the title held by the BVI company.

Notably, the Court of Appeal disagreed with the SICC judge that there is any fall-back role for the *lex fori* to apply. What would be illogical, the Court of Appeal held, would be to apply the law of the forum to the issue of whether a contract had been made, regardless of whether the forum had anything to do with the parties or the subject matter, other than the fact that proceedings happened to be brought in it.

Marevas

Court sets conditions for obtaining a post-judgment Mareva

JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others [2021] SGCA 26 appears to be the first occasion on which the Court of Appeal has specifically addressed in writing the conditions for the grant of a Mareva injunction *post-judgment*.

JTA had brought proceedings against the respondents for deceit and conspiracy and had obtained Mareva injunctions against certain respondents pending trial. JTA's claims were dismissed in the High Court, but certain Mareva injunctions were reinstated pending appeal. The Court of Appeal reversed the High Court's ruling and found the respondents liable to JTA for an amount in excess of US$70 million. JTA applied for the reinstated Mareva injunctions to continue to be in effect until the respondents had fully satisfied the judgment sum and costs. JTA also sought to be released from certain undertakings it had provided when the worldwide Marevas were granted, including that it could not without the leave of Court commence proceedings against certain respondents in other jurisdictions.

The Court of Appeal endorsed the criteria for a post-judgment Mareva injunction set out by the High Court in *Hitachi Leasing (Singapore) Pte Ltd v Vincent Ambrose and another* [2001] 1 SLR(R), namely: (i) there is a real risk of the debtor dissipating his assets with the intention of depriving the debtor or satisfaction of the judgment debt; (ii) the injunction must act as an aid to execution; and (iii) it must be in the interests of justice to grant the injunction. On the facts, all three conditions were met in this case.

The Court also determined that a plaintiff who seeks to be released from his undertakings (in the context of a post-judgment freezing injunction) must (i) demonstrate cogent and persuasive reasons for the release; and (ii) show that the release would not occasion injustice to the defendant. The Court found that there was no reason to release JTA from its undertakings given that the respondents had evinced an intention to pay the judgment sum, and the Court deemed it prudent for it to retain control over the foreign enforcement proceedings.

Garnishees

High bar maintained for obtaining a final garnishee

The Court of Appeal has clarified that an applicant for a garnishee order against a joint bank account still bears the legal burden of showing that a final garnishee order should be made, even after they have obtained a provisional garnishee order and proven a strong *prima facie* case that the money in the joint account belongs solely to the judgment debtor.

In *Timing Ltd v Tay Toh Hin* [2021] SGHC 5, Timing Ltd had an arbitral award in its favour which it sought to enforce. Judgment was entered on the award and during the examination of the judgment debtor, it was discovered that the first defendant,

Tay Toh Hin, had four bank accounts with Standard Chartered Bank that held moneys that were paid to him personally and did not belong to his wife, despite the accounts being jointly held in both their names. On this basis, Timing Ltd took out a summons for a garnishee order to satisfy the debt owed to it.

Four months prior to this decision, the High Court had departed from its previous decision in *One Investment and Consultancy Ltd and another v Cham Poh Meng (DBS Bank, garnishee)* [2016] 5 SLR 923 and held that a joint bank account may be subject to a garnishee order, as to hold otherwise would permit debtors to insulate their assets by holding them in joint accounts and result in an arbitrary position where the recovery of a judgment debt depended in large part on the manner in which the debtor had decided to organise his personal finances. It also concluded that the applicable standard of evidence at the show cause stage was a strong *prima facie* case that the money in the account belonged to the judgment debtor.

At the show cause hearing, the Assistant Registrar dismissed Timing Ltd's application to garnish the money in two of the four joint accounts as it had failed to show on a balance of probabilities that the entire sum of money held in those accounts was held by Mr Tay alone. Timing Ltd appealed against this decision and contended that once a provisional garnishee order was made, the legal burden of proof shifted and it should be for the respondents to rebut the strong *prima facie* case as to why a final garnishee order should be made, rather than for them to satisfy the Court that a final garnishee order should be made.

On appeal, the High Court considered the relevant burdens and standards of proof that operate after a provisional garnishee order is made. It held that although the granting of a provisional garnishee order places a tactical burden on the garnishee to challenge the judgment creditor's case, the legal burden of proof remains firmly on the applicant to satisfy the Court that there is a sound basis to make the final garnishee order. Simply receiving a provisional garnishee order cannot be said to be determinative of whether or not a final order will be made. The Court found that Timing Ltd had not discharged this burden of proof. It was not satisfied that Mr Tay owned the entire beneficial interest in the joint accounts and dismissed the appeal. This ruling thus maintains a high bar for obtaining final garnishee orders.

Employment

Employer's failure to demonstrate sufficient grounds leads to wrongful dismissal

The High Court's decision in *Wong Sung Boon v Fuji Xerox Singapore Pte Ltd and another* [2021] SGHC 24 highlights that, where an employee is summarily dismissed, employers must demonstrate sufficient grounds to terminate the employee and communicate the reasons to the employee.

Mr Wong, a former Senior Managing Director, was summarily dismissed by his former employer, Fuji Xerox. The notice of termination provided to Mr Wong merely stated that his actions and handling of several past transactions gave rise to grounds for dismissal without notice or compensation. It also asserted that the he was in repudiatory breach of his contract and his directors' duties owed to Fuji Xerox. Mr Wong alleged that he was dismissed without cause and in breach of his employment contract.

Apart from the termination notice, Mr Wong was not provided with any reasons for his dismissal until Fuji Xerox filed its defence in the suit. Fuji Xerox claimed that he caused the company to enter into transactions outside the scope of its business, failed to comply with the credit evaluation process for the assessment of the creditworthiness of its customers before entering into various transactions, and breached his employment contract and fiduciary duties to the company by causing it to be unreasonably and unnecessarily exposed to liability.

The Court conducted a detailed analysis of Mr Wong's conduct and, in particular, noted that Fuji Xerox's witnesses did not have first-hand knowledge of the relevant transactions and therefore had limited ability to controvert Mr Wong's evidence. The Court found that Fuji Xerox had not adduced sufficient evidence to support its allegations and there were no grounds for summarily dismissing Mr Wong under the employment contract. Mr Wong was awarded over S$1.4 million in damages for wrongful dismissal, comprising three months' salary in lieu of notice, an

end of term payment under his employment contract, loss of his variable bonus, and loss of unconsumed leave.

Insolvency

Statutory moratorium in aid of a scheme does not bar the filing of admiralty writs

In The *"Ocean Winner" and other matters* [2021] SGHC 8, the High Court examined key questions regarding the interaction between insolvency law and admiralty law. It held that although the purpose of a section 211B moratorium is to provide a company in financial difficulty with "breathing space" to devise a scheme proposal to be approved by its shareholders, this does not prohibit the filing of admiralty writs *in rem*.

The judicial managers of Ocean Tankers (Pte) Ltd (OTPL) applied to set aside admiralty *in rem* writs filed by PetroChina International (Singapore) Pte Ltd (PetroChina) against four ships that OTPL had chartered. The basis for the applications was that there was a subsisting moratorium under section 211B(8) of the Companies Act (now repealed and re-enacted as Section 64(8) of the Insolvency, Restructuring and Dissolution Act 2018 (IRDA)).

The Court dismissed the application and ruled in favour of PetroChina. The Court considered two main issues: whether the filing of the admiralty *in rem* writs were (i) the commencement of "proceedings" against OTPL under section 211B(8)(c) of the Companies Act; or (ii) an "*execution, distress or other legal process [against] property*" against "property" of OTPL under section 211B(8)(d) of the Companies Act.

The Court answered both questions in the negative. An admiralty *in rem* writ did not invoke commencement of proceedings, as it merely functioned to create the security interest (by way of a statutory lien) and, as an action *in res*, did not amount to an action "against the company". Until an appearance is entered (transforming an *in rem* action to an *in personam* action), proceedings are not taken to have commenced. Given that the purpose of the section 211B moratorium is to allow the company to develop its scheme proposal, the Court was of the view that "legal process" must mean enforcement processes similar to "execution" and "distress" proceedings. Filing the *in rem* writ involves no element of enforcement (it merely creates a security interest) and does not amount to "legal process" under section 211(8)(d).

Based on this analysis, the Court held that no leave of court was required to file the writs. In the Court's judgment, the section 211B moratorium is not intended to operate in such a way as to deny the creation of substantive legal rights. It only acts to postpone the pursuit and/or enforcement of such legal rights so that the company's officers will not be too distracted and can focus their minds on coming up with a scheme of arrangement.

Clarification of the estate costs rule

The estate costs rule states that a successful litigant against a company in liquidation is entitled to be paid his costs in priority to the other general expenses of the liquidation, including the costs and remuneration of the liquidator. Thus, a liquidator having to decide whether to adopt litigation on behalf of an insolvent company is a common and recurring problem.

In *Lim Siew Soo v Sembawang Engineers and Constructors Pte Ltd* [2021] SGHC 32, Sembawang Engineers had commenced litigation against Metax Eco Solutions but went insolvent prior to judgment in the litigation. The liquidator had to make an independent judgment whether to adopt or discontinue the liquidation and sought the court's directions on the potential cost consequences of that decision (i.e. how costs would be allocated if Metax Eco Solutions were successful).

Following a long line of Commonwealth precedent based on authorities in England, Hong Kong and Australia, the High Court ruled that: (i) the estate costs rule applies whether the liquidator commences litigation or merely adopts it; (ii) the estate costs rule accords priority to a company's *entire* liability under a costs order, because that liability is incapable of being resolved in a legal sense into a pre-liquidation component and a post-liquidation component.

The Court further relied on two underlying principles as the basis for its ruling: (i) the "risk/reward" principle – which dictates that those who stand ultimately to reap the rewards of litigation succeeding ought ultimately to bear the risks of that same litigation failing (following the Court of Appeal's ruling in *ECRC Land*); and (ii) the "reciprocity principle" – which dictates that if

that party fails in the litigation, it should ordinarily be held liable for its costs *ab initio*. The decision confirms the Singapore application of the estate costs rule to be in line with other Commonwealth jurisdictions.

Guidance on commencement of CVLs

In *Superpark Oy v Super Park Asia Group Pte Ltd and others* [2021] SGCA 8, the Court of Appeal provided guidance in relation to the commencement of creditors' voluntary winding up of companies (CVLs).

SP was the majority shareholder in Super Park Asia Group (SPAG), the first respondent. The second and third Respondents were the appointed provisional liquidators of SPAG. There were three directors in SPAG, J (CEO of SP), K and G. In June 2020, K tabled a board resolution to put SPAG into provisional liquidation, and the resolution passed with votes from K and G. In July, SP convened an EGM of SPAG to terminate the voluntary winding up and remove the second and third respondents as liquidators.

SP commenced an action for a declaration that the provisional liquidation and voluntary winding up of SPAG would be terminated as at the date of the EGM and that the provisional liquidators be restrained from taking any further steps in the liquidation of SPAG. The High Court allowed the provisional liquidators to continue with their efforts to dispose of the assets, and SP appealed against the decision.

The Court of Appeal allowed the appeal, holding that SPAG had never been put into liquidation and that the provisional liquidators should not have been allowed to dispose of the assets. The Court found as follows on the pertinent questions of law.

Can a company be voluntarily wound up by its creditors if no special resolution has been passed?

No. The words of section 290(1) of the Companies Act (CA) were clear – there are only two circumstances in which a company may be wound up voluntarily and these are exhaustive. It is clear that a special resolution is required and allowing a company to be voluntarily would up by its creditors in the absence of a special resolution would be at odds with the very notion of voluntariness.

Does a voluntary winding up commence upon the directors passing a resolution, regardless of whether a members' resolution is passed?

No. Voluntary winding up commences at the time the directors lodge a declaration with the Registrar that a company cannot continue its business and that the meetings of the company and its creditors have been summoned for a date within a month of the date of the declaration. Importantly, the section 291(6)(a) CA only operates "where a provisional liquidator has been appointed before the resolution for voluntary winding up *was* passed." As such, the *provision retrospectively* dates the commencement of the winding up to when the declaration is lodged.

It should be noted that the Companies Act provisions in this case have been replaced by the Insolvency, Restructuring and Dissolution Act 2018 (IRDA) – however, *Superpark* will stand as good authority in interpreting the equivalent provisions of the IRDA.

Tort

Court lists "push and pull factors" for a potential duty of care owed by professional parties conducting investigations into the actions of a third party

In *Tan Woo Than v PricewaterhouseCoopers Advisory Services Pte Ltd* [2021] SGCA 20, the High Court set out considerations and arguments which might "pull in one direction or the other" when considering whether a professional party contracting with a client to carry out an investigation or a fact-finding exercise into the actions of a third party owes that third party a duty of care, particularly if adverse findings are made.

PwC had been engaged by SBI's management to conduct a fact-finding review in respect of certain transactions, in which Mr Tan had been involved in his capacity at SBI's former CEO. Mr Tan claimed against PwC in negligence, alleging that inaccurate statements had been made in the report which had caused him loss including reputational loss and diminution in value of his SBI shares. The High Court dismissed the claim, finding that PwC did not owe Mr Tan any duty of care. The

Court of Appeal held that Mr Tan's appeal failed at the hurdle of causation, so it did not need to reach a conclusion on the duty of care issue. Nonetheless, recognising the complexity of the point and the significant ramifications it might have for professional parties and their insurers, the Court went on to list the factors which it would need to weigh in the balance if required to reach a definitive finding on this issue.

Factors militating *against* a finding of a duty of care may include that: (i) given that an investigator will have specifically imposed contractual restrictions on the scope of its work, tortious obligations which impose a *supervening* standard of care ought to be scrutinised very closely; (ii) individuals who believe they have been wronged by the findings of professional fact-finders may have other avenues for recourse, such as a claim in defamation; and (iii) imposing a duty of care may encourage excessively defensive reporting. Factors in *support* of a duty of care may include: (i) factual findings pertaining directly to the third-party's conduct may have harmful consequences on the target of the investigation; (ii) an investigator's contractual obligations may not necessarily conflict with duties under a duty of care; and (iii) alternative causes of action such as defamation need not preclude the finding of a duty of care.

Leaving the existence of a duty of care as an open question, the Court recognised that these are difficult and important arguments which parties arguing the point in future will need to consider carefully.

Construction

"Pay when paid" provisions unenforceable even for terminated contracts

In *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd* [2021] SGHC 72, the High Court considered whether the SOPA goes so far as to render "pay when paid" provisions in a construction contract unenforceable notwithstanding the termination of the contract.

"Pay when paid" provisions, by which contractors attempt to pass the risk of the owner not paying on to the subcontractor (and thus avoid being stuck with liability for subcontractor claims) are unenforceable and of no effect under section 9 of the Building and Construction Industry Security of Payment Act (SOPA). Section 4(2)(c), meanwhile, provides that the SOPA shall not apply to "*any terminated contract to the extent that (i) the terminated contract contains provisions relating to termination that permit the respondent to suspend progress payments to the claimant until a date or the occurrence of an event specified in the contract; and (ii) that date has not passed or that event has not occurred*".

The subcontract before the Court in this case contained a clause which provided that the contractor could terminate on certain grounds, upon which no further payment would be made to the subcontractor until the whole of the main contract works had been completed. The contractor purported to terminate the subcontract pursuant to that clause. The subcontractor issued a payment claim for work which it had done after the purported termination of the subcontract. The claim was referred to adjudication and the adjudicator issued a determination in favour of the subcontractor. The contractor applied to set aside the adjudicator's determination, arguing that the adjudicator had failed to consider the applicability of section 4(2)(c) of the SOPA on the facts of the case.

Reviewing the statutory framework and taking into account the parliamentary intention on this aspect of the SOPA, the Court ruled that section 4(2)(c) of the SOPA does *not* take primacy over section 9. In the Court's view, legislative purpose was to ensure that sub-contractors are not left at the mercy of main contractors which may: (i) withhold payment for reasons unrelated to the subcontractors' performance; or (ii) attempt to make such payments contingent on performance of another contract. Consistent with this, any termination or suspension of payment provisions in a contract are to be given effect *only if* they do not fall foul of section 9.

Thus, the Court held that the contractor could not rely on a "pay when paid" provision even in circumstances where it had purported to terminate the sub-contract with its sub-contractor and upheld the adjudicator's determination.

Court reinforces the need to comply with contractual conditions for variation claims

In *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63, the High Court held that where a

construction contract required variation works to be carried out only with written instructions from a designated person, variation claims for works that had been orally requested should fail.

Vim and Deluge were the contractor and employer on a building and construction project. The subcontract between the parties provided that variation works shall be carried out only with written instructions from Deluge's project manager. Despite this, Vim claimed to have acted on verbal instructions to undertake certain variation works and claimed the corresponding costs of such works from Deluge.

Vim argued that "a gentleman's word is his bond" and so Deluge should pay for variation works notwithstanding the lack of written instructions. The Court took a strict approach, countering that Vim had given *its* word under the subcontract that it would only carry out variation works with written instructions in accordance with the contract. The Court also found on the facts and in the circumstances that Deluge had no waived and was not estopped from relying on the requirement for written instructions from Deluge's project manager for variation works. The decision is a reminder that parties are well advised to ensure strict compliance with the contractual mechanism for variations, to avoid dispute as to the validity and scope of variation requests.

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