Tomolugen Holdings Ltd and another
v
Silica Investors Ltd and other appeals

[2015] SGCA 57

Court of Appeal — Civil Appeals Nos 123, 124 and 126 of 2014
Sundaresh Menon CJ, Chao Hick Tin JA and Chan Sek Keong SJ
8 April 2015

Arbitration — Arbitrability and public policy

Arbitration — Stay of court proceedings

26 October 2015 Judgment reserved.

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

Introduction

1 Before us are three appeals against the decision of a High Court judge ("the Judge") who dismissed applications to stay the court proceedings in Suit No 560 of 2013 ("the Suit") in favour of arbitration. In the Suit, the plaintiff seeks relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") for oppressive or unfairly prejudicial conduct towards it as a minority shareholder. There are altogether eight defendants. They include the company of which the plaintiff is a minority shareholder, as well as other shareholders and current or former directors of either that company or its related companies. The stay applications were made by the defendants pursuant to s 6

of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") and the court's inherent power of case management.

2 These appeals raise issues concerning the arbitrability of disputes over minority oppression or unfairly prejudicial conduct, as well as the proper approach to adopt when dealing with potentially overlapping court and arbitral proceedings. They draw out a tension that will mount as commercial transactions and the disputes which they spawn grow in their sophistication and complexity. This tension is one that is likely to arise whenever disputes straddle court and arbitral proceedings, with the two sets of proceedings engaging common, although not necessarily identical, issues and parties. The tension lies in the court's desire, on the one hand, to avoid the complications inherent in having to resolve a dispute across two different fora and, on the other hand, its recognition that it must conform to the statutory mandate laid down in s 6 of the IAA to direct that any dispute concerning a matter which is the subject of an arbitration agreement governed by the IAA is to be resolved by arbitration. Where these two considerations pull in opposite directions, the latter necessarily prevails because of the mandatory terms of s 6. The question which then arises for the court is how it can best *manage* the proceedings that it has control over in order to ameliorate the complications that are bound to arise by reason of the overlapping proceedings.

Factual background

Overview of the material facts

3 The plaintiff in the Suit is Silica Investors Limited ("Silica Investors"), a minority shareholder which holds approximately 4.2% of the issued share capital of Auzminerals Resource Group Limited ("AMRG"), the eighth

defendant in the Suit. AMRG is the company whose affairs Silica Investors alleges have been conducted in a manner that is oppressive or unfairly prejudicial towards it.

4 AMRG is a listed Singapore company that develops, explores and exploits mines in Australia. Its wholly-owned subsidiary, Solar Silicon Resources Group Pte Ltd ("SSRG"), is also involved in mine development and exploration, and owns Australian mining licences and exploration permits.

5 Silica Investors first acquired shares in AMRG from Lionsgate Holdings Pte Ltd ("Lionsgate"), the second defendant in the Suit. The share sale agreement between Silica Investors and Lionsgate ("the Share Sale Agreement") contains an arbitration clause. Lionsgate currently remains a shareholder of AMRG and holds approximately 9% of its issued share capital.

6 Lionsgate is wholly owned by Tomolugen Holdings Limited ("Tomolugen Holdings"), the first defendant in the Suit. Tomolugen Holdings is the majority shareholder of AMRG and holds approximately 55% of its issued share capital directly. The third to seventh defendants in the Suit are shareholders and current or former directors of Lionsgate, AMRG or SSRG; together, they hold just over 3% of the issued share capital of AMRG.

7 Lionsgate made an application pursuant to s 6 of the IAA for a stay of the court proceedings against it in the Suit. Lionsgate said that a part of the dispute in the Suit fell within the scope of the arbitration clause in the Share Sale Agreement and the court proceedings against it in respect of that part of the dispute therefore had to be stayed in favour of arbitration; it further submitted that the remainder of the court proceedings against it should be stayed

as well in the interests of appropriate case management pending the resolution of the arbitration. The other seven defendants named in the Suit (collectively, "the remaining defendants") also filed stay applications that were contingent on the success of Lionsgate's application. They argued that if the court proceedings between Silica Investors and Lionsgate were stayed in favour of arbitration, then the rest of the court proceedings in the Suit should also be stayed pending the resolution of that arbitration. Their stay applications were made pursuant to the court's inherent power of case management.

8 The Judge dismissed all the stay applications. His decision is reported as *Silica Investors Ltd v Tomolugen Holdings Ltd and others* [2014] 3 SLR 815 ("the HC Judgment"). Civil Appeal No 126 of 2014 is Lionsgate's appeal against the Judge's decision, while Civil Appeals Nos 123 and 124 of 2014 are appeals by three of the remaining defendants. Silica Investors is the respondent in all three appeals.

9 In the two sections that follow, we shall set out in greater detail the Share Sale Agreement between Silica Investors and Lionsgate, as well as the allegations made in the Suit. This will provide the factual context for the analysis of the issues raised in these appeals.

The Share Sale Agreement

10 The Share Sale Agreement between Silica Investors and Lionsgate consists of an original agreement dated 23 June 2010, which was modified by a supplemental agreement dated 5 July 2010. At the time the Share Sale Agreement was concluded, Lionsgate was known as Tomolugen Pte Ltd. This change of name is immaterial for present purposes, and we use "Lionsgate" to

refer to the entity both before and after its change of name. Silica Investors and Lionsgate were the only parties to the Share Sale Agreement. Under that agreement, Lionsgate agreed to sell Silica Investors up to 2.5m AMRG shares at a price of AU$4.00 per share. The amended completion date was 14 July 2010.

11 The Share Sale Agreement contained terms and warranties relating to the management of AMRG and its assets and liabilities. These included the following:

(a) Lionsgate agreed to support the passage of an AMRG board of directors' resolution for a nominee of Silica Investors to be appointed as a director on AMRG's board: cl 2.5(a) of the Share Sale Agreement.

(b) Lionsgate warranted that the accounts of AMRG and its related companies gave a true and fair view of the state of affairs of those companies: cl 8.2 of the first schedule to the Share Sale Agreement.

(c) Lionsgate warranted that at the completion date, AMRG and its related companies would have settled or discharged "all current liabilities, inter-company loans (in excess of S$250,000 per company) and shareholders' advances and all obligations of AMRG [and its related companies]": cl 8.3 of the first schedule to the Share Sale Agreement.

12 The Share Sale Agreement contemplated the listing of SSRG on a recognised stock exchange by a specified date. It also contained provisions for the distribution of SSRG shares *in specie* amongst the shareholders of AMRG should the listing of SSRG succeed, as well as exit provisions for Silica Investors in the event that the listing of SSRG failed.

13 In addition, the Share Sale Agreement contained an arbitration clause (*viz*, cl 12.3) which provided that "any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination" was to be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("the SIAC") for the time being in force. We shall discuss the arbitration clause and its effect in greater detail later in this judgment.

The allegations made in the Suit

14 Silica Investors commenced the Suit in June 2013, and its only complaint there is that AMRG's affairs were conducted in a manner which was oppressive or unfairly prejudicial towards it as a minority shareholder of AMRG. On this basis, it seeks wide-ranging relief, including a share buy-out order and orders regulating the conduct of AMRG's affairs; in the alternative, it seeks an order that AMRG be placed in liquidation.

15 Silica Investors' complaint of oppression or unfair prejudice is supported by allegations that the Judge classified into four broad categories. We shall use these same categories in this judgment since they were adopted by the parties on appeal. The first category, we shall refer to as "the Share Issuance Allegation". This concerned an issuance of 53,171,040 AMRG shares on 15 September 2010. The share issuance allegedly had the effect of diluting Silica Investors' shareholding in AMRG by more than 50%; it was also purportedly done in breach of AMRG's memorandum and articles of association. AMRG claims that it issued the shares to discharge debts which it owed for certain mining licences ("the Solar Silica Assets") that had been

transferred to SSRG. Silica Investors, on the other hand, says that those debts were fictitious, and that there was no commercial justification for the share issuance.

16 The second category of allegations, we shall refer to as "the Management Participation Allegation". Silica Investors claims that there was an understanding or a legitimate expectation on its part that it would participate in the management of AMRG. In support of this allegation, Silica Investors points to cl 2.5(a) of the Share Sale Agreement, which we referred to at [11(a)] above. Silica Investors claims that it has been denied its entitlement to participate in the management of AMRG.

17 The third category of allegations, we shall refer to as "the Guarantees Allegation". Silica Investors claims that on 11 July 2012, AMRG executed guarantees securing the obligations of Australian Gold Corporation Pte Ltd ("Australian Gold"). Australian Gold is apparently unrelated to AMRG, but 97% of its shares are owned by AMRG's majority shareholder, Tomolugen Holdings. The third, fourth and fifth defendants were or became directors of Australian Gold either at the time or soon after the guarantees were executed. Silica Investors alleges that it was not in AMRG's interest to take on the liabilities under those guarantees.

18 The fourth and final category of allegations, we shall refer to as "the Asset Exploitation Allegation". It is similar to the Guarantees Allegation in so far as it concerns the incurring of financial liabilities by AMRG for the benefit of its majority shareholder, Tomolugen Holdings. Specifically, Silica Investors alleges that AMRG expended resources to identify and develop mining assets in Australia. These assets are now apparently owned by an entity which,

although not related to AMRG, is 90% owned by Tomolugen Holdings. Accompanying this assertion are claims of non-disclosure by AMRG's board of directors of material information relating to these assets.

19 The four categories of allegations appear unconnected. But, what binds them together is that the matters which they concern were all allegedly orchestrated by Mr Roger Thomas May, the seventh defendant in the Suit, who was a shadow director of AMRG at the material time. It is said that Mr May acted in connivance with those directors of AMRG who had been appointed by Tomolugen Holdings and Lionsgate to conduct AMRG's affairs in a manner which was oppressive or unfairly prejudicial towards Silica Investors as a minority shareholder.

The decision below

20 The Judge held (at [18] of the HC Judgment) that for the purposes of s 6 of the IAA, he had to identify the "essential dispute" in the Suit and determine whether that fell within the scope of the arbitration clause in the Share Sale Agreement. He found (at [37]) that the essential dispute was whether the affairs of AMRG had been conducted in a manner that was "oppressive, *ie*, commercially unfair or unfairly prejudicial … towards [Silica Investors] as a minority shareholder". He held (at [56]–[58]) that this dispute did fall within the ambit of the widely-drafted arbitration clause because there was a sufficient factual connection between at least two of the four allegations (namely, the Share Issuance Allegation and the Management Participation Allegation) and the Share Sale Agreement.

21 However, the Judge did not grant Lionsgate's stay application because he held that the dispute was non-arbitrable. He considered that a claim for relief under s 216 of the Companies Act straddled the line between arbitrability and non-arbitrability, and that in most circumstances, such a dispute would fall on the side of being non-arbitrable (see [141]–[142] of the HC Judgment). He was satisfied that on the facts of the case, the dispute was non-arbitrable (at [143]). In particular, he noted (likewise at [143]) that the relief sought in the Suit was of a kind which an arbitral tribunal could not grant; further, the dispute involved parties who were not bound by the arbitration clause in the Share Sale Agreement. The Judge's dismissal of Lionsgate's stay application meant that the remaining defendants' stay applications fell away, and the Judge did not consider them.

22 We shall elaborate further on the Judge's reasons for his decision as well as the parties' arguments in the course of our analysis of the issues that arise for our consideration.

The issues before us

23 Three issues arise for our determination in these appeals:

(a) first, whether a dispute over minority oppression or unfairly prejudicial conduct is arbitrable;

(b) second, whether the court proceedings between Silica Investors and Lionsgate, or any part thereof, fall within the scope of the arbitration clause in the Share Sale Agreement; and

(c) third, in the event that the court proceedings between Silica Investors and Lionsgate (or any part thereof) are covered by the arbitration clause and are stayed in favour of arbitration, whether the remainder of the court proceedings (whether against Lionsgate or against the remaining defendants) should also be stayed pending the resolution of the arbitration.

24 We shall address these issues in the aforesaid order. We are aware that the second issue is both logically and legally anterior to the first, in that the question of arbitrability is a live one only if the dispute in the Suit, or a part of it, falls within the scope of the arbitration clause in the Share Sale Agreement. But, since the Judge's decision turned on his finding of non-arbitrability, we think it convenient to deal with the issue of arbitrability first. Before we do so, however, we shall first consider a threshold question as to what standard of review the court should adopt in an application for a stay under s 6 of the IAA. This question ("the threshold question") was raised by Prof Lawrence Boo, who appeared as *amicus curiae* at our request.

The threshold question: the standard of review in a stay application under the IAA

The backdrop to the threshold question

25 It is often said that an arbitral tribunal's jurisdiction is based on the consent of the parties as manifested in the arbitration agreement concerned. But, it is also established that an arbitral tribunal has the jurisdiction to determine the existence and extent of such consent. The arbitral tribunal's jurisdiction to determine its own jurisdiction – known as *kompetenz-kompetenz* – cannot be based entirely on the parties' consent. This form of jurisdiction necessarily

precedes and exists independently of such consent. The arbitral tribunal may, in the exercise of its *kompetenz-kompetenz*, conclude that there was never any consent by the parties to refer their disputes to arbitration, and as a consequence, that it had no jurisdiction to begin with.

26 The potential circularity that this entails is broken by Art 16 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"), which has the force of law in Singapore: s 3 of the IAA. Article 16 embodies the *kompetenz-kompetenz* principle, and it confers on an arbitral tribunal the jurisdiction to "rule on its own jurisdiction, *including* any objections with respect to *the existence or validity of the arbitration agreement*" [emphasis added].

27 The *kompetenz-kompetenz* principle has the potential to give rise to friction with the regime set out in the IAA (and the Model Law), which mandates a stay of court proceedings in favour of arbitration when the conditions for the grant of a stay are satisfied. Specifically, under s 6 of the IAA, the court must stay court proceedings relating to "any matter" that is covered by an arbitration agreement upon an application for a stay by a party to that agreement. The only exceptions are where the court is satisfied that the arbitration agreement is "null and void", "inoperative" or "incapable of being performed": s 6(2) of the IAA. This regime is substantially similar to that found in Art 8(1) of the Model Law, but with some differences in phraseology. We set out the material portions of both provisions below. Sections 6(1) and 6(2) of the IAA state:

> **Enforcement of international arbitration agreement**
>
> **6.**—(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies

> institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.
>
> …

Article 8(1) of the Model Law states:

> *Article 8. Arbitration agreement and substantive claim before court*
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> …

28 A court hearing a stay application under s 6 of the IAA will necessarily have to take a view on the existence and scope of the arbitration agreement in question. Only then can it decide whether a stay must be granted under s 6. The friction which we have alluded to in the previous paragraph may arise because any determination made by the court on the existence and scope of the arbitration agreement may well intrude into the remit of the arbitral tribunal's *kompetenz-kompetenz*.

29 The threshold question is one that invites consideration of how a balance may be struck between the court and the arbitral tribunal, both of which may

confront the issue of whether the arbitral tribunal has jurisdiction. In our judgment, that balance may be struck by adjusting the standard of review which the court adopts when hearing an application for a stay under s 6 of the IAA. In this regard, the first of two prevailing views is that the court should only undertake a *prima facie* review of the existence and scope of the arbitration clause. Thus, if the court is satisfied on a *prima facie* standard that the conditions for the grant of a stay (*ie*, that there exists an arbitration clause which is valid and which covers the dispute at hand) have been met, it should grant the stay and defer to the arbitral tribunal the determination of whether those conditions have indeed been satisfied. We refer to this as the *prima facie* approach. This approach preserves the arbitral tribunal's *kompetenz-kompetenz* to examine the existence and scope of its jurisdiction afresh and determine it fully.

30 The second prevailing view is that the court should undertake an actual determination of the existence and scope of the arbitration agreement when it hears a stay application under s 6 of the IAA. On this view, the court grants a stay if, and only if, it is satisfied that the requirements for the grant of a stay have in fact been met. We refer to this as the full merits approach. This approach might have the advantage of expedience in that it allows the court to pronounce with finality on an arbitral tribunal's jurisdiction in the first instance, instead of deferring the question to the arbitral tribunal, only to face the prospect of the same question coming back to the court in the event of an appeal against the arbitral tribunal's jurisdictional ruling, or if the unsuccessful party in the arbitration resists enforcement of the arbitral award or applies to set it aside on the basis of the arbitral tribunal's lack of jurisdiction. There appears to be a clear split between these two views in both the case authorities across various jurisdictions as well as the literature (see United Nations Commission on

International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (2012) at paras 29–32).

31 The standard of review that a court in Singapore should apply ultimately turns on the interpretation of s 6 of the IAA. Section 6 has a strong association with and was based on Art 8 of the Model Law. We shall accordingly begin our analysis by reviewing the *travaux préparatoires* of the Model Law and the position in other jurisdictions before returning to discuss the appropriate approach for the Singapore courts.

The* travaux préparatoires *of the Model Law

32 In our judgment, the *travaux préparatoires* of the Model Law are inconclusive as to the appropriate approach to take with regard to the threshold question, as both the *prima facie* approach and the full merits approach can and have been credibly advanced based on different parts of these materials. Proponents of the full merits approach rely on the *Report of the Working Group on International Contract Practices on the Work of its Fifth Session*, UN Doc A/CN/9/233 ("*Report of the Fifth Session*"). At para 77 of the *Report of the Fifth Session*, the UNCITRAL Working Group on International Contract Practices ("the Working Group") apparently expressly considered and rejected the *prima facie* approach:

> 77. A suggestion was made that paragraph (1) [*ie*, what is now Art 8(1) of the Model Law] should not be understood as requiring the court to examine in detail the validity of an arbitration agreement and that this idea could be expressed by requiring only a *prima facie* finding or by rephrasing the closing words as follows: 'unless it finds that the agreement is ***manifestly*** null and void'. In support of that idea it was pointed out that it would correspond with the principle to let the arbitral tribunal make the first ruling on its competence, subject to later control by a court. However, the prevailing view was that, in the

> cases envisaged under paragraph (1) where the parties differed on the existence of a valid arbitration agreement, that issue should be settled by the court, without first referring the issue to an arbitral tribunal, which allegedly lacked jurisdiction. The Working Group, after deliberation, decided to retain the text of paragraph (1). [emphasis in original in bold italics]

33 In his book *International Commercial Arbitration, Volume I: International Arbitration Agreements* (Wolters Kluwer, 2nd Ed, 2014) ("*Gary Born*"), Gary B Born suggests (at p 1083) that this is "[t]he most direct evidence" that the Model Law's drafters rejected the *prima facie* approach. This view is shared by Howard M Holtzmann & Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law, 1989) ("*Holtzmann & Neuhaus*") at p 303 and Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd Ed, 2010) at p 125. The use of the word "finds" in Art 8(1) of the Model Law is also said to support a full merits review by the court: *Gary Born* at pp 1082–1083.

34 On the other hand, proponents of the *prima facie* approach rely on developments in the drafting of the Model Law that occurred at the sixth and subsequent sessions of the Working Group. At the sixth session, the Working Group proposed the introduction of a fourth paragraph to the Article in the draft text of the Model Law ("the draft Model Law") that then articulated the *kompetenz-kompetenz* principle (now Art 16 of the Model Law). The proposed fourth paragraph read as follows (*Report of the Working Group on International Contract Practices on the Work of its Sixth Session*, UN Doc A/CN/9/245 ("*Report of the Sixth Session*") at para 66):

> (4) Where, after arbitral proceedings have commenced, a party invokes before a court lack of jurisdiction of the arbitral tribunal, whether impliedly by bringing a substantive claim or

> expressly by requesting a decision on the jurisdiction of the arbitral tribunal directly from the court without first raising this plea before the arbitral tribunal, the arbitral tribunal may continue the proceedings while the issue is pending with the court.

This proposed paragraph was eventually rejected. The Working Group thought that it was not sufficiently clear, especially in its interface with the then draft Article governing applications for stays of court proceedings (now Art 8 of the Model Law): *Report of the Sixth Session* at paras 68–69. The hesitance to incorporate the proposed fourth paragraph in the form set out above resulted in the Working Group requesting the UNCITRAL Secretariat ("the Secretariat") to revise the text of that draft Article.

35 In lieu of such a revision, the Secretariat proposed instead the introduction of an entirely new Article ("the draft Art 17") in the composite text of the draft Model Law that was presented to the Working Group at its seventh session: *Composite Draft Text of a Model Law on International Commercial Arbitration*, UN Doc A/CN.9/WG.II/WP.48. The draft Art 17 read as follows:

> Article 17. *Concurrent court control*
>
> (1) [Notwithstanding the provisions of Art 16,] a party may [at any time] request the Court specified in article 6 to decide whether or not there exists a valid arbitration agreement and[, if arbitral proceedings have commenced,] whether or not the arbitral tribunal has jurisdiction [with regard to the dispute referred to it].
>
> (2) While such issue is pending with the Court, the arbitral tribunal may continue the proceedings [unless the Court orders a stay or suspension of these proceedings].

36 The draft Art 17 was eventually rejected by the Working Group at its seventh session. The prevailing view of the Working Group was that this proposed Article might enable parties to engage in tactical delays and did not

cohere with the *kompetenz-kompetenz* principle articulated in Art 16 (see *Report of the Working Group on International Contract Practices on the Work of its Seventh Session*, UN Doc A/CN/9/246 at para 55):

> [The draft Art 17] might have adverse effects throughout the arbitral proceedings by opening the door to delaying tactics and obstruction and because it was not in harmony with the principle underlying article 16 that *it was initially and primarily for the arbitral tribunal to decide on its competence, subject to ultimate court control.* [emphasis added]

37 Proponents of the *prima facie* approach say that the decision not to incorporate the draft Art 17 is significant in that it expressed the intention that the arbitral tribunal, rather than the court, should have the first say on the existence and scope of the arbitration agreement in question, and thus, on whether the arbitral tribunal has jurisdiction. They also contend that this view is reinforced by the rejection of subsequent suggestions to reincorporate the draft Art 17 into the draft Model Law.

38 The subsequent suggestions for the reintroduction of the draft Art 17 came from the International Bar Association ("the IBA") and the UK government. In the Secretariat's *Analytical Compilation of Comments by Governments and International Organizations on the Draft Text of a Model Law on International Commercial Arbitration*, UN Doc A/CN.9/263 ("*Secretariat's Analytical Compilation of Comments*") at p 30, the IBA recorded its dissatisfaction with the rejection of the draft Art 17:

> [The] IBA accepts that the primary authority for the determination of jurisdiction issues, including questions of arbitrability, the validity of the arbitration agreement and so forth, should be the arbitral tribunal itself. However, since the arbitral tribunal's decisions on these matters are ultimately subject to court control, it seems sensible that the intervention of the courts on such issues should be permitted at an early stage, rather than only at the end of the arbitration. This would

> avoid unnecessary delay and costs. Accordingly, it is suggested that … [the draft Art 17], as it was discussed and deleted by the Working Group, … might be reviewed with a view to reinstating it.

39 Similar sentiments were also expressed by the UK government: *Second Addendum to the Secretariat's Analytical Compilation of Comments*, UN Doc A/CN.9/263/Add.2 at p 5. These proposals to reintroduce the draft Art 17 were considered but eventually rejected: *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session*, UN Doc A/40/17 at paras 160–161. Instead, a compromise was eventually reached by the introduction of what is now Art 16(3) of the Model Law, which allows a discrete ruling by an arbitral tribunal on its jurisdiction to be referred to a court with supervisory jurisdiction for a decision.

40 The proponents of the *prima facie* approach contend that these developments in the drafting of the Model Law evince the intention that jurisdictional issues be deferred to the *arbitral tribunal*, with the court having the final say only through an appeal from the arbitral tribunal's jurisdictional ruling: Frédéric Bachand, "Does Article 8 of the Model Law Call for Full or *Prima Facie* Review of the Arbitral Tribunal's Jurisdiction?" (2006) 22(3) Arb Int'l 463 at p 473. The upshot is what has been termed by *Fouchard Gaillard Goldman on International Commercial Arbitration* (John Savage & Emmanuel Gaillard eds) (Kluwer Arbitration, 1999) at pp 400–401 as the "negative effect" of the *kompetenz-kompetenz* principle, which is that arbitral tribunals should be the "first judges of their jurisdiction" and should be able to decide the existence (or otherwise) of their own jurisdiction prior to any court or judicial authority. Gary Born asserts that this reasoning is "inconclusive" and "irrelevant", and that "the deletion of the [draft Art 17] … [is] in no way decisive or even relevant as

to the meaning of Article 8(1)": *Gary Born* at p 1084. We are less inclined to dismiss the rejection of the draft Art 17 as irrelevant. The very reason for the proposed introduction of this draft Article was the lack of clarity in the interface between the draft versions of what are now Art 8 and Art 16 (see [34]–[35] above). That interface was a problematic one, and the draft Art 17 was one of the solutions that the Working Group considered in an attempt to address it.

41 In our judgment, the *travaux préparatoires* of the Model Law are ultimately somewhat equivocal as to the appropriate approach to take for the purposes of the threshold question, although it seems to us from the historical analysis we have undertaken that, perhaps, the record offers a little more support for the *prima facie* approach. That said, as we noted at [32] above, there is certainly material to support both the *prima facie* and the full merits approaches. We venture to suggest a historical reason for this seeming lack of certainty in the *travaux préparatoires*. When the draft version of what is now Art 8 of the Model Law was formulated at the fifth session of the Working Group, it was consciously framed in terms that were "in line with the corresponding provision in the 1958 New York Convention" and "for the sake of consistency with that important Convention": *Report of the Fifth Session* at para 76. In other words, the Working Group endeavoured to stay faithful to Art II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Concluded at New York on 10 June 1958 ("the New York Convention"), which states:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article [*ie*, "an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship" (see Art II(1))], shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

42 When Art II(3) of the New York Convention was formulated in the 1950s, it sought principally to achieve the limited goal of preventing Contracting States from refusing to recognise the validity of arbitration agreements (see *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Commentary* (Reinmar Wolff ed) (Hart Publishing, 2012) at pp 153–155). The *kompetenz-kompetenz* principle is not expressed in the New York Convention and does not appear to have been considered in its *travaux préparatoires*. While the *kompetenz-kompetenz* principle has an impressive vintage in international law tribunals (see Lord Collins of Mapesbury JSC's account of it in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [79]–[81]), its acceptance in international commercial arbitration circles appears less rooted. Indeed, even at the time of the drafting of the Model Law, some three decades after the New York Convention was concluded, the *kompetenz-kompetenz* principle was still "thought to be somewhat controversial" (see *Holtzmann & Neuhaus* at p 479) and had yet to be accepted into all national laws (see *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, UN Doc A/CN.9/264 at p 37).

43 The drafters of the New York Convention were thus not exercised by the need to deal with the competing claims of the court and the arbitral tribunal to rule on the latter's jurisdiction; they had the rather more limited aim of obliging national courts' *recognition* of arbitration clauses. Commentators appear largely united in the view that Art II(3) of the New York Convention is silent or, at best, equivocal as to the standard of review which a court should adopt when it is faced with a stay application: see *Gary Born* at pp 1054–1055;

Julian D M Lew, Loukas A Mistelis & Stephan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 14-54; and *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Herbert Kronke *et al* eds) (Kluwer Law International, 2010) at pp 108–109.

44 To summarise our review of the *travaux préparatoires* of the Model Law, the *kompetenz-kompetenz* principle as encapsulated in what is now Art 16 of the Model Law was deliberated at the sixth session of the Working Group: *Report of the Sixth Session* at para 58. The introduction of the *kompetenz-kompetenz* principle added a further dimension to the draft Model Law, which was that of having to allocate the jurisdiction to determine an arbitral tribunal's jurisdiction as between the court and the arbitral tribunal. That was not considered when Art II(3) of the New York Convention was drafted. The adherence to Art II(3) of the New York Convention in what is now Art 8 of the Model Law despite the emergence and incorporation of the *kompetenz-kompetenz* principle as embodied in Art 16 of the Model Law might account for the seeming ambivalence that is found in the *travaux préparatoires* where the threshold question is concerned. In a sense, Art 16 was forward-looking, while Art 8 had its eye fixed on the past.

The position in other jurisdictions

45 We now consider the position in other jurisdictions. In this regard, we shall confine our discussion to cases from England, the Hong Kong Special Administrative Region ("Hong Kong SAR") and Canada. The latter two are Model Law jurisdictions, while England is not.

England

46 Although England has not enacted the Model Law, its case law is still persuasive for two reasons. First, the UK's Arbitration Act 1996 (c 23) ("the UK Arbitration Act 1996") was heavily influenced by the Model Law. The UK Departmental Advisory Committee on Arbitration Law ("the UK Advisory Committee on Arbitration Law"), in its report on the draft Bill published in July 1995 which was subsequently enacted as the UK Arbitration Act 1996 (see the *1996 Report on the Arbitration Bill* (Chairman: The Rt Hon Lord Justice Saville) ("*1996 Report on the Arbitration Bill*") (reprinted at (1997) 13(3) Arb Int'l 275)), stated at para 4 that "at every stage in preparing a new draft Bill, very close regard was paid to the Model Law, and it will be seen that both the structure and the content of the July draft Bill … owe much to this model". Second, the stay provisions in s 9 of the UK Arbitration Act 1996 are substantially similar to those in s 6 of the IAA. Section 6 of the IAA in fact mirrors very closely the wording used in s 1 of the UK's Arbitration Act 1975 (c 3) ("the UK Arbitration Act 1975"), which was the predecessor provision of s 9 of the UK Arbitration Act 1996. Section 6 of the IAA requires the court to stay proceedings unless it is "satisfied" that the arbitration clause is null and void, inoperative or incapable of being performed, as does its English counterpart. This is in contrast to Art 8 of the Model Law, which employs the word "finds" instead of "satisfied". We reproduce ss 9(1) and 9(4) of the UK Arbitration Act 1996 below for convenience:

> **9 Stay of legal proceedings.**
>
> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the

> proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> …
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.
>
> …

47 The UK Arbitration Act 1996 also expressly recognises the *kompetenz-kompetenz* principle. Section 30 thereof states that the arbitral tribunal may "rule on its own substantive jurisdiction", including questions as to:

> (a) whether there is a valid arbitration agreement,
>
> (b) whether the tribunal is properly constituted, and
>
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

48 The English courts generally adopt the full merits approach when hearing stay applications under s 9 of the UK Arbitration Act 1996, subject to a residual discretion to stay the court proceedings under the court's inherent jurisdiction so as to allow the arbitral tribunal to make a determination on its own jurisdiction instead. The English position was summarised by Aikens LJ in *Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky* [2013] 2 Lloyd's Rep 242 ("*Aeroflot v Berezovsky*") at [73]–[79] as follows:

> (a) There is a burden on the party asserting: (i) that there is a concluded arbitration agreement; and (ii) that it covers the disputes which are the subject of the court proceedings to prove that that is indeed the case: *Ahmad Al-Naimi (T/A Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522 at 525 *per* Waller LJ. If that party cannot prove either limb (i) or limb (ii), then the

court has no jurisdiction to grant a stay under s 9(1) read with s 9(4) of the UK Arbitration Act 1996.

(b) If the court cannot decide limb (i) or limb (ii) above in a summary fashion on the written evidence, there are two courses open to it: *Birse Construction Ltd v St David Ltd* [1999] BLR 194 at 196 *per* Judge Humphrey Lloyd QC. First, the court can direct an issue to be tried pursuant to Part 62 of the English Civil Procedure Rules ("the English CPR"), which gives the English courts the express power to "decide [the] question", amongst others, of whether an arbitration agreement has been concluded (see [49] below); or, second, it can stay the court proceedings under its inherent jurisdiction (but *not* pursuant to s 9(1) read with s 9(4) of the UK Arbitration Act 1996) for the putative arbitral tribunal to decide the issue of the existence and scope of the arbitration agreement.

(c) If the court adopts the former course, it must be satisfied of the existence and scope of the arbitration agreement on a balance of probabilities: *Aeroflot v Berezovsky* at [73]. If the court adopts the latter course, it must be satisfied that there is an arguable case that the arbitration clause is valid: *JSC BTA Bank v Ablyazov* [2011] 2 Lloyd's Rep 129 at [31]–[33] *per* Christopher Clarke J.

(d) Once the party applying for a stay has established the existence of an apparently concluded arbitration agreement that covers the matters in dispute in the court proceedings, it is for the party resisting the stay application to "satisf[y]" the court that the arbitration agreement is "null

and void", "inoperative" or "incapable of being performed". This must be proved on a balance of probabilities: *Aeroflot v Berezovsky* at [77].

(e) The court can, in theory, order a trial of an issue to determine whether the arbitration agreement was "null and void", "inoperative" or "incapable of being performed". But, if the evidence and possible findings going to that issue also impinge on the substantive rights and obligations of the parties, the court is unlikely to so order unless the trial can be confined to a relatively circumscribed area of investigation: *A v B* [2007] 1 Lloyd's Rep 237 at 261 *per* Colman J.

49 With regard to Part 62 of the English CPR, which we referred to in the previous paragraph, r 62.8(3) thereof makes express provision for the English courts to determine issues concerning the existence or scope of an arbitration clause. It states:

> (3) Where a question arises as to whether –
>
> (a) an arbitration agreement has been concluded; or
>
> (b) the dispute which is the subject-matter of the proceedings falls within the terms of such an agreement,
>
> the court may decide that question or give directions to enable it to be decided and may order the proceedings to be stayed pending its decision.

Hong Kong SAR

50 Unlike the English courts, the courts of Hong Kong SAR generally adopt the *prima facie* approach when hearing applications for a stay of court proceedings in favour of arbitration. In *Private Company "Triple V" Inc v Star (Universal) Co Ltd & Another* [1995] 2 HKLR 62 ("*Triple V*"), a decision of

the Hong Kong SAR Court of Appeal, Litton VP (with whom Liu JA and Keith J agreed) said at 65, quoting the judge in the court below:

> The judge said this:
>
> > 'There is prima facie evidence of a dispute between the Plaintiff and D1 in relation to [Contract No 1034HK] and an arbitrator ought to be appointed to arbitrate their dispute. It will be for the arbitrator to decide the effect, if any, of the alleged subsequent agreement cancelling the contract.'
>
> I agree. If the judge were to go into the matter more deeply, he would in effect be usurping the function of the arbitrator. Whilst, clearly, the judge had to make a judgment as to whether there existed an underlying agreement to arbitrate, he could do no more than to form a *prima facie* view. Here, in exercising his jurisdiction under Article 11(3) [of the Fifth Schedule to the Arbitration Ordinance (Cap 341) (HK)], Leonard, J. in effect asked himself whether it was arguable that Contract No. 1034HK still subsisted, despite the existence of the subsequent agreement. This seems to me the correct approach.

51 *Triple V* was cited with approval by the Hong Kong SAR Court of Appeal in *PCCW Global Ltd v Interactive Communications Service Ltd* [2007] 1 HKLRD 309. Tang VP, who delivered the judgment of the court in that case, cited the passage in *Triple V* quoted above, and distinguished the English position by emphasising the absence of an equivalent of r 62.8(3) of the English CPR in the Hong Kong SAR's civil procedure rules. Tang VP said at [60]:

> It is important for the court not to usurp the function of the arbitrators, and unless the point is clear, the matter should be stayed for arbitration. In that respect, the absence of provisions similar to [r 62.8(3) of the English CPR] … is significant. In Hong Kong, we do not believe the court should attempt to resolve that issue, even though under art. 16(3) of the Model Law, the court has the power to decide the question of jurisdiction after determination of the question by the arbitral tribunal as a preliminary question.

The *prima facie* standard is well settled in Hong Kong SAR and has also been applied by its courts at first instance: *T v TS* [2014] 4 HKLRD 772 at [16] and *Ling Yan Temple Ltd v Ng Yook Man* [2010] HKEC 734 at [18].

Canada

52 Turning to the position in Canada, the leading decision there is that of the Supreme Court of Canada in *Union des consommateurs v Dell Computer Corp* [2007] 2 SCR 801 ("*Dell Computer*"). The majority in that case likewise preferred the *prima facie* approach, but with a caveat, which we shall come to in a moment. *Dell Computer* was a decision concerning Quebec's Code of Civil Procedure (Cap C-25), the relevant provisions of which read as follows:

> 940.1. Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed in the roll or it finds the agreement null.
>
> …
>
> 943. The arbitrators may decide the matter of their own competence.
>
> 943.1. If the arbitrators declare themselves competent during the arbitration proceedings, a party may within thirty days of being notified thereof apply to the court for a decision on that matter.
>
> While such a case is pending, the arbitrators may pursue the arbitration proceedings and make their award.
>
> 943.2. A decision of the court during the arbitration proceedings recognizing the competence of the arbitrators is final and without appeal.

53 Deschamps J (with whom McLachlin CJ, Binnie, Abella, Charron and Rothstein JJ concurred) observed that the *prima facie* test was "increasingly gaining acceptance around the world": *Dell Computer* at [83]. She said that any

question relating to an arbitral tribunal's jurisdiction should, as a general rule, first be resolved by the arbitral tribunal itself. The exception was where the dispute as to jurisdiction could be resolved purely as a matter of law. Deschamps J thought that this exception was justified for several reasons, namely (*Dell Computer* at [84]):

> … [t]he courts' expertise in resolving such questions, … the fact that the court is the forum to which the parties apply first when requesting referral and … the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.

54 However, Deschamps J also made it clear that as long as the challenge to an arbitral tribunal's jurisdiction required the production and review of factual evidence, the court should refer the issue to the arbitral tribunal itself. The same was said for questions of mixed law and fact, unless those questions required only superficial consideration of the documentary evidence already in the record: *Dell Computer* at [85]. Deschamps J also said that before the court departed from the general rule that the arbitral tribunal should first hear disputes as to its own jurisdiction, the court should be satisfied that the challenge to the arbitral tribunal's jurisdiction was not a delay tactic and would not unduly impair the conduct of the arbitral proceedings: *Dell Computer* at [86]. Deschamps J considered and rejected a suggestion that a distinction should be drawn between cases where the validity of the arbitration clause was in question, as opposed to cases where only the scope of the arbitration clause was in question.

55 The dichotomy between validity and scope formed the basis of the position taken by the dissenting judges in *Dell Computer*, Bastarache and LeBel JJ. They thought that the question of an arbitral tribunal's jurisdiction should not be deferred to the arbitral tribunal where the validity of the arbitration agreement was in question (*Dell Computer* at [176]), save that in circumstances which "truly merit the label 'international commercial arbitration', it may be more efficient to submit all questions regarding jurisdiction for the arbitrator to hear at first instance": *Dell Computer* at [178].

56 The *prima facie* approach has also been adopted and applied in Canadian provinces other than Quebec. The leading cases in British Columbia and Ontario are the decisions of their respective Courts of Appeal in *Gulf Canada Resources Ltd/Ressources Gulf Canada Ltée v Arochem International Ltd* (1992) 66 BCLR (2d) 113 ("*Gulf Canada*") and *Dalimpex v Janicki* (2003) 228 DLR (4th) 179 ("*Dalimpex*"). Both *Gulf Canada* and *Dalimpex* were cited with approval by the majority in *Dell Computer* at [82]. All three cases were applied recently in New Brunswick in *Harrison v UBS Holding Canada Ltd* (2014) 418 NBR (2d) 328, where the New Brunswick Court of Appeal accepted the *prima facie* approach, and held that the judge at first instance erred in applying a balance of probabilities test to determine the existence and applicability of an arbitration clause on an application for a stay of court proceedings in favour of arbitration (at [26]).

The position in Singapore

57 Against that background, we turn to the position in Singapore. There are three Singapore decisions which have addressed the threshold question, and all of them have adopted the *prima facie* approach. The first is the decision of this

court in *Sim Chay Koon and others v NTUC Income Insurance Co-operative Limited* [2015] SGCA 46, an *ex tempore* judgment where we observed at [5], in the context of a stay application under s 6(1) of the Arbitration Act (Cap 10, 2002 Rev Ed), that the *prima facie* standard was the applicable one.

58 The second is *The Titan Unity* [2013] SGHCR 28, a decision of the learned Assistant Registrar ("AR"), Mr Shaun Leong Li Shiong. There, the plaintiff bank provided financing to a company ("Onsys") for the purchase of a cargo of fuel. The plaintiff, as the lawful holder of the bills of lading, brought a misdelivery claim against the owner of the vessel on which the cargo was shipped as well as against the alleged demise charterer of the vessel ("Oceanic"). Oceanic applied for a stay of the court proceedings under s 6 of the IAA, arguing that the arbitration clause in the time charterparty between it and Onsys had been incorporated into the bills of lading on the basis of which the plaintiff brought its claim. AR Leong examined a number of the authorities discussed above and concluded (at [34] of *The Titan Unity*):

> … [T]he court only needs to be satisfied that an arbitration agreement exists on a *prima facie* level for the purposes of establishing the first precondition under section 6(1) [of the IAA]. This first precondition [*ie*, the existence of a valid arbitration agreement] will not be met only in the clearest and most obvious of cases. This is not to say that the court should accept *prima facie* evidence of an arbitration agreement when it is clearly inconsistent with undisputed documentary and contemporaneous evidence, nor should the court accept uncritically every fact placed on the affidavits in support of the stay application. …

AR Leong thought that the *prima facie* threshold had been crossed on the facts of the case, and granted the stay.

59 The third Singapore decision is *Malini Ventura v Knight Capital Pte Ltd and others* [2015] SGHC 225 ("*Ventura v Knight Capital*"), a judgment of Judith Prakash J which was issued shortly after we heard oral arguments in the present appeals. In *Ventura v Knight Capital*, the defendant lenders commenced arbitration against the plaintiff ("Ms Ventura"), a purported guarantor for a loan under a deed of guarantee containing an arbitration clause, after the borrower had defaulted in making repayment of the loan. Ms Ventura's position was that the deed of guarantee was a nullity because she had never signed it. She commenced an action in the High Court to restrain the lenders from continuing with the arbitral proceedings against her.

60 The lenders applied under s 6 of the IAA for a stay of the court proceedings. They urged the court to adopt the *prima facie* approach and defer the question of the existence of the arbitration agreement to the arbitral tribunal (which had already been constituted). Ms Ventura, on the other hand, argued that in situations where a party "denied ever entering into the alleged arbitration agreement so that its very existence [was] brought into question", the court should adopt the full merits approach and determine the question of whether any arbitration agreement had been reached based on the usual civil standard of a balance of probabilities after a full trial: *Ventura v Knight Capital* at [24].

61 Prakash J described the issue before her as "the chicken and the egg question": *Ventura v Knight Capital* at [19]. She began by considering the position under the Model Law. She observed that under the Model Law regime, the court's consideration of whether an arbitral tribunal had jurisdiction "must come after the tribunal's own examination of the issue" (at [28]). She also observed that under the Model Law, an arbitral tribunal's powers were wide and extended to ruling on the very existence of the arbitration agreement in question.

Prakash J next turned to consider the position under s 6 of the IAA. She held that the IAA had been enacted to incorporate the Model Law as part of Singapore law, and strictly circumscribed court intervention in arbitral proceedings. Prakash J concluded that the regime in force under the IAA "gives primacy to the tribunal although, of course, the court still has an important role to play" (at [36]). She thought that "it would satisfy the rights of both parties if the party applying for the stay was able to show on a *prima facie* basis that the arbitration agreement existed" (likewise at [36]). She therefore adopted the *prima facie* approach and, in doing so, she distinguished the position in England. She recognised that ss 6(1) and 6(2) of the IAA were worded similarly to ss 9(1) and 9(4) of the UK Arbitration Act 1996, but pointed out that "the context of the two sections is not the same" (at [35]). Prakash J alluded to the "logical discomfort" of adopting the *prima facie* approach in cases where the very existence of the arbitration agreement was in question (at [37]). She thought, however, that that discomfort had to be put aside in the light of the widespread acceptance and effect of the *kompetenz-kompetenz* principle.

62 On the facts of the case before her, Prakash J held that the lenders had established a *prima facie* case that the deed of guarantee had been signed by Ms Ventura despite her protestations otherwise. Prakash J therefore stayed the court proceedings in favour of arbitration.

63 The *prima facie* approach was also the view urged upon us by the *amicus curiae*, Prof Boo. We agree that a Singapore court should adopt a *prima facie* standard of review when hearing a stay application under s 6 of the IAA. In our judgment, a court hearing such a stay application should grant a stay in favour of arbitration if the applicant is able to establish a *prima facie* case that:

(a) there is a valid arbitration agreement between the parties to the court proceedings;

(b) the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and

(c) the arbitration agreement is not null and void, inoperative or incapable of being performed.

64 Once this burden has been discharged by the party applying for a stay, the court should grant a stay and defer the actual determination of the arbitral tribunal's jurisdiction to the tribunal itself. The court will only refuse to grant a stay when it is clear on the evidence placed before it that one or more of the above three requirements have not been satisfied. The arbitral tribunal's determination of its jurisdiction will nonetheless remain subject to overriding court supervision in the form of an appeal under s 10(3) of the IAA against the arbitral tribunal's jurisdictional ruling, or in proceedings for setting aside or refusing enforcement of the award rendered by the arbitral tribunal (see, respectively, s 24 of the IAA and Art 34 of the Model Law, and s 31 of the IAA).

65 We part company with the English position and adopt the *prima facie* approach for the purposes of the threshold question essentially for four reasons. First, the *prima facie* approach coheres better with what we consider was envisaged by the drafters of the IAA. The earliest iteration of the IAA (*viz*, the International Arbitration Act 1994 (Act 23 of 1994) ("the original IAA")) was enacted in 1994, and it drew heavily from the recommendations made in the *Report of the Sub-committee on Review of Arbitration Laws* (1993) (Chairman: Giam Chin Toon) ("*1993 Report on Review of Arbitration Laws*"). That report

included a draft Bill, which was considered and adopted with amendments by the Singapore Academy of Law's Law Reform Committee, and this subsequently resulted in the enactment of the original IAA in 1994 (see the remarks of Assoc Prof Ho Peng Kee, the then Parliamentary Secretary to the Minister for Law, at the second reading of the International Arbitration Bill 1994 (Bill 14 of 1994) ("the 1994 International Arbitration Bill"): *Singapore Parliamentary Debates, Official Report* (31 October 1994) vol 63 ("*Singapore Parliamentary Debates* vol 63") at cols 627–628).

66 The *1993 Report on Review of Arbitration Laws* stated at paras 37–38:

> 37. … [T]he principle of severability and autonomy of arbitration clauses is sound. *Article 16 of the Model Law, which expressly empowers the arbitral tribunal to rule on its own jurisdiction (including the existence and validity of the arbitration agreement), is a statement of prevailing international arbitral jurisprudence.* There is no need for Singapore to wait for the courts to arrive at the same conclusion by a Darwinian process. The Committee thus recommends the adoption of Article 16 in respect of international arbitrations.
>
> 38. *In allowing appeals on issues of jurisdiction to the court, the Model Law ensures that the arbitral tribunal will not be allowed to assume jurisdiction where it has none.* …
>
> [emphasis added; original emphasis omitted]

It is implicit, if not explicit, in this passage that the arbitral tribunal is to be the first arbiter of its own jurisdiction, with the court having the final say. This point is underscored by an earlier recommendation made in the *1993 Report on Review of Arbitration Laws* at para 23 to confine the scope of curial intervention to three narrow and well-defined areas:

> In the Committee's view, intervention should be allowed only in the following limited circumstances which are contemplated by the Model Law:
>
> (a) *challenge of arbitral jurisdiction [Article 16(3)]*;

> (b) challenge of the arbitral tribunal on grounds of partiality [Article 12];
>
> (c) setting aside the award on the grounds of [Article 34] …
>
> …
>
> [emphasis added]

These two passages, in our judgment, support the construction of s 6 of the IAA as requiring the *prima facie* approach where the threshold question is concerned.

67 Second, to require the court, on a stay application under s 6 of the IAA, to undertake a full determination of an arbitral tribunal's jurisdiction could significantly hollow the *kompetenz-kompetenz* principle of its practical effect. The full merits approach has the potential to reduce an arbitral tribunal's *kompetenz-kompetenz* to a contingency dependent on the strategic choices of the claimant in a putative arbitration. If the claimant decides to pursue its claim by arbitration, the arbitral tribunal will determine any challenge to its jurisdiction, and thus, its *kompetenz-kompetenz* will be given full vent. But, if the claimant decides to pursue its claim by bringing proceedings in court (*instead* of by recourse to arbitration), the court will be seized of jurisdiction, and will be able (and, indeed, on the full merits approach, obliged) to make a full determination on the existence and scope of the arbitration clause; this will deprive the putative arbitral tribunal of its *kompetenz-kompetenz*. In our view, the strength of the *kompetenz-kompetenz* principle cannot depend on the arbitrary choice of the claimant as to whether it will pursue its claim by way of court proceedings or by way of arbitration. That undermines the principles of judicial non-intervention and *kompetenz-kompetenz* which were at the forefront in the drafting of the Model Law and the enactment of the original IAA (see Assoc Prof Ho's remarks at the second reading of the 1994 International

Arbitration Bill: *Singapore Parliamentary Debates* vol 63 at cols 625–626). We should point out that the strain which the English position puts on these principles of judicial non-intervention and *kompetenz-kompetenz* has not escaped criticism (see *Arbitration Law* (Robert Merkin gen ed) (informa, Looseleaf Ed, 15 August 2011 release) at para 8.21, as well as David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2nd Ed, 2010) ("*Jurisdiction and Arbitration Agreements*") at pp 346–347). This difficulty is avoided if the *prima facie* approach is adopted.

68 Third, we consider that the fear of resource duplication which, it is said, will arise from the *prima facie* approach is overstated. A robust recognition and enforcement of the *kompetenz-kompetenz* principle may, on the contrary, deter a plaintiff from commencing proceedings in court in the face of an arbitration agreement. The plaintiff will be well aware that the court will stay the proceedings in favour of arbitration except in cases where the arbitration clause is *clearly* invalid or inapplicable. The author of *Jurisdiction and Arbitration Agreements* also argues (at p 346), albeit anecdotally, that the parties to an arbitration are likely to accept a well-reasoned jurisdictional determination rendered by an arbitral tribunal without appealing against it, and this would avoid re-litigation of the same issue. Parties that attempt to protract proceedings by making unmeritorious appeals against an arbitral tribunal's jurisdictional determination also face the prospect of an adverse costs order under s 10(7) of the IAA.

69 Finally, contrary to what the English Court of Appeal suggested in *Aeroflot v Berezovsky* at [73], we do not think the word "satisfied" in s 6(2) of the IAA suggests that the court is required to conduct a full merits review when it is faced with the threshold question. The UK Advisory Committee on

Arbitration Law, in the *1996 Report on the Arbitration Bill* (cited at [46] above), stated at para 54 that the language used in what is now s 9 of the UK Arbitration Act 1996 was "the language of the Model Law and of course of the [New York Convention], presently to be found in the [UK] Arbitration Act 1975". The drafters of the UK Arbitration Act 1996 thus did not draw a distinction between the term used in the English legislation ("satisfied") and that used in the Model Law ("finds"). We have expressed the view above that the Model Law, as can be seen from its *travaux préparatoires*, is equivocal on the appropriate approach to take with regard to the threshold question, and thus, we do not think the use of the word "satisfied" brings the matter further one way or another. If anything, a textual analysis of s 6(2) of the IAA, which replaces the word "finds" in Art 8(1) of the Model Law with "satisfied", would favour a *prima facie* threshold rather than a determination on a balance of probabilities.

70 We therefore hold that in considering a stay application under s 6 of the IAA, the court need only be satisfied to a *prima facie* standard that the requirements for the grant of a stay under that section have been met before ordering a stay. Our subsequent discussion of the issues in these appeals should therefore be construed in this light by any arbitral tribunal that might in due course hear the dispute in the Suit.

Whether a dispute over minority oppression or unfairly prejudicial conduct is arbitrable

The concept of arbitrability

71 We turn now to the question of arbitrability. The absence of arbitrability has come to be associated with that class of disputes which are thought to be incapable of settlement by arbitration. The concept of arbitrability has a

reasonably solid core. It covers matters which "so pervasively involve 'public' rights and concerns, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve … disputes [over such matters] by 'private' arbitration should not be given effect": *Gary Born* at p 945. However, the outer limits of its sphere of application are less clear. Lord Mustill and Stewart Boyd QC, for instance, suggest that "[i]t would be wrong … to draw … any general rule that criminal, admiralty, family or company matters cannot be referred to arbitration": Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1999) at pp 149–150.

72 Arbitrability may be relevant to an arbitration at both its initial and its terminal stages. At the terminal stage, an award rendered on a non-arbitrable dispute is liable to be set aside or refused enforcement: Art 34(2)(*b*)(i) of the Model Law and s 31(4)(*a*) of the IAA. It must follow from this that the non-arbitrability of a dispute will be a ground for refusing a stay of court proceedings in favour of arbitration. Indeed, in the court below, this was assumed to be the case by the parties as well as by the Judge. After all, it would be pointless for the court to stay court proceedings in favour of arbitration in cases where the applicable law does not permit the subject matter of the dispute to be resolved by arbitration, since to grant a stay in such circumstances would be to compel an arbitration which may lead to an award without force or legal value: *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 ("*Larsen Oil v Petroprod*") at [26].

73 This leads us to the relevance of arbitrability at the initial stage of an arbitration. Section 6(2) of the IAA, which sets out the circumstances in which

the court may *refuse* a stay of court proceedings in favour of arbitration, does not include the non-arbitrability of the subject matter of the dispute as one of the grounds for refusing a stay. Instead, s 6(2) states that a stay may only be refused if the arbitration agreement in question is "null and void", "inoperative" or "incapable of being performed". The exclusion of non-arbitrability in express terms might seem to give rise to an "apparent inconsistency" (see *Holtzmann & Neuhaus* at p 303). But, as noted in the same work, this has "little, if any, effect" in practice for two reasons: first, Art 1(5) of the Model Law preserves the force of the State's laws on arbitrability; and second, "the term 'null and void' would 'normally' include considerations of arbitrability" (see *Holtzmann & Neuhaus* at p 304).

74 We accept that a dispute concerning a non-arbitrable subject matter would fall within one or more of the three exceptions in s 6(2) of the IAA that permit a court to refuse a stay of court proceedings in favour of arbitration. The English Court of Appeal expressed a tentative preference for fitting a non-arbitrable dispute within the "inoperative" limb of s 9(4) of the UK Arbitration Act 1996 in *Fulham Football Club (1987) Ltd v Richards and another* [2012] Ch 333 ("*Fulham FC v Richards*") at [35]–[36]. In our judgment, an arbitration agreement would be either "inoperative" or "incapable of being performed" in relation to a dispute which involves a subject matter that is not arbitrable. The real issue then is as to the proper ambit of arbitrability.

75 The concept of arbitrability finds legislative expression in s 11 of the IAA, which reads as follows:

> **Public policy and arbitrability**
>
> **11.**—(1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be

> determined by arbitration *unless it is contrary to public policy to do so*.
>
> (2) The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.
>
> [emphasis added]

It is evident from this that the essential criterion of non-arbitrability is whether the subject matter of the dispute is of such a nature as to make it contrary to public policy for that dispute to be resolved by arbitration. Beyond this, the scope and extent of the concept of arbitrability has been left undefined, as a consequence of which, it falls to the courts to trace its proper contours (see the *1993 Report on Review of Arbitration Laws* at paras 26–28; *Larsen Oil v Petroprod* at [24]).

76 In our judgment, the effect of s 11 of the IAA is that there will ordinarily be a presumption of arbitrability so long as a dispute falls within the scope of an arbitration clause. This presumption may be rebutted by showing that (*Larsen Oil v Petroprod* at [44]):

> (a) Parliament intended to preclude a particular type of dispute from being arbitrated (as evidenced by either the text or the legislative history of the statute in question); or
>
> (b) it would be contrary to the public policy considerations involved in that type of dispute to permit it to be resolved by arbitration.

77 In *Larsen Oil v Petroprod*, this court found that the above conditions were satisfied, and the presumption of arbitrability was accordingly rebutted. In

that case, the respondent ("Petroprod"), which was in liquidation, commenced proceedings against the appellant ("Larsen"), with whom it had a management agreement. Petroprod sought to avoid, as unfair preferences or transactions at an undervalue, payments that it had made to Larsen under the management agreement. Relying on an arbitration clause in that agreement, Larsen applied for a stay of the court proceedings. Petroprod resisted the stay application on the grounds that the dispute did not fall within the scope of the arbitration clause, and that in any event, the dispute was not arbitrable. Petroprod succeeded on the first point, which was sufficient to warrant the High Court's dismissal of Larsen's stay application; but, on appeal by Larsen, we nonetheless proceeded to consider whether claims made pursuant to the avoidance provisions in ss 98 and 99 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) read with s 329(1) of the Companies Act were arbitrable, and affirmed the High Court's decision that they were not. We explained that allowing the arbitration of claims which arose upon insolvency would run contrary to the objectives of the insolvency regime (*Larsen Oil v Petroprod* at [45]):

> … Many of the statutory provisions in the insolvency regime are in place to recoup for the benefit of the company's creditors losses caused by the misfeasance and/or malfeasance of its former management. This is especially true of the avoidance and wrongful trading provisions. This objective could be compromised if a company's pre-insolvency management had the ability to restrict the avenues by which the company's creditors could enforce the very statutory remedies which were meant to protect them against the company's management. It is … not [an] unimportant consideration that some of these remedies may include claims against former management who would not be parties to any arbitration agreement. The need to avoid different findings by different adjudicators is another reason why a collective enforcement procedure is clearly in the wider public interest.

78 Another area widely regarded as non-arbitrable is the liquidation of an insolvent company by the court. In *Four Pillars Enterprises Co Ltd v Beiersdorf*

Aktiengesellschaft [1999] 1 SLR(R) 382, we observed in passing (at [23]) that a winding-up order was a relief which was not available in arbitration, and that "[o]nly the court could grant such relief".

79 The issue of whether a dispute over the liquidation of a company is arbitrable was given fuller treatment in *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 ("*Skyer Australia*"), a first instance decision of the Supreme Court of Victoria. The applicant in that case ("AB Floor") and the respondent ("Skyer") merged their respective businesses by establishing a joint venture company ("Harvest"), with each of them holding 50% of Harvest's shares. The joint venture agreement between AB Floor and Skyer provided that "any dispute, difference or question … touching [on] the association [between AB Floor and Skyer] or … the dissolution or winding up thereof" was to be settled by arbitration: *Skyer Australia* at [6]. Skyer made an application in its capacity as a contributory to wind up Harvest. In response, AB Floor applied for a stay of Skyer's application in favour of arbitration.

80 Warren J held that the arbitration clause was null and void, and refused to grant the stay. She said at [13] and [18]:

> 13 … *The Corporations Law controls by statutory force the creation and demise of the company; it oversees the birth, the life and [the] death of the company. Such matters cannot and ought not be subject to private contractual arrangement.*
>
> …
>
> 18 *The application by AB Floor to stay the winding up application strikes at the very heart of the corporation structure enshrined in the Corporations Law.* The arbitration clause in the joint venture agreement is null and void insofar as it purports to subject the parties to an arbitration with respect to the dissolution or winding up of [Harvest]. *The provision is null and void because it has the effect of obviating the statutory regime for the winding up of a company.* Moreso [*sic*], the arbitration

> clause, if adhered to, would frustrate the contributory, [Skyer,] in its efforts to seek relief from the court under the winding up provisions of the [Corporations] Law. In essence, the arbitration clause in the joint venture agreement is contrary to the provisions of the Corporations Law and cannot be applied.
>
> [emphasis added]

81 More recently, in *In re Cybernaut Growth Fund LP* Cause No FSD 73 of 2013 (23 July 2013) (unreported) ("*Cybernaut*"), Judge Andrew Jones QC, sitting in the Financial Services Division of the Grand Court of the Cayman Islands, held that a petition for the liquidation of an exempted limited partnership was non-arbitrable. The learned judge stated that two reasons militated against the conclusion that such a petition was arbitrable (at [7]):

> … As a matter of principle … *this type of dispute is non-arbitrable for two inter-related reasons. Firstly, a winding up order (whether relating to a company or an exempted limited partnership) is an order* in rem *which is capable of affecting third parties*. Because the source of an arbitral tribunal's power is contractual, its scope is necessarily limited to making orders which will be binding only upon the contracting parties. *Secondly, any dispute about who should be appointed as a liquidator of a company or exempted limited partnership is a matter involving the public interest, especially if it is carrying on a regulated business*. The shareholders of a solvent company and the partners of a solvent exempted partnership are given a free hand to appoint whomsoever they please as a voluntary liquidator. If a company or partnership is or may be insolvent, or the liquidation is brought under the supervision of the Court for whatever reason, a qualified insolvency practitioner must be appointed in place of the shareholders/partners' chosen liquidator. *There is a public interest in ensuring that all businesses are properly liquidated in the interests of all their stakeholders. The appointment of a liquidator in these circumstances is therefore a public process which is not suitable for determination in private by an arbitral tribunal, even where all the shareholders/partners are themselves parties to an arbitration agreement in terms wide enough to encompass a dispute about the appointment or removal of a voluntary liquidator.* … [emphasis added]

82 The first of the two reasons given by Judge Jones QC for his finding of non-arbitrability in part concerns the inadequacy of the remedies that an arbitrator may grant, as compared to the remedies that may be within a court's jurisdictional competence to grant. This factor was also relied on by the Judge in this case in dismissing the stay applications before him. We agree that it is beyond the powers of an arbitrator to liquidate a company, but we do not agree that an arbitrator's lack of power to grant a particular relief sought should *necessarily* dictate the outcome of the inquiry into the arbitrability of the dispute in respect of which that relief is sought. The simple point is that it just does not follow from the limitations which might apply to an arbitrator's powers that the dispute itself is thus unsuitable for resolution by arbitration. We shall develop this point further at [96]–[100] below.

83 As for Judge Jones QC's second reason for ruling in *Cybernaut* that the dispute before him was non-arbitrable, we do regard that as compelling. In our judgment, a dispute over the liquidation of an insolvent company is non-arbitrable because such a liquidation is a process in which the greater public beyond the parties to the dispute have an interest. A creditor's winding-up petition seeks "an order to put a company into an insolvent liquidation that will affect the interests of all creditors as well as of all members": *Gamlestaden Fastigheter AB v Baltic Partners Ltd and others* [2007] Bus LR 1521 at [32] *per* Lord Scott of Foscote. Because of this, a person who presents a winding-up application is required to advertise the application under the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed) ("the Companies (Winding Up) Rules"). The advertisement plays a crucial role in protecting the interests of parties whose rights stand to be adversely affected by the grant of a winding-up order, and who therefore have a right to be heard. In *Re a Company*

(No 007923 of 1994) [1995] 1 WLR 953, Nourse LJ said at 958F–958H that an advertisement served the purpose of giving notice primarily to creditors and contributories who were entitled to be heard on the winding-up application, and secondarily, to those who might trade with the company in the window between the filing of the winding-up application and its final determination, and "who might thus be adversely affected by the provisions of the insolvency regime".

84 In our judgment, a claim for relief under s 216 of the Companies Act stands on a different footing from the liquidation of an insolvent company or avoidance claims that arise upon insolvency because the former *generally* does not engage the public policy considerations involved in the latter two situations. There is certainly nothing in the text of s 216 to suggest an express or implied preclusion of arbitration. Nor does the legislative history and statutory purpose of the provision suggest that a dispute over minority oppression or unfair prejudice is of a nature which makes it contrary to public policy for the dispute to be adjudicated by an arbitral tribunal.

85 Section 216 of the Companies Act first featured as s 181 of the Companies Act 1967 (Act 42 of 1967), the earliest iteration of what is now the Companies Act (as defined at [1] above). Section 216 has been preserved almost unchanged since its introduction, save for (among other minor amendments) an amendment in 1984 *vide* the Companies (Amendment) Act 1984 (Act 15 of 1984), pursuant to which the court was conferred the power to sanction a derivative action: see s 216(2)(*c*). Section 216 of the Companies Act was modelled on s 210 of the Companies Act 1948 (c 38) (UK) ("the UK Companies Act 1948"), which, in turn, was enacted pursuant to a recommendation by the UK Committee on Company Law Amendment ("the Cohen Committee") in 1945. The Cohen Committee's recommendation was its response to a perceived

need to "strengthen the minority shareholders of a private company in resisting oppression by the majority": *Report of the Committee on Company Law Amendment* (Cmd 6659, 1945) (Chairman: Mr Justice Cohen) ("*Report of the Cohen Committee*") at para 60.

86 The *Report of the Cohen Committee* (at paras 59–60) gave two examples of such "oppression by the majority". The first was the hardship occasioned by reason of restrictions on share transfers in private companies when a minority shareholder passed away. Such restrictions allowed the majority (who were also usually directors of the company concerned) to force the executors of the minority shareholder's estate to sell the deceased's shareholding to the majority at extortionate prices. The second example concerned the payment of excessive remuneration to directors, which resulted in there being little or nothing left for dividend distributions to shareholders. The Cohen Committee proposed that the court be given an "unfettered" discretion to impose on the disputing parties whatever settlement it considered just and reasonable in such circumstances. This proposal gave rise to s 210 of the UK Companies Act 1948. The subsequent 1962 UK Committee on Company Law Amendment (more commonly known as "the Jenkins Committee"), when reviewing s 210, emphasised that it was intended to deal with management disputes between shareholders of privately-run companies: *Report of the Committee on Company Law Amendment* (Cmnd 1749, 1962) (Chairman: Lord Jenkins) at para 199.

87 Section 216 of the Companies Act has undoubtedly increased in scope and prevalence from the two narrow instances of minority oppression that were initially referenced by the Cohen Committee in 1945. But, the essence of a claim for relief under this provision remains the same. A modern statement of the nature of such a claim is found in a famous passage of Lord Hoffmann's

judgment in *O'Neill and Another v Phillips and Others* [1999] 1 WLR 1092 ("*O'Neill v Phillips*") at 1098–1099 in relation to s 459 of the Companies Act 1985 (c 6) (UK), the then English equivalent of s 216 of the Companies Act:

> In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.

This exposition was endorsed by this court in *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745 at [82].

88 This extract from Lord Hoffmann's judgment in *O'Neill v Phillips* makes it plain that the essence of a claim for relief on the ground of oppressive or unfairly prejudicial conduct lies in upholding the commercial agreement between the shareholders of a company. This is irrespective of whether the agreement is found in the formal constitutional documents of the company, in

less formal shareholders' agreements or, in the case of quasi-partnerships, in the legitimate expectations of the shareholders. Section 216 of the Companies Act was not introduced to protect or further any *public* interest. An application for relief under s 216 of the Companies Act almost always arises in the context of a solvent company. The role of this section was, and still remains, that of remedying differences which sometimes inevitably arise as a consequence of persons associating for an economic purpose through the corporate form of a company. Section 216 is concerned with protecting the commercial expectations of the parties to such an association. It seems to us that if those persons choose to have their differences resolved by an arbitral tribunal, they should be entitled to do so. There is, in general, no public element in disputes of this nature which mandate the conclusion that it would be contrary to public policy for them to be determined by an arbitral tribunal rather than by a court.

89 A further point of procedure reinforces this view. This court has held that it is "abundantly clear" that an application for relief under s 216 of the Companies Act need not be advertised under the Companies (Winding Up) Rules, even when winding up is sought as a relief: *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] 1 SLR(R) 795 ("*Kuah Kok Kim*") at [15]. This is because "none of the provisions in Pt X of [the then equivalent of the Companies Act, *viz*, the Companies Act (Cap 50, 1990 Rev Ed)], *ie* provisions relating to winding up of companies, apply" until the court makes an order to wind up the company pursuant to s 216(2)(*f*): *Kuah Kok Kim* at [10].

90 We are fortified in this conclusion by the decision of the English Court of Appeal in *Fulham FC v Richards*, where it held that a dispute giving rise to a claim for relief under s 994 of the Companies Act 2006 (c 46) (UK) ("the UK Companies Act 2006") was arbitrable. The appellant in that case, Fulham

Football Club (1987) Ltd ("Fulham"), was a member of the second respondent, the Football Association Premier League Ltd ("the FAPL"). The FAPL and its members were required to comply with the FAPL's articles of association and rules, as well as with the rules of the English Football Association ("the FA"). Fulham presented a petition pursuant to s 994 of the UK Companies Act 2006 for the regulation of the FAPL's affairs. That section is substantially similar to s 216 of the Companies Act, the only material differences being that s 994 does not include oppressive conduct as a ground for seeking relief and also does not allow the court to wind up the company concerned upon a finding of unfair prejudice. (It is, however, not uncommon for a petition under s 994 to be presented alongside a petition for winding up on the "just and equitable" ground under s 122(1)(*g*) of the Insolvency Act 1986 (c 45) (UK) ("the UK Insolvency Act 1986") where winding up is sought as a potential relief: see, *eg*, *Practice Direction (Companies Court: Contributory's Petition)* [1990] 1 WLR 490 at [1].) The allegation of unfair prejudice in Fulham's petition was directed at the first respondent, Sir David Richards, who was the chairman of the FAPL, for allegedly meddling in the transfer of a football player in breach of the FA's rules. Fulham sought an order restraining Sir David from interfering with the transfers of players or, alternatively, an order for his termination as the chairman of the FA.

91 Relying on arbitration clauses in the FAPL's and the FA's rules, Sir David applied for a stay of the court proceedings in favour of arbitration. Fulham resisted the stay application, arguing that a petition under s 994 of the UK Companies Act 2006 was non-arbitrable.

92 The English Court of Appeal rejected Fulham's argument and overruled an earlier English High Court decision to that effect, *Exeter City Association*

Football Club Ltd v Football Conference Ltd and another [2004] 1 WLR 2910 ("*Exeter City*"). In *Exeter City*, Judge John Weeks QC, sitting as a deputy judge of the English High Court, held that an unfair prejudice petition was not arbitrable. Judge Weeks QC found Warren J's reasoning in *Skyer Australia* (cited at [79] above) "compelling": *Exeter City* at [22]. He adopted that reasoning because he considered that there was no difference between a winding-up petition and an unfair prejudice petition, and further, that "[t]he statutory rights conferred on shareholders to apply for relief [on the ground of unfair prejudice] are … inalienable and cannot be diminished or removed by contract or otherwise": *Exeter City* at [23].

93 The English Court of Appeal thought otherwise in *Fulham FC v Richards*. Patten LJ (with whom Longmore and Rix LJJ agreed) said at [77]–[78]:

> 77 The determination of whether there has been unfair prejudice consisting of the breach of an agreement or some other unconscionable behaviour is plainly capable of being decided by an arbitrator and it is common ground that an arbitral tribunal constituted under the FAPL or the FA rules would have the power to grant the specific relief sought by Fulham in its section 994 petition. We are not therefore concerned with a case in which the arbitrator is being asked to grant relief of a kind which lies outside his powers or forms part of the exclusive jurisdiction of the court. *Nor does the determination of issues of this kind call for some kind of state intervention in the affairs of the company which only a court can sanction. A dispute between members of a company or between shareholders and the board about alleged breaches of the articles of association or a shareholders' agreement is an essentially contractual dispute which does not necessarily engage the rights of creditors or impinge on any statutory safeguards imposed for the benefit of third parties.* The present case is a particularly good example of this where the only issue between the parties is whether Sir David has acted in breach of the FA and [the] FAPL rules in relation to the transfer of a Premier League player.

> 78 Judge Weeks QC was therefore wrong in my view to extend the reasoning of Warren J in *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 to [an unfair prejudice petition] … *The statutory provisions about unfair prejudice contained in section 994 give to a shareholder an optional right to invoke the assistance of the court in cases of unfair prejudice. The court is not concerned with the possible winding up of the company and there is nothing in the scheme of these provisions which, in my view, makes the resolution of the underlying dispute inherently unsuitable for determination by arbitration on grounds of public policy.* The only restriction placed upon the arbitrator is in respect of the kind of relief which can be granted.
>
> [emphasis added]

An application for leave to appeal against the English Court of Appeal's decision in *Fulham FC v Richards* was refused by the UK Supreme Court on 22 February 2012.

94 Disputes over oppressive or unfairly prejudicial conduct towards minority shareholders have also been held to be arbitrable in: (a) New South Wales and Victoria in Australia (see, respectively, *ACD Tridon v Tridon Australia* [2002] NSWSC 896 ("*ACD Tridon*") and *Paul Brazis and others v Emilio Rosati and others* [2014] VSC 385 ("*Re Form 700*")); (b) the British Virgin Islands (see *Ennio Zanotti v Interlog Finance Corp and others* Claim No BVIHCV 2009/0394 (8 February 2010) (unreported) ("*Zanotti v Interlog*")); and (c) British Columbia in Canada (see *ABOP LLC v Qtrade Canada Inc* (2007) 284 DLR (4th) 171 ("*ABOP v Qtrade*")). In fact, our attention was *not* drawn to any jurisdiction which regarded such a dispute as non-arbitrable.

The Judge's reasons for his finding of non-arbitrability

95 This brings us to the Judge's reasons for concluding that a claim for relief under s 216 of the Companies Act was non-arbitrable. There were

principally two concerns on the part of the Judge: remedial inadequacy and procedural complexity. We address each of them in turn below.

Remedial inadequacy

96 With regard to remedial inadequacy, the Judge noted that an arbitral tribunal would not have available to it the full arsenal of remedies which the court was vested with under s 216(2) of the Companies Act. For instance, an arbitral tribunal would not have the power to make awards *in rem* in the sense of awards which were binding on third parties or the world at large. In particular, it was common ground that an arbitral tribunal would not have the power to order the winding up of a company: the HC Judgment at [100] and [110]. The Judge thought that since the nature of the oppressive or unfairly prejudicial conduct complained of in a claim under s 216 was "inextricably" connected to the relief that might be awarded, "the arbitrability of the remedy sought could affect the arbitrability of the claim": the HC Judgment at [120]. We hear in this echoes of the reasoning of the court in *Cybernaut* (see [81] above).

97 We recognise the force of these concerns. But, with respect, we are unable to agree that jurisdictional limitations on an arbitral tribunal's ability to grant relief are relevant to the question of arbitrability. We would point out preliminarily that the IAA confers wide remedial powers on arbitral tribunals (and the Judge acknowledged as much at [111] of the HC Judgment). Section 12(5)(*a*) of the IAA stipulates that an arbitral tribunal "may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court". The jurisdictional limitations on the type of relief which an arbitral tribunal can grant may also be overcome if provided for by the express agreement of the parties. There are, of

course, boundaries to an arbitral tribunal's power to grant relief even if the parties agree to it; these include public policy considerations and situations which engage the rights of third parties who are not bound by the arbitration agreement in question.

98 But, *even if* such jurisdictional limitations cannot be overcome, in our judgment, the Judge elided the jurisdictional limitations on an arbitral tribunal's power to grant certain types of relief with the separate question of whether the subject matter of the dispute in question is arbitrable. The fact that the relief sought might be beyond the power of the tribunal to grant *does not* in and of itself make the subject matter of the dispute non-arbitrable. This point is elegantly captured in a slightly different, although nonetheless instructive, context in Lord Mustill & Stewart C Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition* (Butterworths, 2001) at p 73:

> … It is of course true that an award to the effect that a disputed patent is valid cannot make the patent valid, for the grant of a monopoly right exercisable against the world is a matter for public authorities, and so is the pronouncement of decisions about whether the monopoly was properly granted, whether it still exists, and so on, which affect its enforceability against the whole world. *An arbitrator whose powers are derived from a private agreement between A and B plainly has no jurisdiction to bind anyone else by a decision on whether a patent is valid, for no-one else has mandated him to make such a decision, and a decision which attempted to do so would be useless. But this is a question of jurisdiction, not of arbitrability, and we can see no reason why an arbitrator cannot conclude the issue of validity as between A and B if the issue is one which they have mandated him to decide.* … [emphasis added]

99 The English Court of Appeal in *Fulham FC v Richards* too was alive to the distinction between the jurisdictional limitations of an arbitral tribunal on the one hand and subject matter arbitrability on the other. Patten LJ said at [83]–[84]:

> 83 … If the relief sought is of a kind which may affect other members who are not parties to the existing reference, I can see no reason in principle why their views could not be canvassed by the arbitrators before deciding whether to make an award in those terms. Opposition to the grant of such relief by those persons may be decisive. Similarly if the order sought is one which cannot take effect without the consent of third parties then the arbitrators' hands will be tied.
>
> 84 *But, as explained earlier in this judgment, these jurisdictional limitations on what an arbitration can achieve are not decisive of the question [of] whether the subject matter of the dispute is arbitrable. They are no more than the practical consequences of choosing that method of dispute resolution …*
>
> [emphasis added]

100 In the court below, the Judge developed that point and, as we mentioned at [96] above, observed (at [120] of the HC Judgment) that "the arbitrability of the remedy sought could affect the arbitrability of the claim". But, with respect, it is not clear to us why that needs to be the case. Conceptually, there is nothing to preclude the underlying dispute from being resolved by an arbitral tribunal, with the parties remaining free to apply to the court for the grant of any specific relief which might be beyond the power of the arbitral tribunal to award. In so far as any findings have been made in the arbitration in such a case, the parties would be bound by such findings and would, at least as a general rule, be prevented from re-litigating those matters before the court. The point is neatly illustrated by Patten LJ's observation in *Fulham FC v Richards* that the underlying dispute grounding a winding-up application on the "just and equitable" ground under s 122(1)(*g*) of the UK Insolvency Act 1986 would be arbitrable even if it might be beyond the power of the arbitral tribunal to grant some of the remedies sought. He said at [83]:

> … The agreement could not arrogate to the arbitrator the question of whether a winding up order should be made. That would remain a matter for the court in any subsequent proceedings. But the arbitrator could, I think legitimately,

> decide whether the complaint of unfair prejudice was made out and whether it would be appropriate for winding up proceedings to take place or whether the complainant should be limited to some lesser remedy. …

101 Patten LJ's observation was picked up by the Hong Kong SAR High Court in *Re Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759 ("*Re Quiksilver Glorious Sun*"). In that case, Quiksilver Greater China Limited ("Quiksilver"), a shareholder in two joint venture companies, presented winding-up petitions on the "just and equitable" ground pursuant to s 177(1)(f) of the Hong Kong SAR's Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32). Glorious Sun Overseas Company Limited ("Glorious Sun") was the only other shareholder in both joint venture companies, with Quiksilver and Glorious Sun each holding 50% of the shares in these companies. The two joint venture companies had been established pursuant to a comprehensive joint venture agreement between Quiksilver and Glorious Sun which contained an arbitration clause. Glorious Sun applied for a stay of the winding-up petitions in favour of arbitration pursuant to s 20 of the Hong Kong SAR's Arbitration Ordinance (Cap 609).

102 Quiksilver resisted the stay application, arguing that a petition to wind up a company was the exercise by a shareholder of its inalienable right of access to the court. It was "common ground" between the parties that "the relief sought in the [petitions], winding-up orders, [could not] be granted by an arbitrator": *Re Quiksilver Glorious Sun* at [14]. The difficulty was obviated by Harris J's holding that the dispute could nonetheless be resolved by the arbitral tribunal without its having to grant the specific reliefs sought. Harris J said at [21]:

> … The determinative issue arising from the way in which Mr Barlow put Quiksilver's case is whether or not the substantive dispute between the parties is arbitrable. *By*

> *substantive dispute I mean the commercial disagreement, which they wish to have resolved. This is not the same as the relief that one party seeks.* [emphasis added]

Harris J therefore stayed the winding-up petitions for the underlying factual dispute to be determined by arbitration. He said that once the arbitral tribunal had resolved that factual dispute, either Quiksilver or Glorious Sun could apply for the stay to be lifted and invite the court to grant any appropriate relief, including the making of a winding-up order, having regard to the findings of the tribunal.

103 In our judgment, the approach taken by the courts in England (see *Fulham FC v Richards*) and in Hong Kong SAR (see *Re Quiksilver Glorious Sun*) commends itself to us because it seeks to strike a balance between, on the one hand, upholding the agreement of the parties as to how their disputes are to be resolved and, on the other, recognising that there are jurisdictional limitations on the powers that are conferred on an arbitral tribunal. We accept that this has the effect of enhancing the procedural complexity of a dispute which is covered by an arbitration agreement where one or more of the reliefs sought is beyond the arbitral tribunal's powers to grant, and such complexity will be further exacerbated if, in addition, the dispute concerns other parties who are not party to the arbitration agreement in question. It is to this that we turn next; but we are satisfied that an arbitral tribunal's inability to grant certain reliefs which may be sought would not in itself render the subject matter of the dispute non-arbitrable.

Procedural complexity

104 In the court below, the Judge was uncomfortable about sending the dispute in the Suit to arbitration, only to have the parties return to the court for

their remedy. The Judge thought that this would lead to procedural complexity and cause difficulties at two levels. First, there would be the difficulty of securing the attendance of witnesses and parties who were material to or would be affected by a potential arbitral award, and who might refuse to appear at one or the other of the arbitral and the court proceedings, thus giving rise to the possibility of conflicting findings between the two sets of proceedings: the HC Judgment at [133]. Second, there was the possibility that the court would disagree with the arbitral tribunal on findings of fact or on the appropriate remedy to be granted: the HC Judgment at [123].

105 As a preliminary observation, we reiterate a point we have already alluded to, which is that as a general rule at least, the parties to an arbitration will be bound by the arbitral tribunal's findings and, to that extent, there would not be any question of the court having to decide on such matters afresh. But, aside from this, we accept that there will be a measure of procedural complexity whenever a dispute involving some common parties and issues has to be resolved before two different fora by virtue of the fact that only part of the dispute falls within the scope of the applicable arbitration clause. The question for us is whether such procedural difficulties render the dispute non-arbitrable. We do not think it does. Of course, some, perhaps even substantial, inconvenience may be caused by such an arrangement and this would be regrettable; but inconvenience is not the threshold that justifies refusing a stay of court proceedings on the basis that the subject matter of the dispute is non-arbitrable. A similar view was expressed by the British Columbia Court of Appeal in *ABOP v Qtrade*, which concerned an application under s 15 of British Columbia's Commercial Arbitration Act (RSBC 1996, c 55) to stay a claim for relief for minority oppression. The British Columbia Court of Appeal granted

the stay, and Thackray JA, who delivered the judgment of the court, said at [24] that "procedural complexity" simply "cannot form the basis of the determination of this case". We agree. To put it simply, procedural difficulties fall short of the statutory criterion for non-arbitrability, which is a finding that to enforce the obligation to arbitrate would be contrary to public policy in view of the subject matter of the dispute in question.

106 We therefore hold that the subject matter of the present dispute is arbitrable even though it entails Silica Investors seeking relief under s 216 of the Companies Act.

Whether the court proceedings against Lionsgate or any part thereof fall within the ambit of the arbitration clause in the Share Sale Agreement

107 In the light of our foregoing conclusion, we turn to consider whether, as between Silica Investors and Lionsgate, the dispute in the Suit (or any part thereof) falls within the scope of the arbitration clause in the Share Sale Agreement between them. The governing provision in this regard is s 6 of the IAA, which we set out earlier at [27] above. For convenience, we reproduce the material parts of s 6 again here:

> **Enforcement of international arbitration agreement**
>
> **6.**—(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings

> so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.
>
> …

The applicable principles

108 It will be evident that in considering whether a dispute is covered by an arbitration agreement, the court is concerned with establishing whether the dispute pertains to a "matter" that is subject to the arbitration agreement. In our judgment, there are two stages involved in this process:

(a) the court must first determine what the matter or matters are in the court proceedings; and

(b) it must then ascertain whether the matter(s) fall within the scope of the arbitration clause on its true construction.

It is clear that the court proceedings which are sought to be stayed may be in respect of more than a single "matter", and in those situations, the court's *obligation* is to stay only that part of the court proceedings which concerns the matter or matters that fall within the ambit of the arbitration clause. This is clear from s 6(2) of the IAA, which mandates a stay only "*so far as*" [emphasis added] the court proceedings relate to the matter or matters which are the subject of the arbitration agreement.

109 In the present case, the parties do not agree on the approach at either of the two stages of the inquiry that we have set out above. The disagreement at the first stage raises a methodological question, which centres on the degree of specificity with which the court should characterise a "matter". Silica Investors argues that a broad approach should be adopted, with the court seeking to

identify the "essential dispute" or "main issue" between the parties in the court proceedings. On this view, Silica Investors argues that the sole matter in the Suit is whether the affairs of AMRG have been conducted in an oppressive or unfairly prejudicial manner towards it (Silica Investors) as a minority shareholder. Lionsgate, on the other hand, advocates a more granular approach. It contends that the court is entitled to segment as a separate matter each "issue which is material to the relief sought and/or is capable of settlement as a discrete controversy". On Lionsgate's view, each of the four categories of allegations made by Silica Investors in the Suit (as outlined at [15]–[18] above) constitutes a separate matter.

110 The disagreement at the second stage raises a question of application, which relates to whether the matter(s) in the Suit, however it or they be characterised, fall(s) within the scope of the arbitration clause in the Share Sale Agreement. On the basis of Silica Investors' broad characterisation of the matter, it argues that the entire dispute in the Suit falls outside the ambit of the arbitration clause. However, on Lionsgate's more granular characterisation of the matters in the Suit, Lionsgate argues that the Share Issuance Allegation and the Management Participation Allegation are caught by the arbitration clause, while it accepts that the other two allegations are not.

The question of methodology

111 We begin with the methodological question, which is a crucial step in the analysis because the characterisation of a matter can often be dispositive of whether it falls within the scope of the arbitration clause concerned. If the matter is characterised at a high level of abstraction – *eg*, in the present case, whether the affairs of AMRG have been conducted in an oppressive or unfairly

prejudicial manner towards Silica Investors as a minority shareholder – then the case for its falling within the scope of the arbitration clause is weakened. A cogent argument can be made that the parties could not have intended that a dispute over the management of a company with many shareholders, each of whom might potentially be affected, should fall within the ambit of an arbitration clause contained in a share sale agreement between just two shareholders. On the other hand, if a more granular approach is adopted, there is a compelling case that at least some of the four allegations made by Silica Investors in the Suit fall within the scope of the arbitration clause in the Share Sale Agreement. The Management Participation Allegation, for instance, rests almost exclusively on cl 2.5(a) of the Share Sale Agreement (see [11(a)] and [16] above). The Judge adopted the broad approach, having been persuaded that this was the approach taken in Australia, and was also consistent with that taken in England, Canada and Singapore.

112 In Australia, the prevailing test to determine what constitutes a "matter" is whether there is "the assertion of a right or liability … which … is at least susceptible of settlement as a discrete controversy". However, it also seems to be clear that a "mere issue" which falls to be decided in the court proceedings would not suffice to constitute a matter. The dichotomy between a "discrete controversy" and a "mere issue" was articulated in the joint dissent of Deane and Gaudron JJ in *Tanning Research Laboratories Inc v O'Brien* (1990) 91 ALR 180 ("*Tanning Research*"), a decision of the High Court of Australia, and it has since come to gain wide acceptance. *Tanning Research* is cited in *Jurisdiction and Arbitration Agreements* at pp 332–334 as well as in Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (informa, 2009) at p 18, both of which were relied on by the Judge.

113 In our judgment, the starting point of the analysis is the language of s 6 of the IAA, which clearly recognises that the court, when faced with a stay application, is not presented with a binary choice which confines it to either staying the proceedings entirely and so forcing the parties to arbitrate, or refusing the stay and allowing the court proceedings in their entirety to continue. Instead, s 6(2) contemplates that the court is to stay the proceedings "*so far as* [they] relate to [the] matter" [emphasis added]. This seems to us to militate against taking an excessively broad view of what constitutes a "matter" or treating it as a synonym for the court proceedings as a whole. In our judgment, when the court considers whether any "matter" is covered by an arbitration clause, it should undertake a practical and common-sense inquiry in relation to any reasonably substantial issue that is not merely peripherally or tangentially connected to the dispute in the court proceedings. The court should not characterise the matter(s) in either an overly broad or an unduly narrow and pedantic manner. In *most* cases, the matter would encompass the claims made in the proceedings. But, that is not an absolute or inflexible rule. We take this view for three reasons.

114 First, the semantic distinction between a "discrete controversy" and a "mere issue" – the criteria upon which the traditional test is based – is so fine that it may be illusory. This distinction has been described as one of "fact and degree [to be determined] by reference to the 'whole matter in controversy in the court proceedings'": *Flint Ink NZ v Huhtamaki Australia Pty Ltd and Lion-Dairy & Drinks Pty Ltd* [2014] VSCA 166 at [89] *per* Nettle JA. But, such a test eludes consistent and predictable application: both labels are so malleable that in the present case, Silica Investors and Lionsgate, applying precisely the same test to precisely the same facts, have arrived at opposite conclusions.

115 Second, the courts, both in Australia and in other foreign jurisdictions, have retreated somewhat from characterising a matter too broadly. The first instance decision of the New South Wales Supreme Court in *ACD Tridon* is a case in point. There, the plaintiff, ACD Tridon Inc ("Tridon"), commenced proceedings against four defendants: Tridon Australia Pty Ltd ("TAPL"); Richard Lennox; Sandra Lennox (Mr Lennox's wife); and Tridon New Zealand Ltd ("TNZL"), which was TAPL's wholly-owned subsidiary. Tridon was a minority shareholder of TAPL, while the Lennoxes were the majority shareholders and directors of TAPL. A shareholders' agreement between Tridon and Mr Lennox contained an arbitration clause.

116 Tridon's claims in the court proceedings fell principally into four categories, namely (see *ACD Tridon* at [20]): (a) claims for access to TAPL's documents; (b) claims seeking to reverse a compulsory acquisition of Tridon's shares in TAPL by Mr Lennox; (c) claims against the Lennoxes for purported misconduct as directors of TAPL; and (d) claims relating to further instances of oppressive conduct, including TAPL's and TNZL's failure to declare dividends and TAPL's oppressive conduct of legal proceedings against Tridon. The claims in the first three categories were based in part on the provisions of the shareholders' agreement between Tridon and Mr Lennox and in part on statutory provisions in Australia's Corporations Act 2001 (Cth). The final category of claims was based entirely on statute.

117 TAPL, the Lennoxes and TNZL applied for the court proceedings to be stayed in favour of arbitration under s 7(2) of Australia's International Arbitration Act 1974 (Cth) ("the Australian IAA 1974"), which is the Australian counterpart of s 6 of the IAA. Section 7(2) of the Australian IAA 1974 states:

> **7 Enforcement of foreign arbitration agreements**
>
> …
>
> (2) Subject to this Part, where:
>
> (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
>
> (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;
>
> on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.
>
> …

Tridon, which was resisting the stay application, submitted that each of its four categories of claim constituted a separate "matter" for the purposes of s 7(2)(b). Tridon acknowledged that embedded within each category of claims were issues relating to the construction of the shareholders' agreement between it and Mr Lennox, but argued that those were mere issues which should not be regarded as "matters": see *ACD Tridon* at [102].

118 Austin J did not agree. He adopted a granular approach to the characterisation of the "matters" (*ACD Tridon* at [110]), and found that there were no less than *eight* of them (*ACD Tridon* at [110]–[111]):

> 110 … I had decided that each of the [four] claims … involves a "matter" arising out of the Shareholders' Agreement … and also one or more matters arising out of claims to statutory and equitable rights. The controversies as to the correct construction of the Shareholders' Agreement concerning each of the first four Claims, and concerning the rights and liabilities of Mr Lennox and Tridon under the relevant parts of the Agreement, are controversies discrete from the statutory and

> equitable claims, both in the sense that the contract claims might have been asserted independently of the statutory and equitable claims, although arising out of the same facts, and in the sense that the parties to the contract claims are only Mr Lennox and Tridon, not the other defendants.
>
> 111 There are two or more discernable subject matters in the disputes between the parties concerning each Claim. …

Austin J held that the matters which arose out of the construction of the rights and liabilities created by the shareholders' agreement between Tridon and Mr Lennox fell within the ambit of the arbitration clause, while those which arose out of the statutory provisions on oppression fell without: *ACD Tridon* at [167]–[177].

119 To similar effect is the British Virgin Islands High Court decision of *Zanotti v Interlog* (cited earlier at [94] above). In that case, a minority shareholder sought relief against a company and its other shareholders on the ground of oppression. There was an arbitration clause in the company's articles of association which extended to any difference between the company and its shareholders that: (a) touched on either the company's articles of association or the British Virgin Islands' Business Companies Act 2004 (No 16 of 2004); or (b) affected the company or the conduct of its affairs: *Zanotti v Interlog* at [8]. Bannister J characterised the complaints made against the company as separate matters from the complaints made against the other shareholders, and stayed the court proceedings in respect of the former but not the court proceedings in respect of the latter: *Zanotti v Interlog* at [28]. The court did not specifically consider the distinction between a "discrete controversy" and a "mere issue", but the decision was made in the context of s 6(2) of the British Virgin Islands' Arbitration Ordinance 1976 (Cap 6), which is substantially similar to s 6 of the IAA.

120 The approach adopted by Andrew Smith J in *Lombard North Central plc and another v GATX Corporation* [2012] 1 Lloyd's Rep 662 ("*Lombard North v GATX*") is also consistent with the tenor of *ACD Tridon* and *Zanotti v Interlog*. The learned judge said at [15]–[16] of *Lombard North v GATX*:

> 15. It seems to me that, if the parties have agreed to refer a matter to arbitration, a party who so wishes should be entitled to have the agreement upheld and to have the court stay the proceedings for that purpose …
>
> 16. *This might lead to legal proceedings in which a referred matter is … being stayed while that matter, or issue, is referred to an arbitral tribunal, and then resuming when it has been resolved in accordance with the parties' agreement. This might be inconvenient and result in additional costs and some delay, but that is the price of respecting the parties' agreement and a risk that they are taken to have chosen to take …*
>
> [emphasis added]

121 Our third and final reason for rejecting the broad approach canvassed by Silica Investors is that it is ill-suited to the reality that disputes may be complex and engage disparate factual and legal issues. Characterising a "matter" at an unduly high degree of abstraction may carry with it the elegance of simplicity and convenience. But, any attempt to boil down a complex dispute to a singular aspect of its essence would be contrived. This case presents a perfect example. There are four distinct allegations made in support of the main complaint that the affairs of AMRG have been conducted in an oppressive or unfairly prejudicial manner towards Silica Investors as a minority shareholder. At least the second of the four allegations (*ie*, the Management Participation Allegation) has an immediately apparent and undeniable nexus to the Share Sale Agreement. On the other hand, it is not disputed that the latter two allegations (*ie*, the Guarantees Allegation and the Asset Exploitation Allegation) have no relation whatsoever to the Share Sale Agreement. To say that each of these

allegations, although quite different from one another, all form part of the same matter, and that the court must then decide whether the matter as a whole falls within the scope of the arbitration clause in the Share Sale Agreement seems unprincipled and, indeed, artificial. Another example of the strain which an overly broad approach entails would be where a party to a contract containing an arbitration clause brings a claim for unlawful means conspiracy against the other contracting party and a third party, with the alleged breach of the contract relied on as the unlawful means in question. While the court may conceivably consider that the conspiracy claim against both defendants falls outside the scope of the arbitration clause, that would be to ignore a substantial issue – the question of breach of contract – which plainly arises out of the contractual relationship between the two contracting parties.

122 We therefore consider that a "matter", for the purposes of s 6 of the IAA, should not be construed in either an overly broad or an unduly narrow way. On the specific facts of this case, each of the four categories of allegations made in the Suit raises substantial issues that are neither peripheral nor tangential to Silica Investors' claim for relief under s 216 of the Companies Act. We accordingly find that each category is a separate "matter" for the purposes of Lionsgate's stay application under s 6 of the IAA.

The question of application

123 We turn now to the question of application, which is whether the matters that we have identified fall within the scope of the arbitration clause in the Share Sale Agreement. We set out that clause in full below for ease of reference:

> **12.3 Dispute Resolution**
>
> Without prejudice to any right of the Parties to apply to any competent court for injunctive relief, any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC") for the time being in force, which rules are deemed to be incorporated by reference in this clause. The tribunal shall consist of one arbitrator to be appointed by the chairman of the SIAC. The language of the arbitration shall be English.

124 The principles governing the construction of an arbitration clause are well settled. The court does not adopt a technical approach, but construes the clause based on the presumed intentions of the parties as rational commercial parties: *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] 2 Lloyd's Rep 267, affirmed by the House of Lords *sub nom Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2008] 1 Lloyd's Rep 619 ("the *Fiona Trust* case"). Lord Hoffmann's statement at [13] of the *Fiona Trust* case is pertinent in this regard:

> … [T]he construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. …

We cited Lord Hoffmann's observations with approval in *Larsen Oil v Petroprod* at [13].

125 When ascertaining whether a given matter is covered by an arbitration clause, the court must consider the underlying basis and true nature of the issue or claim, and is not limited solely to the manner in which it is pleaded (see, for

example, *Larsen Oil v Petroprod* at [7]–[10]). As Andrew Smith J stated in *Lombard North v GATX* at [14]:

> … The question of course depends upon the nature of the claim (or claims) made in the legal proceedings, but not, I think only on the formulation of it (or them) in the claim form and any pleadings. That would allow a claimant to circumvent an arbitration agreement by formulating proceedings in terms that, perhaps artificially, avoid reference to a referred matter, knowing that any application to stay them must be made before a defence is pleaded. …

126 Blair J approached the issue in the same way in *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal, Standard Chartered Bank, Singapore Branch* [2011] Arb LR 26, where he emphasised at [35]:

> … the importance of identifying the "substance of the controversy", rather than the formal nature of the proceedings … [T]he court must consider the substance of the controversy as it appears from the circumstances in the evidence on the application (and not just the particular terms in which the Claimant has sought to formulate its claim in court). …

127 We agree with both these statements as to the proper approach which a court should take. In the present appeals, the only dispute before us is whether the Share Issuance Allegation and the Management Participation Allegation fall within the scope of the arbitration clause in the Share Sale Agreement, as there is no dispute that the other two allegations made by Silica Investors in the Suit do not. We shall address each of the former two allegations in turn.

128 The Share Issuance Allegation concerns what is said to be an improper issuance of shares by AMRG on 15 September 2010, which apparently had the effect of diluting Silica Investors' shareholding in AMRG by more than 50%. AMRG's explanation is that the shares were issued to discharge outstanding liabilities arising from the transfer of the Solar Silica Assets to SSRG (see [15]

above). Silica Investors, on the other hand, alleges that the share issuance was done without commercial justification because the alleged liabilities in respect of the Solar Silica Assets were fictitious.

129 Silica Investors' allegation that the 15 September 2010 share issuance was improper comprises a number of strands, each of which was particularised in its original statement of claim in the Suit as follows:

(a) First, a document that Silica Investors presented to the Singapore Stock Exchange in or around January 2010 stated that the Solar Silica Assets had been transferred to SSRG.

(b) Second, an email dated 19 May 2010 from Mr May, the seventh defendant in the Suit (see [19] above), to one of Silica Investors' officers stated that the Solar Silica Assets had been transferred to SSRG on 2 December 2009.

(c) Third, an email dated 1 June 2010 from Mr May to the same officer stated that the assignment of the Solar Silica Assets to SSRG had been completed.

(d) Fourth, cll 8.2 and 8.3 of the first schedule to the Share Sale Agreement warranted that at the completion date, SSRG would have discharged all its current liabilities, and that the accounts of SSRG (which did not disclose any debts for the Solar Silica Assets) would give a true and fair view of SSRG's state of affairs.

(e) Fifth, in the course of the due diligence exercise conducted by Silica Investors leading up to the conclusion of the Share Sale Agreement, the defendants in the Suit did not inform Silica Investors of

> or disclose to it any documents which showed the existence of outstanding liabilities associated with the Solar Silica Assets.

130 In short, Silica Investors' contention was that the transfer of the Solar Silica Assets to SSRG had been completed prior to the conclusion of the Share Sale Agreement, and neither the due diligence exercise which it carried out nor the warranties contained in the Share Sale Agreement disclosed any outstanding liabilities associated with the transfer of the Solar Silica Assets. There were therefore no liabilities to be discharged by the issuance of shares by AMRG, and the 15 September 2010 share issuance was thus done without commercial justification.

131 At the hearing of these appeals, we suggested to counsel for Silica Investors, Mr Paul Ong, that the manner in which the Share Issuance Allegation had been pleaded appeared to engage the warranties in the Share Sale Agreement and give rise, at least indirectly, to considerations of whether they had been breached. Mr Ong resisted this suggestion vigorously. He contended that Silica Investors was not alleging that the warranties in the Share Sale Agreement had been breached; on the contrary, it was relying on the truth of those warranties to evidence its contention that the liabilities relating to the Solar Silica Assets had already been settled by the time the Share Sale Agreement was concluded. Mr Ong further contended that there was no need for Silica Investors to rely on the Share Sale Agreement to make good its allegation that the alleged debts were fictitious and the share issuance, improper. We did not, however, think that Silica Investors' pleadings on the Share Issuance Allegation cohered entirely with Mr Ong's position before us, and so, at the close of the hearing, we gave Silica Investors an opportunity to amend its pleadings on that allegation if it desired.

132 Silica Investors took up the opportunity. The substance of its pleadings on the Share Issuance Allegation in its amended statement of claim remains unchanged, but the difference is that its amended pleadings do not make reference to any specific warranties in the Share Sale Agreement, unlike what was done in its original statement of claim (see [129(d)] above). Instead, Silica Investors now simply asserts that "the Share Sale Agreement did not disclose any liabilities associated with the Solar Silica Assets".

133 In keeping with the authorities before us, our task is to examine the substance of the controversy without paying undue attention to the details of how it has been pleaded. In our judgment, the substance of the controversy concerns the issuance of shares by AMRG *after* the Share Sale Agreement was concluded and whether there was any commercial justification for that share issuance. Silica Investors contends implicitly, if not explicitly, that *Lionsgate* directly or indirectly procured this share issuance by AMRG for improper purposes. In this regard, we find it significant that:

(a) the share issuance was by AMRG, which is not a party to the arbitration clause in the Share Sale Agreement at all as that agreement was between Silica Investors and Lionsgate only;

(b) the alleged wrongdoing does not concern any breach of the Share Sale Agreement; and

(c) Silica Investors relies on certain facts, including the fact that nothing as to the continuing existence of liabilities relating to the Solar Silica Assets was disclosed to it at any time, whether before, during or after the time it became a shareholder of AMRG pursuant to the Share Sale Agreement.

134 In these circumstances, we agree with Mr Ong that the substance of the controversy pertaining to the Share Issuance Allegation is not one that can fairly be said to arise out of or in connection with the Share Sale Agreement. The central issue, as we have noted, is whether there was any commercial justification for the issuance of the shares by AMRG on 15 September 2010, and that issue is wholly unaffected by the Share Sale Agreement. There is nothing in that agreement which would either provide or remove any commercial justification. It is true that at the heart of the Share Issuance Allegation is the assertion that AMRG did not have any outstanding liabilities subsequent to the transfer of the Solar Silica Assets to SSRG, which had been completed prior to the conclusion of the Share Sale Agreement. But, this, with respect, conflates temporal proximity with factual or legal relevance. To put it simply, the existence of commercial justification for the share issuance by AMRG depends on whether or not the liabilities concerning the Solar Silica Assets had been discharged prior to that share issuance, and we are unable to see how this could be said to be an issue arising out of or in connection with the Share Sale Agreement.

135 Much was made of Silica Investors' reference to the warranties in the Share Sale Agreement to make good its case on the Share Issuance Allegation. But, in our judgment, this was peripheral to the primary question, which is whether or not the liabilities relating to the Solar Silica Assets had been settled prior to the 15 September 2010 share issuance. If those liabilities had not been settled by that time, it may well be that there was commercial justification for the share issuance, even if the existence of those liabilities happened to render the warranties untrue.

136 We turn next to the Management Participation Allegation, which presents no difficulty. Clause 2.5(a) of the Share Sale Agreement appears to be Silica Investors' only basis for asserting that there was an understanding or a legitimate expectation on its part that it would participate in AMRG's management. At the hearing of these appeals, Mr Ong accepted that there was no basis independent of the Share Sale Agreement for that assertion. The construction of cl 2.5(a) of the Share Sale Agreement will form an inescapable and substantial (if not the entire) step in establishing the existence of any understanding or legitimate expectation of management participation by Silica Investors, and thus, in resolving the Management Participation Allegation. The Management Participation Allegation therefore falls squarely within the ambit of the arbitration clause in the Share Sale Agreement.

137 We therefore find that there is a *prima facie* case that the Management Participation Allegation falls within the scope of the arbitration clause in the Share Sale Agreement. The court proceedings in respect of this allegation as between Silica Investors and Lionsgate are thus subject to a mandatory stay under s 6(1) of the IAA. However, the Share Issuance Allegation, in our judgment, is clearly not covered by the arbitration clause based on the pleadings and the evidence placed before us.

Whether the rest of the court proceedings against Lionsgate and the remaining defendants should be stayed pending the resolution of the arbitration between Silica Investors and Lionsgate

138 This leaves us with that part of the court proceedings in the Suit which are not subject to a mandatory stay under s 6 of the IAA. These comprise: (a) the court proceedings between Silica Investors and Lionsgate concerning the Share Issuance Allegation, the Guarantees Allegation and the Asset Exploitation

Allegation; and (b) the court proceedings between Silica Investors and the remaining defendants concerning those three allegations as well as the Management Participation Allegation. The parties do not dispute the court's inherent power to stay court proceedings in the interests of case management pending the resolution of a related arbitration. The only dispute is over whether and, if so, how this power should be exercised in the present case.

The options available to the court

139 Broadly speaking, there are three options available to a Singapore court which is faced with proceedings whose outcome depends on the resolution of a related arbitration, namely:

(a) stay the *whole* of the court proceedings pending the resolution of the putative arbitration (*ie*, resolve the arbitration first);

(b) stay the court proceedings only to the extent that is required under s 6 of the IAA, but on the condition that the putative arbitration proceed only *after* the resolution of the remaining court proceedings (*ie*, resolve that part of the court proceedings which falls outside s 6 first); or

(c) stay the court proceedings only to the extent that is required under s 6 of the IAA, and allow the putative arbitration and the remaining court proceedings to run in parallel (*ie*, concurrent resolution of the arbitration and that part of the court proceedings which falls outside s 6).

There are also the intermediate possibilities of the court granting a focused stay of the court proceedings on certain issues, while allowing selected other issues to be concurrently determined in court and by arbitration.

140 Three features of this case make deciding on the appropriate option a delicate task. First, there is an overlap in the *parties* to the putative arbitration (*viz*, Silica Investors and Lionsgate) and the parties to the Suit (*viz*, Silica Investors and all eight defendants named in the Suit). Second, there is an overlap in the *issues* that will be engaged in the putative arbitration (which will be limited to the Management Participation Allegation) and those that will be engaged in the Suit. Third, there is an underlap in the *remedies* that the putative arbitral tribunal may grant, as compared to those which the court may grant. There is the possibility that Silica Investors and Lionsgate may have to return to the court for the appropriate remedies to be granted once the arbitration of the Management Participation Allegation is concluded. These three intersecting dimensions of the present dispute create a potential case management quandary.

141 Silica Investors seeks the third approach (at [139(c)] above), which in effect points towards the court not managing the resolution of the dispute as a whole, but rather, allowing the court and the arbitral proceedings to run in parallel. Lionsgate and the remaining defendants seek the first solution (at [139(a)] above), whereby the court proceedings are stayed until after the putative arbitration between Silica Investors and Lionsgate has concluded.

142 Allowing both the putative arbitration and the court proceedings in the Suit to proceed in tandem will lead to duplication of resources, and may force Lionsgate to litigate on two fronts. On the other hand, if the putative arbitration were deferred until after the resolution of the court proceedings, then the court

proceedings may well envelop and effectively dispose of the issue in the arbitration (*ie*, the Management Participation Allegation). That would enable Silica Investors to circumvent the arbitration clause in the Share Sale Agreement. But, if the court proceedings were stayed pending the resolution of the putative arbitration between Silica Investors and Lionsgate, then upon the completion of the arbitration, when the matter returns to the court, the remaining defendants may seek to challenge findings made in the arbitration to which they were not party and by which they might not be bound. In our judgment, if the remaining defendants were to do so, they would, in the broad sense, be "re-litigating" issues already decided in the arbitration, even though they were not parties to the arbitration and did not have the opportunity to address the arbitral tribunal on those issues. In the ensuing paragraphs, we shall refer to this form of "re-litigation" as "re-litigation (in the broad sense)" to distinguish it from re-litigation in the *res judicata* sense. In addition, if the remaining defendants were to challenge the arbitral tribunal's decision when this dispute returns to the court, that would be contrary to their present stance in seeking a stay of the court proceedings pending arbitration, and might potentially amount to an abuse of the process of the court.

143 We digress to examine how the courts of Australia, Canada, England and New Zealand have addressed the situation of overlap outlined at [140] above – *ie*, where a dispute falls to be resolved in part by arbitration and in part by court proceedings, with the two sets of proceedings involving overlapping issues and parties – before discussing the principles that we consider emerge from these jurisdictions' case law and applying these principles to the case before us. In each of these jurisdictions, the courts have recognised their inherent power to stay or manage court proceedings that are related to a matter

which is subject to a mandatory stay in favour of arbitration under legislation similar to the IAA. The courts, however, have differed in their approach to the exercise of that power.

The approach in other jurisdictions

Australia

144 We begin with Australia and the decision of the Full Court of the Federal Court of Australia in *Hi-Fert Pty Ltd and another v Kiukiang Maritime Carriers Inc and another* (1998) 159 ALR 142 ("*Hi-Fert*"). The plaintiffs in that case were, respectively, the consignee ("Hi-Fert") and the consignor ("Cargill") of a shipment of wheat. The defendants were, respectively, the charterer ("WBC") and the owner ("KMC") of the vessel on which the consignment of wheat was shipped. The shipment was found to be contaminated and so could not be discharged at the destination port in New South Wales, Australia. The plaintiffs commenced court proceedings in Australia against the defendants, claiming in contract and in tort (for negligence). They additionally claimed against the charterer, WBC, for misrepresentation and alleged contraventions of Australia's Trade Practices Act 1974 (Cth) ("the Australian Trade Practices Act 1974"). Relying on an arbitration clause in the contract of affreightment between itself and Hi-Fert, WBC applied for a stay of the court proceedings under s 7(2) of the Australian IAA 1974, which is the Australian counterpart of s 6 of the IAA (see [117] above). That arbitration clause required disputes between WBC and Hi-Fert to be arbitrated in London. The owner of the vessel, KMC, also made a stay application pursuant to the court's inherent jurisdiction, which was contingent on the success of WBC's stay application.

145 Emmett J, with whom Beaumont and Branson JJ agreed, held that the contractual claims by Hi-Fert against WBC fell within the scope of the arbitration clause in the contract of affreightment between them. Those claims therefore had to be stayed. Emmett J, however, held that Hi-Fert's non-contractual claims against WBC were not caught by the arbitration clause. He went on to observe at 167 of *Hi-Fert*:

> … It is clear that there is a significant overlap between the claims made against KMC under the bills of lading and the contractual claims made against WBC. It would be undesirable for those claims to be adjudicated in different places by different tribunals. If they were, there would be the possibility of inconsistent determinations. That possibility should be avoided if possible.

146 Emmett J also pointed out that any claim for an indemnity between WBC and KMC would be subject to arbitration in London pursuant to an arbitration clause in the time charter between the two of them. Emmett J thought that the best approach would be to have both plaintiffs' claims against KMC and WBC arbitrated in London, so that they could run alongside and be heard by a common arbitrator of any indemnity claim that WBC might make against KMC pursuant to the time charter: *Hi-Fert* at 167–168. But, there were some impediments to this seemingly elegant solution, namely, the fact that the non-contractual claims against WBC as well as the entirety of the claims against KMC were not subject to arbitration. In that light, Emmett J said at 168:

> … WBC is entitled to a stay of so much of the proceedings as involves the determination of the contractual claims. The parties, therefore, should be referred to arbitration in respect of those matters.
>
> However, the non-contractual claims against WBC are not the basis of a dispute "arising from" the [contract of affreightment], nor are they matters that, in pursuance of the charter contract, are capable of settling by arbitration. Accordingly, WBC is not entitled, as of right, to a stay in respect

> of the [non-contractual] claims made against it. Further, KMC is not entitled, as of right, to a stay in respect of the claims against it.
>
> Referring the parties to arbitration in respect of contractual claims against WBC, while the balance of the proceedings against WBC and the whole of the proceedings against KMC continue in this court, would have the unfortunate result that Hi-Fert and WBC would be litigating similar issues in different tribunals. The result is unfortunate in so far as the parties may be required to litigate similar issues in two places. However, that is the result of … the insistence by WBC on invoking the provisions of s 7 of the [Australian IAA 1974].
>
> Prima facie, Hi-Fert, having properly commenced proceedings in this court, is entitled to prosecute the proceedings against WBC and KMC in this court … If the [plaintiffs] succeed in the proceedings, there may be no need to pursue the contractual claims against WBC by arbitration in London. If the [plaintiffs] fail, however, those claims can then be pursued in London. Accordingly, I consider that the appropriate course would be to impose a condition on the stay of the contractual claims that the reference to arbitration in respect of the contractual claims not proceed until after the final determination of the proceedings in the Federal Court.

147 Emmett J accordingly ordered that the mandatory stay of the contractual claims against WBC in favour of arbitration be conditional upon the arbitration in London not proceeding until after the resolution of the proceedings before the Federal Court of Australia, *ie*, the proceedings in respect of the non-contractual claims against WBC and all the claims against KMC. The philosophical underpinning of the decision may be put thus: the court considered that the paramount consideration was to avoid having the same or similar issues re-litigated (in the broad sense) before different fora. Recognising the reality that it could not force WBC and KMC to submit to arbitration matters that were outside the ambit of an arbitration agreement, the court opted to postpone the arbitration until after those issues had been resolved in court. This would minimise the prospect of re-litigation (in the broad sense). Indeed, the court noted that in this way, it might obviate the need for any arbitration at all.

148 The next case is *Recyclers of Australia Pty Ltd and another v Hettinga Equipment Inc and another* (2000) 175 ALR 725 ("*Recyclers v Hettinga*"), another decision of the Federal Court of Australia, but this time at first instance. In *Recyclers v Hettinga*, the first plaintiff ("Unimould") purchased an injection moulding unit from the first defendant ("Hettinga Equipment"), whose principal was the second defendant. The purchase agreement between Unimould and Hettinga Equipment contained an arbitration clause. Unimould and the second plaintiff ("Recyclers") commenced court proceedings against the two defendants for misleading and deceptive conduct under s 52 of the Australian Trade Practices Act 1974, as well as for negligent misrepresentation under common law. In support of their claims, the plaintiffs relied on both pre- and post-contractual representations that were allegedly made by the defendants.

149 The defendants sought a stay of the court proceedings in favour of arbitration pursuant to s 7(2) of the Australian IAA 1974. Merkel J held that, as between Unimould and Hettinga Equipment, the claims based on pre-contractual representations fell within the arbitration clause in the purchase agreement between them. Those claims, to the extent that they were between Unimould and Hettinga Equipment, were therefore subject to a mandatory stay. Merkel J, however, held that the plaintiffs' claims against the defendants based on post-contractual representations "[stood] on a different footing" and fell outside the scope of the arbitration clause: *Recyclers v Hettinga* at [64]. Merkel J also made the following observations (at [65]–[66]) on the court's discretion to impose a stay of court proceedings which were not caught by an arbitration clause:

> 65 In the event that a proceeding includes matters that are not capable of being referred to arbitration, but the determination of which is dependent upon the determination of

> the matters required to be submitted to arbitration, a court may, in the exercise of its discretion, stay the whole proceeding … A court may also exercise a discretion to impose terms that the arbitration of the arbitrable claims not proceed prior to the determination of the non-arbitrable claims where the arbitrable claims are seen to be subsidiary to or significantly less substantial than, but overlapping with, the non-arbitrable claims … The discretion may also be exercised to stay the proceedings where the non-arbitrable claims are the ancillary claims.
>
> 66 The broad discretion arises as part of the exercise of a court's general power to control its own proceedings. The basis for the discretion is that the spectre of two separate proceedings – one curial, one arbitral – proceeding in different places with the risk of inconsistent findings on largely overlapping facts, is undesirable …

(We should clarify that Merkel J used "non-arbitrable" in this passage in the sense of matters that do not fall within the scope of the arbitration clause in question, rather than in the public policy sense outlined at [71]–[75] above.)

150 On the facts, Merkel J thought that the claims which fell within the ambit of the arbitration clause were the primary and substantial claims, while the remaining claims were ancillary and less significant. He also thought that the outcome of the claims which were covered by the arbitration clause would be "determinative of many of the issues arising between the parties": *Recyclers v Hettinga* at [69]. In view of the "significant legal and factual overlap" between the claims which fell within the scope of the arbitration clause and those which fell without, Merkel J thought that the arbitration of the former category of claims should proceed first to minimise wastage and the risk of inconsistent findings. He granted a conditional stay of the court proceedings relating to the latter category of claims on the following terms (at [72]–[73]):

> 72 The proceeding by Unimould against Hettinga Equipment is to be stayed under s 7(2) of the [Australian IAA 1974] on terms that Hettinga Equipment undertake to use its

> best endeavours to refer Unimould's claims to arbitration in accordance with the arbitration clause and pursue the arbitration with due expedition.
>
> 73 The proceeding in respect of the claims by [Recyclers], and the claims by the [plaintiffs] against [the second defendant], are to be stayed until further order in the exercise of the Court's discretion. The stay will be on the condition that in the event that the [plaintiffs] agree to those claims being arbitrated, the [defendants] are to use their best endeavours to enable those claims to be referred to arbitration as part of the arbitration of the arbitrable claims and pursue the arbitration with due expedition. Whether the [plaintiffs] agree to the reference to arbitration of claims that are not the subject of the stay under s 7(2) … is a matter for them.

Similar results have been reached in similar circumstances in more recent cases: *Casaceli v Natuzzi SpA* [2012] FCA 691; *Amcor Packaging (Australia) Pty Ltd v Baulderstone Pty Ltd* [2013] FCA 253.

151 The final Australian case which we consider is in some respects an outlier from those discussed above, but, at least on the facts, it bears the greatest resemblance to the facts before us. It is the first instance decision of the Supreme Court of Victoria in *Re Form 700*, which we cited at [94] above in discussing the issue of arbitrability. There, court proceedings were commenced by three plaintiffs against nine defendants. The plaintiffs brought, amongst others, a claim for relief on the ground of oppression against five of the nine defendants. Various types of relief were sought, including orders for share buy-outs, the commencement of a derivative action, accounts of profits and statutory damages. Of the three plaintiffs and five defendants involved in the oppression claim, only two of the plaintiffs and four of the defendants were party to a shareholders' agreement which contained an arbitration clause. The shareholders' agreement was intended to regulate the management and

operation of the group of companies in respect of which the oppression claim was brought.

152 All nine defendants applied for a stay of the court proceedings: *Re Form 700* at [51]. As in the present case, the stay applications fell into two categories. The first consisted of those made by the four defendants who were involved in the oppression claim and were party to the shareholders' agreement containing the arbitration clause. Those applications were made pursuant to s 8 of Victoria's Commercial Arbitration Act 2011 (No 50 of 2011), which states:

> **8 Arbitration agreement and substantive claim before court**
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> …

The second category of stay applications consisted of that made by the one defendant who was involved in the oppression claim but was not party to the shareholders' agreement, as well as the applications made by the remaining four defendants who were not involved in the oppression claim. The latter group of stay applications was dependent on the success of the first, and was made pursuant to the court's inherent power of case management.

153 Robson J held that as between the two plaintiffs and the four defendants who were party to the shareholders' agreement, the oppression claim fell within the scope of the arbitration clause and was subject to a mandatory stay: *Re Form 700* at [130]. He therefore granted the first category of stay applications.

He, however, refused to grant the second category of stay applications as he considered that it was possible for the arbitration to proceed even though one of the plaintiffs and one of the defendants involved in the oppression claim would not be party to the arbitration: *Re Form 700* at [131]–[137]. He said at [142]–[144]:

> 142 The plaintiffs have some claims that must go to arbitration if they wish to pursue them, and other claims that are not subject to the arbitration clause (part of the Oppression Claim, and the balance of the plaintiffs' claims). This raises the question [of] whether the plaintiffs should be able to decide which claims to bring first. It may be that the plaintiffs prefer to bring the derivative action in the Court first, and then bring an arbitration later, or not bring the arbitration at all.
>
> 143 Further, as discussed, the Oppression Claim is not stayed in its entirety. That part of the Oppression Claim that is brought by the third plaintiff, or brought against the second and sixth to ninth defendants, will be heard by the Court. In this situation, where there is an arbitrable oppression claim, and an oppression claim that is not subject to arbitration, the plaintiffs are able to elect which oppression claim to bring first.
>
> 144 The plaintiffs are alleging that they have been wronged. In my view it is premature to make an order staying the claims not subject to the arbitration agreement. At this stage there is no certainty that an arbitration will go ahead. That is a matter for the plaintiffs. Accordingly, I decline, at this stage, to stay the claims not subject to the arbitration agreement. …

Robson J thus underscored the plaintiffs' freedom to decide how, when and against whom to bring their claims to an appreciably more significant degree than the other Australian cases discussed above. The Victoria Court of Appeal has since granted leave for an appeal against Robson J's decision: *Brazis and others v Rosati and others* (2014) 102 ACSR 626.

154 We make some observations on the Australian position before turning to the position in other jurisdictions. First, the Australian courts have a strong preference to avoid parallel proceedings that re-litigate (in the broad sense)

common issues. Indeed, from our review of the cases discussed above, that appears to be their predominant consideration in deciding whether to grant a stay of proceedings which do not fall within the scope of an arbitration clause.

155 Second, perhaps because the Australian courts have tended to opt for solutions that avoid the occurrence of parallel proceedings which entail the re-litigation (in the broad sense) of common issues, they do not appear to have devoted much attention to the possibility that those parties to the court proceedings who do not participate in the arbitration and who might thus not be bound by the arbitral tribunal's decision may seek to challenge, in subsequent court proceedings, adverse findings made by the arbitral tribunal. But, there are hints (although no more than this) that pursuing such a course *may*, as we alluded to at [142] above, amount to an abuse of court process: see the High Court of Australia's decision in *Michael Wilson & Partners Ltd v Nicholls and others* (2011) 282 ALR 685 at [99] and [107].

156 Third, the Australian courts look to whether the claims which do not fall within the scope of the arbitration clause in question are "subsidiary to", "significantly less substantial, but overlapping with" or "ancillary" to the claims that are covered by the arbitration clause when determining how to resolve the tension presented by the situation of overlapping court and arbitral proceedings outlined at [140] above: see *Recyclers v Hettinga* at [65] (quoted at [149] above). However, one must also bear in mind that s 7 of the Australian IAA 1974 does not stipulate a cut-off time for an application for a stay of court proceedings in favour of arbitration. The Australian courts therefore may, and often do, have the benefit of the statement of claim and the defence before them when considering a stay application made under s 7 of the Australian IAA 1974. The Australian courts are therefore in a better position to make an assessment

of the issues that will be ventilated in the proceedings than the Singapore courts, which, by virtue of the time frame stipulated in s 6(1) of the IAA for making a stay application, hear stay applications prior to the filing of the defence.

Canada

157 We turn now to case law from Canada. The Canadian courts adopt what appears to be the most liberal approach with regard to staying court proceedings when they overlap with related arbitral proceedings. The leading case is the Ontario Court of Appeal decision of *Dalimpex*, which we mentioned earlier at [56] above in the context of the threshold question. In that case, the plaintiff ("Dalimpex") had a long-standing business relationship with one of the defendants ("Agros"), a Polish corporation from which it imported goods for distribution. An "Agency Agreement" containing an arbitration clause governed the contractual relations between Dalimpex and Agros. Another defendant ("Mr Janicki") was a long-time employee of Agros who later became an employee and senior executive of Dalimpex.

158 The business relationship between Dalimpex and Agros subsequently soured. Dalimpex commenced court proceedings against Agros, Mr Janicki and an Ontario corporation ("Agropol") which hired Mr Janicki after he resigned from Dalimpex when the business relationship between Dalimpex and Agros began to deteriorate. Dalimpex alleged that Mr Janicki had conspired with Agros and Agropol to injure it. It claimed: (a) against Mr Janicki for breaches of contract, trust and fiduciary duties; (b) against Agros for conspiracy, interfering with the economic relationship between it (Dalimpex) and Mr Janicki and inducing a breach of contract between it and Mr Janicki; and (c) against Agropol for conspiracy. Dalimpex also sought an injunction against

all three defendants and an order for the disgorgement of profits. The defendants applied for a stay of the court proceedings in favour of arbitration pursuant to Ontario's International Commercial Arbitration Act (RSO 1990, c I-9), which gives effect to Art 8 of the Model Law on the stay of proceedings.

159 Charron JA, delivering the judgment of the Ontario Court of Appeal, held at [42] that the dispute between Dalimpex and Agros fell within the scope of the arbitration clause and therefore had to be stayed. The court also did not disturb the decision of the Divisional Court below that the rest of the dispute between Dalimpex on the one hand and Mr Janicki and Agropol on the other should be stayed pending the resolution of the arbitration. Charron JA accepted at [44] the holding of the Divisional Court that since the "main protagonists" were Dalimpex and Agros, the claims against the other two defendants should be stayed pending the resolution of the arbitration. She said at [45] that "it is obvious from the pleadings that [Dalimpex's] action against the other two [defendants] will stand or fall on the merits of the action against Agros".

160 The *Dalimpex* approach was adopted and developed in a recent decision of the Ontario Superior Court of Justice, *Blind Spot Holdings Ltd v Decast Holdings Inc* (2014) 25 BLR (5th) 122 ("*Blind Spot*"). In that case, there was a dispute between the minority shareholder ("Blind Spot") and the majority shareholder ("Decast") of a company ("Munro Ltd"). Blind Spot was controlled by John Munro. Both Mr Munro and his wife, Sheri Munro, were employees of Munro Ltd. There was a shareholders' agreement between Munro Ltd, Decast, Blind Spot and Mr Munro which contained an arbitration clause. Disagreements broke out between the parties, resulting in Munro Ltd terminating the employment of Mr and Mrs Munro.

161 Blind Spot and Mr and Mrs Munro commenced proceedings against Munro Ltd, Decast and Decast's principal ("Mr Vitali"). A large part of the claims made by the plaintiffs were for relief on the ground of oppression. There was also a defamation claim by Mr Munro, a claim (likewise by Mr Munro) for breach of fiduciary duties against Mr Vitali, as well as wrongful dismissal and defamation claims by Mrs Munro. The defendants applied for a stay of the court proceedings (except for that part of the proceedings relating to Mrs Munro's claims) in favour of arbitration.

162 Brown J held that the oppression claim fell within the scope of the arbitration clause in the shareholders' agreement and should be stayed. Brown J also thought that a stay in respect of all the other claims was appropriate on the basis of *Dalimpex*: *Blind Spot* at [34], [37] and [46]. He did not, however, order a stay of Mrs Munro's claims since the defendants were prepared to let those claims proceed in court.

163 The Canadian courts therefore appear ready to stay court proceedings pending the resolution of a related arbitration when they are satisfied that a substantial part of the dispute before the court falls within the scope of an arbitration clause. They also do not appear to have considered the potential difficulty that those parties to the court proceedings who are not party to the arbitration clause may not be bound by the arbitral tribunal's findings.

England

164 Turning now to England, the English courts do not as readily grant stays as do the Australian and the Canadian courts. The leading decision is that of the English Court of Appeal in *Reichhold Norway ASA and another v Goldman*

Sachs International (a firm) [2000] 1 WLR 173 ("*Reichhold Norway (CA)*"), where Lord Bingham CJ said at 186 that "stays are only granted in cases of this kind in rare and compelling, circumstances". He stated that in exercising its discretion to grant a stay of court proceedings in the interests of sensible case management pending the resolution of a related arbitration, the court must take account of the "legitimate interests of plaintiffs and the requirement that there should be no prejudice to plaintiffs beyond that which the interests of justice [are] thought to justify": *Reichhold Norway (CA)* at 186.

165 The reason for such restraint may be found in the established common law principle that a plaintiff is entitled to choose whom he wants to bring proceedings against and where. Moore-Bick J, whose decision was the subject of the appeal in *Reichhold Norway (CA)*, said at first instance (see *Reichhold Norway ASA and Anor v Goldman Sachs International* [1999] CLC 486 ("*Reichhold Norway (HC)*") at 491):

> … [A] plaintiff who has claims against a number of different people is entitled to choose for himself whom to sue and whom not to sue. He is entitled to take proceedings against some and not others for whatever reasons seem best to him and, subject only to the need to control abuse of its process, the court is not concerned with the reasons for his choice or the motives that lie behind it. …

166 But, Moore-Bick J also recognised that the aforesaid entitlement was neither an absolute nor an overriding one. He went on to add (likewise at 491 of *Reichhold Norway (HC)*):

> … However, choosing whom to sue is one thing; choosing in what order to pursue proceedings against different defendants may be another, especially when two related sets of proceedings are being, or could be, pursued concurrently. In such a case the court itself has a greater interest, not only because the existence of concurrent proceedings may give rise to undesirable consequences in the form of inconsistent decisions,

> but also because the outcome of one set of proceedings may have an important effect on the conduct of the other. …

167 The proceedings in the *Reichhold Norway* litigation stemmed from the sale of the polymer division of Jotun AS ("Jotun") to the plaintiffs (collectively, "Reichhold"). The sale was facilitated by the defendant ("Goldman Sachs"), which acted as Jotun's agent. Jotun's terms of engagement with Goldman Sachs required it to indemnify and hold Goldman Sachs harmless against any loss arising out of the engagement.

168 A dispute arose because the profitability of Jotun's polymer division was allegedly not what it had been warranted to be under the sale and purchase agreement between Jotun and Reichhold ("the S&P agreement"). That agreement contained an arbitration clause which required disputes arising out of the agreement to be resolved by arbitration in Norway. Reichhold commenced arbitration against Jotun in Norway pursuant to the arbitration clause in the S&P agreement. Reichhold also commenced court proceedings against Goldman Sachs in England for alleged negligent misstatements made by the latter in the negotiations leading up to the conclusion of the S&P agreement.

169 Goldman Sachs applied for a stay of the English court proceedings pending the resolution of the arbitration in Norway between Reichhold and Jotun. Crucial to Moore-Bick J's decision to grant the stay was his characterisation of the relationship between the parties to the transaction. Moore-Bick J said as follows at 492 of *Reichhold Norway (HC)*:

> … I think it is reasonably clear … that the commercial basis on which Reichhold pursued the negotiations with Jotun was that it should have no recourse against Jotun or anyone acting on its behalf, including Goldman Sachs, in respect of the accuracy

> of any of the material disclosed during the negotiations but instead would obtain under the [S&P] agreement warranties of the accuracy of the accounts and of the development of the business in the period since the most recent audited accounts. In commercial terms that seems to me to make perfectly good sense because a warranty of that kind could be expected to provide a straightforward remedy against the seller which should adequately protect the buyer's position while leaving it to the seller to make whatever arrangements he thought fit with those acting on his behalf. In the present case the third side of the triangle, that is, the relationship between Goldman Sachs and Jotun, was covered by the engagement letter under which Jotun agreed to indemnify Goldman Sachs against any liability to Reichhold. *Viewed as a whole, therefore, there was a coherent arrangement under which Reichhold would have its remedy under the [S&P] agreement for any misleading or inaccurate information, but would be limited to that remedy, and Jotun alone would be liable to provide that remedy. Any dispute between them was to be decided in arbitration in accordance with the contract.* [emphasis added]

170 Moore-Bick J concluded at 493 that "[i]n practical terms … an award [at the arbitration] might well determine the matter once and for all". He was alive to the fact that the arbitral award would not *bind* Goldman Sachs. But, practically, in the context of the specific commercial arrangement between the parties, the outcome of the arbitration would have been dispositive of Reichhold's claim against Goldman Sachs before the court. Moore-Bick J also considered a number of other factors in deciding whether to grant a stay, namely (at 495–496): (a) the existence of a concurrent related arbitration, and the degree of overlap between the court proceedings and the arbitration; (b) the relationship between the parties to the court proceedings and the parties to the arbitration; (c) considerations of cost and convenience; and (d) whether Reichhold had a legitimate reason for pursuing court proceedings, and the prejudice to it should a stay of the court proceedings be ordered. He concluded that the factors weighed in favour of granting the stay sought by Goldman Sachs. Moore-Bick J's decision was upheld on appeal in *Reichhold Norway (CA)*.

171 Subsequently, in *Mabey and Johnson Ltd v Jonathan Laszlo Danos* [2007] EWHC 1094 (Ch) (unreported) (11 May 2007) ("*Mabey and Johnson*"), a different result was reached. The plaintiff in that case ("Mabey"), an English company that manufactured and exported pre-fabricated steel bridges, brought claims against four defendants for fraud and conspiracy in relation to a project for the supply of pre-fabricated bridges to Jamaica. The first two defendants were former employees of Mabey. The third defendant was a Jamaican company which acted as Mabey's agent in the project ("DAG"), and the fourth defendant was the principal of DAG ("Mr Gibson"), who resided in Jamaica. The agency relationship between Mabey and DAG was governed by an agreement containing an arbitration clause. The alleged fraud arose from a conspiracy to inflate the level of commission which DAG was entitled to receive, with the surplus to be divided between the four defendants.

172 DAG applied for the claims against it to be stayed pursuant to s 9 of the UK Arbitration Act 1996. Mr Gibson applied for either: (a) a declaration that the English courts had no jurisdiction to try the claims against him (by seeking to set aside the service of the originating process out of jurisdiction on him); or (b) in the alternative, an order that the claims against him be stayed pending the resolution of the arbitration between Mabey and DAG. Mabey accepted that as between it and DAG, the action had to be stayed in favour of arbitration: *Mabey and Johnson* at [14]. The dispute was over whether, as between Mabey and Mr Gibson, the action should also be stayed.

173 Henderson J held that it should not, and dismissed Mr Gibson's application for a stay. He was influenced by the desirability of having "a single trial [take] place, in public, at which the strong prima facie case of fraud and conspiracy against the three human defendants can be fully investigated and

determined": *Mabey and Johnson* at [37]. Henderson J also thought that there was no reason why Mr Gibson should be permitted to take advantage of the arbitration clause in the agreement between Mabey and DAG. He said that the claims against Mr Gibson were "distinct, both legally and conceptually, from the claims against DAG": *Mabey and Johnson* at [37]. Henderson J thus refused to grant a stay, and distinguished *Reichhold Norway (CA)* as an "unusual case": *Mabey and Johnson* at [38].

174 As against this, *Reichhold Norway (CA)* was cited and followed by the English High Court in *ET Plus SA v Welter* [2006] 1 Lloyd's Rep 251. That case, however, is of limited assistance because there was "no or no serious dispute" (at [91]) there that if the court proceedings relating to the central issue in dispute were stayed in favour of arbitration, then the rest of the court proceedings should also be stayed pending the resolution of the arbitration.

New Zealand

175 We turn finally to the position in New Zealand, which adopts the "rare and compelling" standard laid down by Lord Bingham in *Reichhold Norway (CA)* (see [164] above). In this regard, the New Zealand High Court's decision in *Danone Asia Pacific Holdings Pte Ltd and others v Fonterra Co-operative Group Limited* [2014] NZHC 1681 ("*Danone v Fonterra*") is instructive.

176 There were eight plaintiffs in the court proceedings in *Danone v Fonterra* (collectively, "the Eight Plaintiffs"). The first plaintiff ("Danone AP") was a manufacturer and supplier of baby formula. The dispute arose out of a supply agreement between Danone AP and Fonterra Limited, under which

Fonterra Limited agreed to provide dairy-derived nutritional base powder product to Danone AP for use in its baby formula. The supply agreement contained a clause requiring disputes to be settled by arbitration before the SIAC. The product supplied by Fonterra Limited pursuant to that agreement was subsequently discovered to be toxigenic, and as a consequence, the Eight Plaintiffs had to issue comprehensive recalls of baby formula that might potentially have been affected by the toxigenic product.

177 Pursuant to the arbitration clause in the supply agreement between Danone AP and Fonterra Limited, the Eight Plaintiffs commenced arbitration in Singapore against Fonterra Limited and Fonterra Australia Pty Limited ("Fonterra Australia"), the company which had manufactured the toxigenic product distributed to the Eight Plaintiffs. (Fonterra Limited, in its response to the notice of arbitration, pointed out that the putative arbitral tribunal would only have jurisdiction over it and Danone AP, who were the only parties to the supply agreement.) The Eight Plaintiffs' claims in the arbitration were in contract and in tort, in particular, for false representations about the safety of the product. There were also statutory claims for misleading and deceptive practices.

178 The Eight Plaintiffs then commenced proceedings in the New Zealand High Court against Fonterra Limited's parent company, Fonterra Co-operative Group Limited ("FCGL"). In the court proceedings, the Eight Plaintiffs contended that the persons who had made the false representations (the subject matter of one of the claims in the arbitration) on behalf of Fonterra Limited had been employed by FCGL at the material time, and FCGL was therefore liable vicariously. There were also claims against FCGL for negligence and deceptive and misleading conduct, as well as statutory claims for misleading

representations. The heads of damages and the amounts claimed by the Eight Plaintiffs in both the arbitration and the court proceedings were exactly the same: €280m for projected costs impact, and €350m for lost sales.

179 FCGL applied for a stay of the New Zealand court proceedings pending the resolution of the Singapore arbitration. Venning J held that the New Zealand High Court had the power to grant the stay. He said at [54]–[55]:

> 54 … [T]he Court retains jurisdiction to stay the proceedings … under … its inherent jurisdiction including for reasons of sensible case management. Parties do not enjoy an unfettered right to access the Courts; rather, the Court is entitled to impose procedures that are appropriate in the circumstances having regard to the nature and content of the litigation as a whole.
>
> 55 The jurisdiction to do so, however, should only be exercised in *rare and compelling* circumstances. There must be a real risk of unfairness or oppression to the defendant if the proceedings were allowed to continue. Considerations of cost, convenience and the interests of justice must weigh in favour of a stay. The onus is on the applicant to satisfy the Court that such circumstances exist.
>
> [emphasis added]

Venning J considered a number of factors when determining whether to grant the stay, including (at [56]): (a) the relationship between the parties to the court proceedings and the parties to the arbitration; (b) the claims in the court proceedings and those in the arbitration, and the respective issues which they raised; (c) issue estoppel; (d) the risk of inconsistent findings between the two sets of proceedings; (e) the risk of delay; and (f) cost.

180 Venning J decided to stay the New Zealand court proceedings pending the resolution of the Singapore arbitration for the following reasons:

(a) The Eight Plaintiffs' claims in the court proceedings were "effectively derivative from, and subsidiary to" the contractual claims that Danone AP (the first plaintiff) was pursuing against Fonterra Limited in the arbitration. The second to eighth plaintiffs' "claims against FCGL [in the court proceedings] add little to Danone AP's claims": *Danone v Fonterra* at [61].

(b) There was a "significant overlap between both the factual basis underlying the claim in the arbitration and [the court] proceeding and also the legal issues that will arise in both": *Danone v Fonterra* at [77].

(c) There was no bar to the claims pursued by Danone AP against FCGL in the court proceedings being pursued by Danone AP against Fonterra Limited in the arbitration: *Danone v Fonterra* at [84].

(d) The claimants (*viz*, the Eight Plaintiffs) were the same in both the arbitration and the court proceedings. In the court proceedings, the Eight Plaintiffs and FCGL would be bound by relevant findings made at the arbitration because FCGL and Fonterra Limited were "likely to be regarded as privies" for the purposes of issue estoppel as there was "a sufficient nexus or mutuality of interest as between Fonterra [Limited] and FCGL in relation to the issues raised in the arbitration and [the issues raised in] the current proceedings": *Danone v Fonterra* at [87].

(e) There was a practical risk of inconsistent findings of fact and law between the court proceedings and the arbitration, given the overlap between the facts and the legal issues in the two sets of proceedings: *Danone v Fonterra* at [89].

(f) There would be a duplication of witnesses and evidence between the arbitration and the court proceedings: *Danone v Fonterra* at [90].

(g) Both Danone AP and Fonterra Limited were large corporate enterprises that had agreed to resolve their disputes by arbitration and not by the court process: *Danone v Fonterra* at [92].

181 In granting the stay, Venning J took into account the fact that the arbitration was at a very preliminary stage (at that time, both parties had already appointed their arbitrators, but the third had yet to be appointed), which would add to the delay in resolving the dispute. He noted, however, that if the arbitration were delayed by Fonterra Limited, then the Eight Plaintiffs were entitled to apply to have the stay lifted. He also pointed out that "[t]he financial consequences of delay can be addressed by an award of interest at a realistic rate": *Danone v Fonterra* at [91].

182 The stay that Venning J granted was temporary, and the Eight Plaintiffs were entitled to pursue court proceedings once the arbitration concluded. In explaining why it was sensible for the arbitration to proceed first, Venning J said (at [96]):

> In my view the arbitration should go first because the parties agreed the arbitration process was to apply to claims arising out of the supply of product by Fonterra [Limited] to Danone AP. The central dispute in this matter lies between Fonterra [Limited] and Danone AP. The parties negotiated the terms of the supply agreement and provided for the consequences flowing from breach to be determined by arbitration. This dispute is the direct result of alleged failures by Fonterra [Limited] in quality control in breach of the supply agreement. The tortious and statutory claims may not be derivative in a technical sense from the supply agreement but I am of the opinion that they are sufficiently connected so that it would be unrealistic to divorce them and determine the issues in tandem

> without reference to each other. Whether or not the Singaporean arbitration ultimately determines all the issues between the [Eight Plaintiffs] and [the] Fonterra [group of companies] …, it will at the very least clarify the landscape for the remaining issues not caught by issue estoppel.

183 Venning J concluded at [97] that the case before him was one of the "rare and compelling" situations which required a stay. He considered the Eight Plaintiffs' entitlement to access the court and have their rights vindicated in a timely manner, but thought that this was subject to the court's overriding control of its own proceedings. He also thought that it would be oppressive for FCGL to have to answer the allegations raised by the Eight Plaintiffs in the court proceedings when the claims arose out of the supply agreement between Danone AP and Fonterra Limited which contained the arbitration clause.

184 Venning J's decision in *Danone v Fonterra* was appealed against. However, by the time the appeal reached the New Zealand Court of Appeal, events had overtaken the issues that had arisen before Venning J. By then, the arbitral proceedings in Singapore were afoot, and a timetable with tight timelines had been set for the arbitration: *Danone Asia Pacific Holdings Pte Ltd and others v Fonterra Co-operative Group Limited* [2014] NZCA 536 at [16]. The only question before the New Zealand Court of Appeal was whether the pre-trial procedures for the New Zealand court proceedings should be allowed to run alongside the arbitration. The New Zealand Court of Appeal did not think so, and dismissed the appeal.

185 For completeness, we should also mention *Montgomery Watson NZ Ltd v Milburn NZ Ltd* [2000] BCL 1022, a decision of Young J, who was then sitting in the New Zealand High Court. Young J did not allow court proceedings to proceed alongside arbitration in that case because he thought that that would

allow the plaintiff to subvert the arbitration clause in question. It will be sufficient to note Venning J's summary of the case at [42] of *Danone v Fonterra*:

> In *Montgomery Watson NZ Ltd v Milburn NZ Ltd & Ors*, Montgomery Watson and Aquatec-McDow were parties to an arbitration agreement. Montgomery Watson issued proceedings against four defendants, including Aquatec-McDow. William Young J considered that if Montgomery Watson was permitted to pursue its claims against the first three defendants those defendants could be expected to join Aquatic-McDow with the result [that] the proceedings would effectively run in parallel with the arbitration agreement. He considered that that would permit the process of the Court to subvert the arbitration agreement between Aquatic-McDow and Montgomery Watson. The Judge stayed the proceedings.

Our decision on the appropriate orders to make

186 The authorities discussed above reveal gradations of response to what is in essence the same problem as that in the situation of overlapping court and arbitral proceedings outlined at [140] above. We alluded to this problem in our introduction to this judgment, namely, that of seeking to uphold the statutory mandate and the strong legislative policy in favour of arbitration in circumstances where the dispute which is covered by the arbitration clause in question forms only part of a larger dispute with a broader horizon. The unifying theme amongst the cases is the recognition that the court, as the final arbiter, should take the lead in ensuring the efficient and fair resolution of the dispute as a whole. The precise measures which the court deploys to achieve that end will turn on the facts and the precise contours of the litigation in each case.

187 We would not set the bar for the grant of a case management stay at the "rare and compelling" threshold that the English and the New Zealand courts have adopted. We recognise that a plaintiff's right to sue whoever he wants and

where he wants is a fundamental one. But, that right is not absolute. It is restrained only to a modest extent when the plaintiff's claim is stayed temporarily pending the resolution of a related arbitration, as opposed to when the plaintiff's claim is shut out in its entirety: *Reichhold Norway (HC)* at 491 *per* Moore-Bick J. In appropriate cases, that right may be curtailed or may even be regarded as subsidiary to holding the plaintiff to his obligation to arbitrate where he has agreed to do so. The strength of the plaintiff's right of timely access to the court will therefore vary depending on the facts of each case. In a situation where there are multiple plaintiffs, some of whom are not bound to arbitrate (as in *Danone v Fonterra*), staying the court proceedings may result in a greater derogation from this right for those plaintiffs who are not bound by the arbitration clause. But, that is not a concern for us in the present appeals because Silica Investors is the *sole plaintiff* in the Suit and is *bound to arbitrate* at least one of the issues that it intends to rely on in the court proceedings against Lionsgate and the remaining defendants (namely, the Management Participation Allegation). The presence of the obligation to arbitrate this allegation diminishes the force of any objection that Silica Investors may raise that its right of timely access to the court is being undermined.

188 This does not mean that if part of a dispute is sent for arbitration, the court proceedings relating to the rest of the dispute *will* be stayed as a matter of course. The court must in every case aim to strike a balance between three higher-order concerns that may pull in different considerations: first, a plaintiff's right to choose whom he wants to sue and where; second, the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and third, the court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes. The

balance that is struck must ultimately serve the ends of justice. In this regard, we consider that the court's discretion to stay court proceedings pending the resolution of a related arbitration, at the request of parties who are not subject to the arbitration agreement in question, can in turn be made subject to the agreement of those parties to be bound by any applicable findings that may be made by the arbitral tribunal. We also think that the set of factors considered by Venning J in *Danone v Fonterra* (at [179]–[180] above) offers a comprehensive (although by no means exhaustive) and instructive guide for courts faced with the scenario of overlap described at [140] above.

189 Against the backdrop of these principles, we turn to the facts of the present appeals. The position as it stands may be summarised as follows:

(a) As between Silica Investors and *Lionsgate*:

(i) We have held that the court proceedings between these two parties in relation to the Management Participation Allegation are subject to a mandatory stay under s 6 of the IAA.

(ii) That allegation forms part of Silica Investors' case against all eight defendants named in the Suit, in which Silica Investors alleges oppressive or unfairly prejudicial conduct towards it as a minority shareholder of AMRG. It was not suggested before us that the Management Participation Allegation on its own could sustain the oppression claim that Silica Investors wishes to pursue.

(iii) It would be logical to have the Management Participation Allegation determined first as between Silica Investors and Lionsgate by arbitration. As it turns out, this is likely to involve

a reasonably limited inquiry into the construction of a specific provision in the Share Sale Agreement. Thereafter, the rest of the court proceedings by Silica Investors against Lionsgate (*ie*, the court proceedings relating to the other three allegations made by Silica Investors in the Suit) can proceed, with the court having the benefit of the arbitral tribunal's award on the Management Participation Allegation.

(iv) There is no arbitration afoot as yet and Silica Investors may elect to forgo its reliance on the Management Participation Allegation as far as Lionsgate is concerned, and rest its case against Lionsgate in the court proceedings on the remaining three allegations.

(b) As between Silica Investors and *the remaining defendants*:

(i) There is no arbitration agreement between any of these parties.

(ii) The remaining defendants seek a stay of the court proceedings against them as a matter of case management. In our judgment, such a position would be warranted and would have much to commend it, especially if the remaining defendants are agreeable to being bound by whatever decision is reached by the arbitral tribunal on the Management Participation Allegation as between Silica Investors and Lionsgate (assuming Silica Investors wishes to pursue that aspect of its case).

(iii) On the other hand, it seems to us that the remaining defendants' present stance of seeking a stay of the court

proceedings against them pending the arbitration of the Management Participation Allegation between Silica Investors and Lionsgate is inconsistent with their retaining a right to re-litigate (in the broad sense) that allegation after the arbitration. Any attempt to do so may well fall within the remit of the doctrine of abuse of process (see [142] above), which has been recognised as being similar to but distinct from, and in that sense, as overlapping with, the doctrine of *res judicata*: *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR(R) 565 at [62]–[63]; *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [22]–[24].

(iv) A situation of such abuse of process would be even more likely to materialise if Silica Investors offers to arbitrate the Management Participation Allegation with the remaining defendants before the same tribunal as that which deals with this allegation as between Silica Investors and Lionsgate, but the remaining defendants decline the offer.

(v) Silica Investors' position at present is that it wishes to proceed with the Suit in court.

190 In our judgment, having regard to the aforesaid, we consider that the present appeals should be resolved in the following manner:

(a) Silica Investors should first decide within two weeks from the date of this judgment (or such other period as we may provide on application) whether it is willing to forgo its claim against Lionsgate on

the Management Participation Allegation, and it should make its decision clear.

(b) If Silica Investors decides not to pursue the Management Participation Allegation against Lionsgate, then there will be no need for the court proceedings in the Suit to be stayed. But in that event, Silica Investors will similarly not be entitled to rely on the Management Participation Allegation against the remaining defendants. If it were to do so, that would be a naked attempt on its part to circumvent the arbitration clause in the Share Sale Agreement. The Management Participation Allegation rests entirely on a clause in the Share Sale Agreement, and the only counterparty to that agreement is Lionsgate. Hence, if Silica Investors decides not to pursue the Management Participation Allegation against Lionsgate, then this allegation will not form part of its case against the remaining defendants as well.

(c) If, on the other hand, Silica Investors decides to pursue the Management Participation Allegation against Lionsgate, then the court proceedings against Lionsgate in respect of that allegation will be stayed in favour of arbitration pursuant to s 6 of the IAA. In addition, the court proceedings against Lionsgate in respect of the remaining three allegations made in the Suit will also be stayed pursuant to the court's inherent power of case management, *subject to* the provisos set out at sub-para (e) below.

(d) In scenario (c) above, Silica Investors should consider whether it is willing to offer to arbitrate the Management Participation Allegation with the remaining defendants before the same tribunal as that which is

to be constituted to arbitrate this allegation as between it (Silica Investors) and Lionsgate. If Silica Investors does make such an offer but the remaining defendants decline that offer, then that, coupled with their present stance of asking for a stay of the court proceedings against them on the basis of case management, will provide strong grounds for finding that it would be an abuse of process for them to seek to re-litigate (in the broad sense) the Management Participation Allegation in court after the conclusion of the arbitration between Silica Investors and Lionsgate.

(e) The provisos we have mentioned at sub-para (c) above are these:

(i) The Management Participation Allegation strikes us as a narrow issue that is subsidiary in importance to the other issues and allegations which have been raised in the Suit. Thus, if Silica Investors decides to pursue this particular allegation, the stay of the court proceedings will be conditional upon this allegation being arbitrated expeditiously. The parties to any arbitration to resolve the Management Participation Allegation should therefore endeavour to have it resolved by means of any expedited procedures that may be available under the SIAC Arbitration Rules for the time being in force.

(ii) In any case, should the resolution of any such arbitration of the Management Participation Allegation be unduly delayed, any party to the arbitration has liberty to apply to the court for the stay to be lifted and for the court proceedings in respect of Silica Investors' remaining three allegations to proceed.

(f) Subject to the foregoing (including the provisos listed at sub-para (e) above), we consider that if Silica Investors decides to pursue the Management Participation Allegation against Lionsgate by arbitration, whether with or without the participation of the remaining defendants, then the rest of the court proceedings in the Suit, whether against Lionsgate or against the remaining defendants, will be stayed in the interests of case management.

Conclusion and disposition

191 In the circumstances, we allow all three appeals in part and make the following directions for the conduct of the Suit:

(a) Silica Investors is to decide within two weeks from the date of this judgment (or such other period as we may provide) whether it intends to pursue the Management Participation Allegation against Lionsgate by arbitration.

(b) If Silica Investors decides to do so, then:

(i) As between Silica Investors and Lionsgate, the court proceedings in respect of the Management Participation Allegation will be stayed in favour of arbitration under s 6 of the IAA.

(ii) The remaining court proceedings between Silica Investors and Lionsgate, as well as the entirety of the court proceedings against the remaining defendants will also be stayed in the interests of case management, *subject to* the provisos set out at [190(e)] above.

(iii) In addition, Silica Investors is to decide (likewise within two weeks from the date of this judgment or such other period as we may provide) whether it is willing to offer to arbitrate the Management Participation Allegation with the remaining defendants on the terms outlined at [190(d)] above. If Silica Investors is willing to do so and does make such an offer to arbitrate, the remaining defendants are to respond to Silica Investors' offer within two weeks from the date of the offer. For the avoidance of doubt, regardless of whether or not the remaining defendants accept any offer to arbitrate which Silica Investors may make, pending the resolution of the arbitration concerning the Management Participation Allegation, the court proceedings against the remaining defendants in respect of all four allegations made in the Suit will be stayed, *subject to* the provisos set out at [190(e)] above.

(c) If, on the other hand, Silica Investors abandons reliance on the Management Participation Allegation, then it may proceed in court against all eight defendants named in the Suit in respect of the other three allegations made in the Suit, save for the Management Participation Allegation.

(d) In any event, the parties are at liberty to apply for any further orders should there be any difficulty in working out the orders made by this court, any need for clarification or any material change of circumstances (which includes the emergence of material new considerations). As any such application would be made pursuant to the

court's inherent power of case management, it may be made to the High Court in the first instance.

192 In all the circumstances, we set aside the costs order made by the Judge in the court below, and hold that each party is to bear its own costs for both the proceedings below and the proceedings before us. We also make the usual consequential orders.

193 Finally, we record our gratitude to counsel for their thorough research and able assistance, and to Prof Boo, whose views we found very helpful.

Sundaresh Menon	Chao Hick Tin	Chan Sek Keong
Chief Justice	Judge of Appeal	Senior Judge

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Professor Lawrence Boo as *amicus curiae*.