Maldives Airports Co Ltd and another
v
GMR Malé International Airport Pte Ltd

[2013] SGCA 16

Court of Appeal — Civil Appeal No 160 of 2012
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Woo Bih Li J
6 December 2012

Arbitration — Interlocutory Order
Civil Procedure — Injunctions
Courts and Jurisdiction — Jurisdiction

13 February 2013

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 This is an appeal from the decision of the High Court judge ("the Judge") in Originating Summons No 1128 of 2012 ("OS 1128") By her decision, the Judge granted an interim injunction ("the Injunction") to restrain the appellants, Maldives Airports Company Limited ("MACL") and the Republic of the Maldives ("the Maldives" or "the Maldives Government") and their respective officers (collectively, "the Appellants"), from interfering with the performance by the respondent, GMR Malé International Airport Private Limited ("the Respondent"), of its obligations under a concession agreement entered into on 28 June 2010 ("the Concession Agreement"). MACL is a company which is wholly owned by the Maldives Government.

2 At the close of the hearing, we allowed the appeal and set aside the Injunction. We delivered a brief oral judgment setting out our view that the balance of convenience did not lie in favour of the Injunction being granted or upheld. As we indicated we would, we now set out the full grounds for our decision.

Facts

Background

3 The Concession Agreement was entered into between the Appellants and a consortium under which the latter was granted a concession of 25 years to rehabilitate, expand, modernise and maintain the Malé International Airport ("the Airport"). The consortium then incorporated the Respondent, and assigned and novated all its rights and obligations under the Concession Agreement to the Respondent.

4 A series of events took place after the Concession Agreement was entered into. First, an action was brought by one Mr Imad Salih before the Malé Civil Court ("the Maldives Court") for a declaration that cll 2(a) and 2(b) of Annex 10 of the Concession Agreement,[1] which allowed the Respondent to impose a fee on departing passengers, was contrary to a piece of Maldivian legislation, Act No 71/78. Having heard the matter, on 8 December 2011, the Maldives Court held that cll 2(a) and 2(b) were indeed inconsistent with Act No 71/78 ("the Maldives Judgment").[2] Following this, negotiations were held, and the Appellants subsequently each issued a letter

[1] Sachin Kerur's 1st Affidavit at p 188.

[2] Mohamed Ahmed's 1st Affidavit at p 35.

dated 5 January 2012 consenting to a variation of the fees payable by the Respondent to MACL under the Concession Agreement to take into account the Respondent's expected loss of revenue arising from the Maldives Judgment.[3]

The arbitrations

5 Shortly after this, on 7 February 2012, there was a change of government in the Maldives. On 19 April 2012, MACL issued a letter to the Respondent (copied to the Maldives Government) stating that its (*ie*, MACL's) earlier letter of 5 January 2012 had been issued by its former chairman without authority.[4] The earlier letter was the one by which the parties were said to have agreed to a variation of the fees payable by the Respondent to MACL to offset the consequences of the Maldives Judgment. By a letter dated 26 April 2012, the Maldives Government also purported to withdraw the consent to the arrangements that it had ostensibly given by its earlier letter of 5 January 2012. Notwithstanding these developments, the Respondent continued to operate the Concession Agreement on the basis that it was entitled to take into account the loss of income arising from the Maldives Judgment in calculating the fees that it had to pay to MACL.

6 Nonetheless, on 5 July 2012, the Respondent commenced arbitration proceedings against the Appellants pursuant to the arbitration agreement that is contained in cl 21.4 of the Concession Agreement. By this arbitration, the Respondent sought, among other things, a declaration that it was entitled to

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[3] Sachin Kerur's 1st Affidavit at p 271.

[4] Sachin Kerur's 1st Affidavit at p 277.

adjust the fees payable to MACL ("the 1st Arbitration"). The Appellants filed their response in the arbitration on 4 September 2012. The arbitral tribunal for the 1st Arbitration has been nominated, although no terms of appointment have yet been agreed.[5]

7 On 27 November 2012, the Appellants each informed the Respondent, albeit in almost identical letters ("the November Notices"), that following the Maldives Judgment, the Concession Agreement was void *ab initio* or, in the alternative, that the Concession Agreement had been frustrated. The Respondent was given seven days' notice to vacate the Airport, whereupon, it was intimated, the Appellants would take over the Airport. Shortly after this, on 29 November 2012, the Appellants commenced arbitration proceedings against the Respondent pursuant to cl 21.4 of the Concession Agreement, seeking, among other things, a declaration that the Concession Agreement was void and of no effect ("the 2nd Arbitration").[6] As cl 21.4 provides that the seat of the arbitration is Singapore, the *lex arbitri* for both arbitrations is Singapore law.

The present proceedings

8 It is evident that the relationship between the parties has deteriorated severely and rapidly. Faced with the prospect of the Concession Agreement being terminated prematurely and the Airport being taken over by the Appellants imminently, the Respondent commenced OS 1128 on 30 November 2012 seeking an injunction from the Singapore High Court to

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[5] Sachin Kerur's 1st Affidavit at para 4.14.

[6] Mohamed Ahmed's 1st Affidavit at p 44.

restrain the Appellants and their directors, officers, servants or agents from taking any step to:

> (a) interfere either directly or indirectly with the performance by the Respondent of its obligations under the Concession Agreement; and
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> (b) take possession and/or control of the Airport or its facilities pending further order by the Singapore court or an arbitral tribunal constituted to resolve the dispute.

9 The Judge granted the Injunction on 3 December 2012, but only in the terms sought in relation to (a) above. No order was made in the terms of (b) above. Thus, the Appellants and their employees were only restrained from interfering with the performance of the Respondent's obligations under the Concession Agreement ("the Restrained Acts"), although it might well be said that it would not have been possible for the Appellants to do any of the acts under (b) without thereby also doing the acts under (a), contrary to the terms of the Injunction.

10 The Appellants appealed against the Judge's decision and the matter came before us three days later on 6 December 2012.

The issue in dispute

11 The main issue in the appeal was whether an interim injunction to restrain the Appellants from interfering with the Respondent's performance of its obligations under the Concession Agreement should be granted until such time as the arbitral tribunal in the 2nd Arbitration was in a position to determine the matter and make a ruling on the orders sought.

12 This presents two questions:

(a) whether a Singapore court has the power to grant the Injunction, particularly against the government of a foreign sovereign State; and

(b) if it has such power, whether the Injunction should be granted or upheld in all the circumstances.

13 For the avoidance of doubt, it bears emphasising at the outset that the Singapore court has no jurisdiction to resolve the substantive dispute. The validity of the Concession Agreement is a matter to be determined in the 2nd Arbitration. The Singapore court in these proceedings is concerned primarily with the exercise of the powers that are vested in it under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), that being the law governing the two arbitrations.

Analysis

Jurisdictional issues

(i) Whether the Court of Appeal has jurisdiction to hear the appeal

14 The Respondent raised a preliminary objection to the jurisdiction of this court. Counsel for the Respondent, Mr Mohan Reviendran Pillay ("Mr Pillay"), submitted that the Judge's decision to grant the Injunction was a decision made on an interlocutory application and so, leave to appeal was required pursuant to s 34(2)(*d*) of the Supreme Court of Judicature Act

(Cap 322, 2007 Rev Ed) ("the SCJA").[7] As the Appellants had not sought leave from the High Court, Mr Pillay argued, the Court of Appeal therefore had no jurisdiction to hear the appeal. In support of the argument that the Judge's decision was given pursuant to an interlocutory application, Mr Pillay referred[8] to *PT Pukuafu Indah and others v Newmont Indonesia Ltd and another* [2012] 4 SLR 1157 ("*PT Pukuafu*"), where Lee Seiu Kin J observed (at [20]) that an interim order which sought to preserve the legal rights and obligations of the parties before the dispute was completely disposed of was an interlocutory order. Lee J defined (likewise at [20]) an interlocutory order as "an order that [did] not decide the substance of the dispute or an order under s 12 of the IAA during the pendency of arbitration proceedings".

15 The Respondent's jurisdictional objection is without merit. First, it is incorrect to characterise the Judge's decision as one made on an interlocutory application. The application for the Injunction was made by OS 1128; the sole purpose of OS 1128 was to seek the Injunction. It would be odd if OS 1128 were characterised as an interlocutory application when there was nothing further for the court to deal with once the Injunction had been either granted or refused. This was not a case where an interlocutory injunction was sought pending the resolution of a substantive dispute before the court. The sole and entire purpose of the originating process in this case was to obtain the Injunction. Once that application had been determined, the entire subject matter of that proceeding would have been spent.

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[7] Respondent's Outline Submissions dated 5 December 2012 ("Respondent's Submissions") at paras 6–9.

[8] Respondent's Submissions at para 7.

16 Second, the attempt to draw a link between interim orders under s 12 of the IAA and decisions on interlocutory applications for which leave of the High Court is required to bring an appeal under s 34(2) of the SCJA is tenuous at best. *PT Pukuafu* does not assist Mr Pillay's argument. Lee J was not addressing the issue of whether an interim order was a decision arising out of an interlocutory *application*. He was concerned, rather, with whether the court had the power to set aside interim orders made in an arbitration. In that respect, he held (at [19]) that an interim order was not an "award" as defined in s 2 of the IAA and therefore could not be set aside *as an award* under the IAA. This is plainly correct in that context, but it does not support the contention that all interim orders are or must be construed as decisions made upon interlocutory applications. Whether a particular decision is one that has been made upon an interlocutory application depends in the first place on the nature of the application which is the subject matter of the decision. Where, as in the present case, the nature of the application takes the form of an originating summons and the substantive merits are being determined in another forum, it would be wrong to characterise the application as interlocutory in nature: see further *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 525 at [16].

(ii) Whether the State Immunity Act (Cap 313, 1985 Rev Ed) applies

17 The Appellants, on their part, raised two jurisdictional objections. Their first objection was that an injunction could not be granted against a State by reason of the prohibition contained in s 15(2) of the State Immunity Act (Cap 313, 1985 Rev Ed) ("the State Immunity Act"). Indeed, that would generally be so, unless that State has consented under s 15(3) of the same Act to being subject to such a remedy. Sections 15(2) and 15(3) read:

> (2) Subject to subsections (3) and (4) —
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> (*a*) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and
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> (*b*) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.
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> (3) Subsection (2) *does not prevent the giving of any relief* or the issue of any process *with the written consent* of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.
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> [emphasis added]

18 We disagree with the Appellants' first objection because, in our judgment, cl 23 of the Concession Agreement is sufficient to constitute written consent on the part of the Maldives Government within the meaning of s 15(3) of the State Immunity Act. Clause 23 provides:[9]

> To the extent that any of the Parties may in any jurisdiction claim for itself … immunity from service of process, suit, jurisdiction, arbitration … or other legal or judicial process *or other remedy …, such Party hereby irrevocably and unconditionally agrees not to claim and hereby irrevocably and unconditionally* ***waives*** *any such immunity to the fullest extent permitted by the laws of such jurisdiction.* [emphasis added in italics and bold italics]

19 Counsel for the Appellants, Mr Christopher Anand Daniel ("Mr Daniel"), argued that as the Appellants' case was that the Concession Agreement was (*inter alia*) void *ab initio*, cl 23 was also void and could not be relied upon to found consent for the purposes of s 15(3) of the State Immunity

[9] Sachin Kerur's 1st Affidavit at p 133.

Act. This argument is misplaced in our judgment because it requires the court to accept and proceed on the basis that the Concession Agreement is void *ab initio*, when this is the very issue which is being contested by the parties in the 2nd Arbitration. Additionally, it requires the court to conclude that cl 23 is not severable and would not survive the possible avoidance of the Concession Agreement in the same way that the arbitration agreement in cl 21.4 plainly would survive as a result of the operation of the established doctrine of separability.

20 In our judgment, cl 23 is part of the dispute resolution mechanism that is prescribed in the Concession Agreement. It contains references to service of process, commencement of proceedings and enforceability of awards, and even a specific reference to the New York Convention (*ie*, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded in New York on 10 June 1958). In *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543, this court held (at [46]–[47]) that a choice of law clause was enforceable even where the main contract containing the clause was declared to be void on the grounds of mistake, duress, or even fraud. The rationale for upholding the choice of law clause in such circumstances is simply that the framework which the parties have agreed should govern the resolution of differences that might arise between them should be upheld and applied.

21 We consider that the parties here intended that if there was any allegation of invalidity of the Concession Agreement, the entire dispute resolution mechanism, including cl 23, would apply. The position might perhaps be different if the basis for alleging that the Concession Agreement is void *ab initio* is that the contract itself never came into existence because no

offer was ever made, or, if an offer had been made, it was never accepted. However, that is not the case here, and as this point was never canvassed before us, we express no view on this.

22 Hence, we are satisfied that cl 23 may be relied upon by the Respondent notwithstanding the Appellants' allegations that the Concession Agreement is (*inter alia*) void *ab initio*. The Maldives Government has therefore waived any immunity from being subject to the Injunction.

(iii) Whether the act of State doctrine applies

23 The Appellants' second jurisdictional objection was that the Singapore court had no jurisdiction to grant the Injunction as it offended the act of State doctrine.

24 The act of State doctrine is a long-standing doctrine of Anglo-American jurisprudence. It can be traced at least as far back as the English decisions of *Blad v Bamfield* (1674) 3 Swans 604; 36 ER 992 and *Charles Frederick Augustus William, Duke of Brunswick v Ernest Augustus, King of Hanover, Duke of Cumberland and Teviotdale, in Great Britain and Earl of Armagh, in Ireland* (1848) 2 HL Cas 1; 9 ER 993 ("*Brunswick*"). In the seminal decision of the United States Supreme Court in *Underhill v Hernandez* 168 US 250 (1897) ("*Underhill*"), Fuller CJ said (at 252):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. *Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.* [emphasis added]

25 In the subsequent decision of the United States Supreme Court in *Oetjen v Central Leather Company* 246 US 297 (1918), Clarke J said (at 303–304):

> The principle that the conduct of one independent government cannot be successfully questioned in the courts of another … rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be re-examined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations".

26 These decisions of the United States Supreme Court have been applied by the English courts: *Aksionairnoye Obschestvo Dlia Mechaniches-koyi Obrabotky Diereva (1) A M Luther (Company for Mechanical Woodworking A M Luther) v James Sagor and Company* [1921] 3 KB 532; *Princess Paley Olga v Weisz and Others* [1929] 1 KB 718 ("*Princess Paley*"). In *Princess Paley*, Russell LJ (as he then was) stated (at 736):

> This Court will not inquire into the legality of acts done by a foreign Government against its own subjects in respect of property situate in its own territory.

27 The proper approach for the court when deciding if it should assume or decline jurisdiction in proceedings involving an alleged act of State was aptly summarised by Lord Pearson in *Attorney-General v Nissan* [1970] AC 179 ("*Nissan*") at 237:

> An act of state is something not cognisable by the court: *if a claim is made in respect of it, the court will have to ascertain the facts but if it then appears that the act complained of was an act of state the court must refuse to adjudicate upon the claim.* In such a case the court does not come to any decision as to the legality or illegality, or the rightness or wrongness, of the act complained of: the decision is that because it was an act of state the court has no jurisdiction to entertain a claim in respect of it. This is a very unusual situation and *strong*

> *evidence is required to prove that it exists in a particular case.* [emphasis added]

28 The crucial question is what amounts to an act of State. Whether a particular act amounts to an act of State depends on the nature of the act done: *Nissan* at 238. More specifically, a given act may amount to an act of State if it was done in the exercise of the State's supreme sovereign power: see *Salaman v Secretary of State in Council of India* [1906] 1 KB 613. Thus, Lord Cottenham LC stated in *Brunswick* (at 21–22):

> *If it were a private transaction, … then the law upon which the rights of individuals may depend, might have been a matter of fact to be inquired into* … But … if it be a matter of sovereign authority, we cannot try the fact whether it be right or wrong. [emphasis added]

29 In the present case, Mr Daniel sensibly agreed in the course of the hearing that the dispute between the parties was essentially one of a private nature, even though one of the disputing parties happened to be a sovereign State. The contrary became unarguable once Mr Daniel confirmed that the Appellants accepted the jurisdiction of the arbitral tribunal in the 2nd Arbitration to resolve the dispute over the validity of the Concession Agreement. Indeed, this was the only position which the Appellants could take, given that it was they who had commenced the 2nd Arbitration seeking a declaration that the Concession Agreement was void *ab initio* and/or had been frustrated. As noted in *Underhill* (see [24] above), the essence of the act of State doctrine is that redress for grievances are left to be secured through means that may be availed of by sovereigns as between themselves. Here, the Appellants are seeking private law remedies. Moreover, they fully accept that the subject matter of the dispute may be resolved by and through a private law

arbitral tribunal. Indeed, in their written submissions for this appeal, they stated:[10]

> … [T]he substantive dispute between the Appellants and the Respondent … is whether the Concession Agreement is void and of no effect and/or whether the Concession Agreement had been frustrated and had come to an end and whether the Appellants *are entitled to restitutionary remedy* [*sic*] *from the Respondent for appropriate accounts and inquiries*. [emphasis added]

30 That being the substance of the Appellants' grievance, there is no scope for the argument that the Restrained Acts *would have* amounted to acts of State in which this court may not intervene. The background leading to OS 1128, from the issuance of the November Notices until the commencement of the 2nd Arbitration two days later and the nature of the reliefs that were sought there by the Appellants, all contribute to paint a picture of what in essence is a private law dispute between the parties. It is also relevant that the Appellants' asserted basis for taking over the Airport stems from their claim that the Concession Agreement was void *ab initio* and/or had been frustrated. This is asserted as a matter of contract law. It is evident, therefore, that there is no act of the Maldives Government pursuant to an exercise of sovereign power which is impinged by the Injunction.

31 It was not pressed before us that where a *possible* future act of State might be the subject of an injunction, the wider principle of judicial abstention or restraint should apply and the court should refrain from adjudicating on the matter (see *Buttes Gas and Oil Co and Another v Hammer and Another* [1982]

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[10] Appellants' Skeletal Arguments dated 5 December 2012 ("Appellants' Submissions") at para 23.

AC 888 at 931). It is unnecessary for us to express a view on this, save to say that it would inevitably be a factor which a court will take into consideration when assessing whether an injunction should be granted in such circumstances. As far as the present circumstances are concerned, we are satisfied that the Injunction does not offend the act of State doctrine.

Whether the Singapore court has the power to grant the Injunction

32 There is one further gateway issue. Assuming the foregoing jurisdictional objections were disposed of (as they have been), the parties seemed to assume that the Singapore court would have the *power* to grant the Injunction. We invited submissions on this issue as it was not initially clear to us that that was indeed the position.

Section 12A of the IAA

33 Section 12A of the IAA was enacted to set out the powers of the High Court to grant interim measures in connection with arbitration proceedings. It achieves this by extending to the High Court the powers that are conferred on an arbitral tribunal to make orders or give directions as to the range of matters set out in ss 12(1)(*c*) to 12(1)(*i*). As the opening words of s 12A(2) make clear, the court is conferred such powers "[s]ubject to" the constraints that are laid down in ss 12A(3) to 12A(6). At the hearing, Mr Daniel and Mr Pillay both agreed that s 12A(4) of the IAA was the material provision governing the court's power to grant the Injunction as this was a case of urgency and the arbitral tribunal in the 2nd Arbitration was not yet in a position to determine this issue. Section 12A(4) must be read with ss 12A(2) and 12(1)(*i*). The respective provisions read:

> **12.**—(1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law [*viz*, the UNCITRAL

> Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985], *an arbitral tribunal shall have powers* to make orders or give directions to any party for —
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> …
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> (*i*) *an interim injunction* or any other interim measure.
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> …
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> **12A.**—(1) This section shall apply in relation to an arbitration —
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> (*a*) to which this Part applies; and
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> (*b*) irrespective of whether the place of arbitration is in the territory of Singapore.
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> (2) *Subject to subsections (3) to (6)*, for the purpose of and in relation to an arbitration referred to in subsection (1), the High Court or a Judge thereof shall have the same power of making an order in respect of any of the matters set out in section 12(1)(*c*) to (*i*) as it has for the purpose of and in relation to an action or a matter in the court.
>
> …
>
> (4) *If the case is one of urgency*, the High Court or a Judge thereof may, on the application of a party or proposed party to the arbitral proceedings, make such orders under subsection (2) as the High Court or Judge thinks necessary for the ***purpose of preserving evidence or assets***.
>
> …
>
> [emphasis added in italics and bold italics]

34 On their face, these provisions provide that the High Court may grant an interim injunction if it is "necessary for the purpose of preserving evidence or assets". In conventional parlance, where evidence or assets are sought to be preserved, the court typically grants an Anton Piller order or a Mareva injunction. In the present case, the Injunction is neither. It is an open-ended injunction to restrain the Appellants from interfering with the Respondent's performance of its obligations under the Concession Agreement. That,

however, is not the end of the matter because the express wording of s 12A(4) does not strictly confine the court to *only* ordering an Anton Piller order or a Mareva injunction. The court may make "*such orders*" [emphasis added] under ss 12(1)(*c*) to 12(1)(*i*) as are necessary for the preservation of the evidence or assets in question. Therefore, although the usual order might likely take the form of an Anton Piller order or a Mareva injunction, it is in fact the case that any other interim order may be granted by the court as long as this is considered necessary for the preservation of evidence or assets.

35 Initially, the Respondent claimed that it was seeking to preserve two specific assets by the Injunction, namely, two contractual rights:[11] (a) the right to be served the appropriate notice under the Concession Agreement before termination was effected; and (b) the right to have any dispute over the entitlements of the parties under the Concession Agreement resolved by an arbitral tribunal before those entitlements were destroyed. During the oral arguments, Mr Pillay also included the Respondent's asserted interest in the land on which the Airport is situated ("the Site") as an asset which the Respondent was seeking to preserve.

36 Mr Pillay argued that the aforesaid contractual rights fell within the term "assets" in s 12A(4) as that section must be construed widely. He referred to the English Court of Appeal decision in *Cetelem SA v Roust Holdings Ltd* [2005] 1 WLR 3555 ("*Cetelem*") in support of his contention. In *Cetelem*, the plaintiff and the defendant entered into a contract under which the defendant would sell the plaintiff a 50% interest in a Cypriot company. The contract

[11] Sachin Kerur's 1st Affidavit at paras 10.2 and 11.6.

provided that any dispute would be referred to arbitration in London. The approval of the Russian Central Bank ("the RCB") was a condition precedent to the contract. If approval was not obtained by 31 January 2005, the contract would be null and void. The latest possible date for submitting documents to the RCB for approval was 10 December 2004, but that deadline lapsed without any documents having been submitted by the defendant. On 23 December 2004, the plaintiff applied under s 44(3) of the Arbitration Act 1996 (c 23) (UK) ("the Arbitration Act 1996") for, among other things, an interim mandatory injunction requiring the defendant to submit an application to the RCB for the approval of the share purchase agreement. The injunction was granted on 29 December 2004. The defendant appealed. Its case was that the court had no power to grant an interim mandatory injunction under s 44(3) because the order requiring the defendant to procure that certain documents be delivered was not one that was necessary for the preservation of the plaintiff's assets. The court disagreed, holding instead, first (at [57]), that "assets" in s 44(3) included choses in action and contractual rights, and, second (at [67]), that the court had the power under s 44(3) to grant the interim mandatory injunction as long as it was persuaded that the injunction was necessary to preserve the plaintiff's right to purchase the shares under the contract.

(1) Scope of the term "assets"

37 On the scope of the term "assets", Clarke LJ (as he then was), who delivered the leading judgment, held that once it was accepted that "assets" included choses in action, which counsel for the defendant did, there was no reason to distinguish between different types of choses in action. Moreover, Clarke LJ could not see any reason why a contractual right should not be an "asset" within the meaning of s 44(3) of the Arbitration Act 1996. At least two other English High Court decisions have followed *Cetelem* and interpreted

s 44(3) as encompassing contractual rights: *Telenor East Holding II AS v Altimo Holdings & Investments Ltd and other companies* [2011] EWHC 458 (Comm) at [30]; *Starlight Shipping Co and another v Tai Ping Insurance Co Ltd Hubei Branch and another* [2008] 1 Lloyd's Rep 230 ("*Starlight Shipping*") at [21].

38 We have discussed *Cetelem* at some length because it was evidently relied on by the Ministry of Law ("the Ministry") in formulating the International Arbitration (Amendment) Bill 2009 (Bill 20 of 2009) ("the Bill") by which s 12A was introduced into the IAA. In a press release containing the Ministry's response to feedback following a public consultation on the Bill ("the Press Release") (available at <http://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/linkclick1e3a.pdf> (accessed 8 February 2013)), the Ministry stated that while it found useful the suggestion to remove the phrase "for the purpose of preserving evidence or assets" as the word "assets" was potentially confusing in the light of *Cetelem*, nonetheless, it had decided to retain the phrase. The Ministry (at p 5 of the Press Release) reaffirmed its intention and understanding that:

> … a wide meaning of the term "assets" be adopted to include choses in action and rights under a contract (*as decided by the English Court of Appeal in Cetelem*). [underlining in original; emphasis added in italics]

39 This is echoed in the Explanatory Statement to the Bill, which explained (at p 8) with respect to the proposed s 12A(4) that it was intended that a wide meaning of the term "assets" be adopted to include choses in action and "rights under a contract". Moreover, at the second reading of the Bill in Parliament, the Minister for Law, Mr K Shanmugam ("the Minister"), repeated that "assets" should be read "in line with *current case law* … to include intangible assets or 'choses in action' such as bank accounts, shares

and financial instruments" [emphasis added]: *Singapore Parliamentary Debates, Official Report* (19 October 2009) vol 86 at col 1628. The choses in action articulated by the Minister are arguably different from typical rights under a contract. Bank accounts, shares and financial instruments are more closely aligned to the concept of "assets" than contractual rights. Be that as it may, the Bill was passed without any amendment. Neither *Cetelem* nor the expression "rights under a contract" was explicitly referred to at the second reading of the Bill. In our judgment, the extrinsic evidence indicative of Parliament's intention *vis-à-vis* the scope of the term "assets" strongly suggests that the holding in *Cetelem* is intended to govern the proper interpretation of s 12A(4) of the IAA. The court's function is to give effect to Parliament's intention, and, to that end, we read the reference to "assets" in s 12A(4) as encompassing rights under a contract. But, in the context of the provision itself, this must be confined to such contractual rights as lend themselves to being preserved. In the normal course of events, a party faced with a threatened breach of a contract is not entitled to preserve his right to have the contract performed; rather, the primary obligation to perform the contract gives way to a secondary obligation to pay damages: see *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 AC 827 at 848–849 *per* Lord Diplock. That said, there plainly are rights under a contract that can and ordinarily are preserved by way of an order for specific performance or an injunction.

40 Thus, we do not interpret *Cetelem* (or Parliament, by extension) as having established a rule that *all* types of contractual rights may be the subject matter of a preservation order under s 12A(4) of the IAA. If an interim injunction should lie under s 12A(4) to preserve *any* contractual right from being eroded, it would ineluctably open the floodgates to applications for

interim mandatory injunctions to compel parties to perform *any and all* types of contractual obligations pending the resolution of the dispute. A seller's breach of an obligation to deliver ordinarily substitutable goods such as produce, for example, would, on such a hypothesis, trigger the court's power to grant an interim mandatory injunction to preserve the right to receive those goods by compelling the seller to deliver the goods. This plainly cannot be the position because, as we have already noted, the recourse of the buyer in such circumstances would ordinarily be an order for damages: see also *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 23.082. It is beside the point that the court would not necessarily grant the interim order sought in such cases; indeed, we note that the courts, for good reasons, are slow to grant interim mandatory injunctions: *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 ("*NCC International*") at [75]. The mere fact (under the above hypothesis) that it would be *open* to the court to order an interim injunction to prevent such potential, albeit mundane, breaches of contract is contrary to the basic conventional principle in contract law that a final mandatory injunction, which is akin to specific performance (*Dowty Boulton Paul Ltd v Wolverhampton Corporation* [1971] 1 WLR 204), does not practically lie when damages are an adequate remedy for the breach.

41 An overly broad understanding of choses in action for the purposes of defining "assets" in s 12A(4) would lead to the perverse result that s 12A(4), in principle, contemplates and sanctions the protection of contractual rights by way of an *interim* injunction, even though a *final* finding of a breach of those same rights would, for all intents and purposes, only give rise to a secondary right to claim damages and not a right to specific performance. We do not think that s 12A(4) should be interpreted as having this far-reaching, and

plainly unintended, effect. The more restrained interpretation that we have applied to "assets" in s 12A(4) would not have led to a different result in *Cetelem*. The contractual right preserved in *Cetelem* was the right to purchase shares of what appears to have been an unlisted company, and a contractual right to purchase such shares, which are not available in the open market, is one that is likely to be specifically enforceable at the suit of either the purchaser or the vendor: *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 at [54].

42 In the same vein, the right to have disputes resolved before a contractually chosen court or pursuant to an arbitration agreement could also rightfully be protected by way of an anti-suit injunction, whether on a final or an interim basis: *National Westminster Bank plc v Utrecht-America Finance Company* [2001] 3 All ER 733 at [29]–[35]. The justification for the grant of an anti-suit injunction in these cases was clearly articulated by Millett LJ (as he then was) in *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace")* [1995] 1 Lloyd's Rep 87 at 96 as follows:

> In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in *Continental Bank N.A. v Aeakos Compania Naviera S.A.* [1994] 1 W.L.R. 588. *The justification for the grant of the injunction in either case is that* ***without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy***. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case. [emphasis added in italics and bold italics]

43 Millett LJ's explanation has been widely accepted even as part of Singapore law: *Halsbury Laws of Singapore* vol 6(2) (LexisNexis, 2009) at para 75.133. In our judgment, the same rationale that avails when granting anti-suit injunctions to restrain breaches of jurisdiction clauses or to uphold arbitration agreements also applies in the context of s 12A(4) of the IAA. Accordingly, we consider that the type of contractual rights which would come within the meaning of "assets" under s 12A(4) are those which lend themselves to being preserved or, put another way, those which, if lost, would not adequately be remediable by an award of damages.

(2) Preservation of the Respondent's assets

44 Even though the reference to "assets" in s 12A(4) of the IAA includes contractual rights, the court may only order an interim injunction in an urgent case if it is satisfied that the injunction is *necessary* to preserve evidence or assets. This qualification was emphasised in *Cetelem* (at [45]–[47]), overruling the earlier decision of *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] 2 Lloyd's Rep 438, where it was held that the power under s 44(3) of the Arbitration Act 1996 was not limited to the stated purposes. In our view, "necessary" ordinarily imports the notion that without the order in question, the evidence or asset which is sought to be preserved would be lost. If there are other reasonably available alternatives for securing the evidence or asset, then it cannot be said that the order is *necessary* for the preservation of that evidence or asset. This narrow interpretation is in line with the object and purpose of the IAA to limit curial involvement in arbitration proceedings (*NCC International* at [40]–[41]), and it also lends further support to the view we have taken as to the restrained interpretation of "assets" in s 12A(4). Naturally, if the order sought does not in effect preserve the evidence or asset

in question, the order cannot be considered necessary for the preservation of that evidence or asset.

(A) THE CONTRACTUAL RIGHTS RELIED ON BY THE RESPONDENT

45 In our judgment, the Injunction does not preserve the first of the two contractual rights (see [35] above) relied upon by the Respondent. We are unable to see how an injunction that restrains the Appellants from interfering with the Respondent's performance of its obligations under the Concession Agreement can preserve the Respondent's right to be served the appropriate notice under the Concession Agreement. If this was all that the Respondent wanted, it should have sought an interim mandatory injunction compelling the Appellants to serve the appropriate notice prior to effecting termination of the Concession Agreement.

46 In relation to the second of the two contractual rights which the Respondent relied on, the core of Mr Pillay's argument had to be that the Appellants' intimated actions in the present circumstances would have the effect of irretrievably and irreversibly displacing the Respondent's right to carry out and perform the Concession Agreement before the arbitral tribunal in the 2nd Arbitration had the opportunity to pronounce on the parties' rights. Accordingly, or so the argument went, the Injunction was necessary to preserve this asset, namely, the contractual right to carry out and perform the Concession Agreement before the dispute over the subsistence of that right was conclusively decided by an arbitral tribunal. The flaw in this argument is that there was nothing to suggest that the Concession Agreement as a whole was one that was specifically enforceable, or that its breach (even a repudiatory one) could not be adequately remedied by an award of damages.

47 Nor was Mr Pillay's argument strengthened by reference to the arbitration agreement contained in cl 21.4 of the Concession Agreement. In *Starlight Shipping*, one party breached its obligation to arbitrate a dispute in London by first commencing proceedings before a court in China. The other party then applied to the English court for and obtained an interim anti-suit injunction under s 44(3) of the Arbitration Act 1996 to halt the Chinese court proceedings and preserve its right to have the matter resolved by arbitration. In the present case, it might be argued that the Injunction is not *necessary* in order to preserve the Respondent's right to have the dispute arbitrated. Indeed, that right was observed and given effect to by the Appellants prior to the Respondent's application in OS 1128 when the Appellants themselves commenced the 2nd Arbitration.

48 Nor did cl 21.5 of the Concession Agreement change the position. That clause, which we consider in some detail below at [72]–[78], provides that "during the pendency of any Dispute and the resolution thereof, both Parties shall continue to perform all their respective obligations under this Agreement".[12] In the context of a long-term agreement such as the Concession Agreement was contemplated to be, it made perfect sense for the parties to agree that they would keep performing their respective obligations, notwithstanding the existence of some dispute over an aspect of the Concession Agreement. But, we do not see how the clause can be called in aid in circumstances such as the present, where a party's actions attack the very foundation and continuance of the contract. Indeed, this is borne out by the fact that cl 21.5 goes on to exclude from the scope of the commitment to

[12] Sachin Kerur's 1st Affidavit at p 132.

continue performance of each party's obligations an obligation which "constitutes the subject matter of [the] Dispute".[13] We recognise that it may be unsatisfactory from a commercial standpoint for a party to be permitted to stop performing all its obligations under a contract, notwithstanding the presence of a clause such as cl 21.5, by simply alleging that the contract is void either *ab initio* or by reason of some subsequent vitiating factor which is disputed; but, on the other hand, it would require very clear language to sustain a construction that despite the existence of a dispute that goes to the very root and foundation of the contract and despite the exclusion of obligations constituting the "subject matter of [the] Dispute",[14] the parties are nonetheless obliged to continue performing their respective obligations under the contract (including the disputed ones) until they are freed of this by an order of an arbitral tribunal. Moreover, we return to the main point which we have made above (at [46]), *viz*, that to invoke the court's power under s 12A(4) of the IAA to grant an interim injunction to protect a contractual right, the right in question must be one that would ordinarily be capable of being protected by an injunction or an order for specific performance. To put it simply, even an obligation to continue performing a contract despite the existence of a dispute (*ie*, a cl 21.5-type obligation) would not give rise to a contractual right amounting to an "asset" that may be preserved by way of an interim injunction under s 12A(4) unless it can be shown that its breach is not adequately compensable by damages. In the present case, we were not convinced that a breach of cl 21.5 could not be adequately compensable by damages and Mr Pillay did not proffer any reasons to the contrary.

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[13] *Ibid.*

[14] *Ibid.*

49 For all these reasons, we were unable to see how Mr Pillay could bring the Respondent's case within s 12A(4) at least in so far as he was relying on the two contractual rights mentioned at [35] above as constituting the relevant assets to be preserved.

(B) THE RESPONDENT'S INTEREST IN THE SITE

50 As we noted earlier, in the course of the oral arguments, Mr Pillay also raised the point that a further asset that the Respondent sought to preserve was its interest in the Site. Mr Pillay submitted that the Respondent's interest in the Site arose from its status as the lessee of the Site under a lease agreement with MACL. In particular, cl 2.3.1 of the Concession Agreement provided that MACL granted the Respondent a sub-lease with the "exclusive right to occupy, use and peacefully enjoy the Site"[15] for a term which was defined in cl 3 as a period of 25 years.

51 In our judgment, a lessee's interest in land, even if it be a right to occupy, use and enjoy that land for a term, is precisely the sort of contractual right that is capable of coming within the meaning of "asset" for the purposes of s 12A(4). The Appellants' intimation in the November Notices that they would be taking over the Airport undermined and threatened to destroy the Respondent's interest in the Site. Mr Daniel's only reply to this was to point to cl 2.3.2 of the Concession Agreement, which states that MACL "has, and shall retain, good and valid title to all Immovable Property".[16] But, this is not an answer. First, under the Concession Agreement, "Immovable Property" is

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[15] Sachin Kerur's 1st Affidavit at p 68.

[16] Sachin Kerur's 1st Affidavit at p 69.

defined as a subset of the Site. The Respondent's "asset" therefore encompasses more than the immovable property which belongs to MACL. Second, and in any event, the Respondent is not asserting title over immovable property situated within the Site; instead, the Respondent is seeking to protect its interest and rights in respect of the Site, whether as a lessee or a licensee of the Site.

52 The Injunction was framed in extremely wide terms (see [8]–[9] above). If upheld, it would prohibit the Airport from being taken over by the Appellants. If the Injunction were set aside and if the Appellants then take over the Airport, the Respondent's rights to have exclusive use, occupation and peaceful enjoyment of the Site would be destroyed, Therefore, on this ground, we are satisfied that in principle, the Injunction meets the requirement of being necessary for the preservation of an asset – *ie*, the Singapore court does have the power to grant the Injunction. That said, whether the court should exercise its discretion to grant the Injunction is a separate matter that must be assessed against the balance of convenience, and it is to this that we now turn. Before leaving this point, we should mention that given our view that s 12A(4) of the IAA can in principle be invoked in this case, it was not necessary for us to consider whether the Singapore court's jurisdiction to act might have been invoked under any other provision, whether contained in the Civil Law Act (Cap 43, 1999 Rev Ed) or the SCJA or otherwise, especially as no arguments on this were advanced before us.

Whether the balance of convenience lies in favour of granting or upholding the Injunction

53 The test that we applied to determine whether the Injunction should be granted or upheld was the well-known one laid down by Lord Diplock in

American Cyanamid Co Ltd v Ethicon Ltd [1975] AC 396. The assessment is one which involves a balance of convenience. The essential principle is that because the court is asked to conduct this balancing exercise at an early stage and based only on affidavit evidence, it should take whichever course appears to carry the lower risk of injustice if that course should ultimately turn out to have been the "wrong" course, in the sense of an injunction having been granted when it should have been refused or an injunction having been refused when it should have been granted: *Regina v Secretary of State for Transport, Ex parte Factortame Ltd and Others (No 2)* [1991] 1 AC 603 at 683. Would the unsuccessful applicant for an injunction who later establishes that he was right, or, in the converse situation, the party who is later shown to have been wrongly subjected to an injunction be adequately compensated by an award of damages?

54 On the facts, the balance of convenience here plainly lies in favour of *not* granting or upholding the Injunction for the reasons that follow.

(i) Damages as an adequate remedy

(1) Calculating the Respondent's potential loss

55 The Respondent contended that without the Injunction, the Appellants would take over the Airport. According to the Respondent, this would cause it extensive direct loss as well as loss of reputation and goodwill, which would be difficult to assess if it should ultimately turn out that the Appellants were not entitled to take that course of action. Mr Pillay submitted that the direct loss suffered by the Respondent would involve the calculation of revenue and concession fees which were dependent on commercial airport activities as well as passenger and airline traffic over a 25-year period, which was the duration

of the Concession Agreement. Such damages, Mr Pillay submitted, would be difficult, if not impossible, to assess.

56 We do not accept this. Whatever the relevant period for assessing damages may be, while it is true that passenger numbers and airline traffic may fluctuate, historical data for the Airport and other airports that are similarly situated should provide some basis for prescribing and calculating the loss of profits that may be sustained by the Respondent. In fact, it is reasonable to expect that such data would be recorded by the operators of the Airport, whether this be the Respondent or MACL. Moreover, there are experts who would be able to assist in this task. Thus, any direct loss of profit is calculable, even though the difficulties involved should not be underestimated. At the same time, the difficulties inherent in assessing the damages accruing to the Appellants if the Injunction should ultimately turn out to be unjustified also should not be underestimated. These damages would likely be of a different order of complexity for the reasons outlined below at [68]–[71].

57 The Respondent's next argument on the loss of reputation and goodwill is also untenable. The Respondent was specially incorporated for the purpose of the Concession Agreement. There is no suggestion or evidence that the Respondent had any plans to manage other airports either within the Maldives or abroad in the interim period or at any future time.

58 It is also significant to note that the Concession Agreement itself contemplates both the possibility of significant changes to the political and

economic climate in the Maldives, and the possibility of such changes affecting the Concession Agreement.[17] For instance, cl 19.2.1(a) states that MACL shall have the right to terminate the Concession Agreement upon the occurrence of any "Political Event", which is comprehensively defined in cl 18.1. Expropriation is also expressly stated as a basis for termination by MACL in cl 19.2.1(h). "Expropriation" is defined in cl 1.1 as:[18]

> … the nationalization, seizure, requisition or expropriation of all or any part of [the Airport], any Works or all or any part of [the Respondent's] Rights by [the Maldives Government] or any Relevant Authority.

59 Crucially, the Concession Agreement then goes on to provide for the payments that would have to be made to the Respondent in the event that the Concession Agreement is terminated on the grounds of "Expropriation" or "Political Event". These payments are set out in cll 19.2.1(a) and 19.4.3(b) read with cll 19.2.2 and 19.2.1. Clause 19.4.3(b), in particular, deals with payments upon the occurrence of an event of "Expropriation":[19]

> In the event of a termination of this Agreement by [the Respondent] in accordance with Clause 19.3.2 or by [MACL] pursuant to Clause 19.2.1(h), [MACL] (or [the Maldives Government] as applicable) shall, notwithstanding the provisions of Clause [illegible] pay to [the Respondent]:
>
> (i) an amount equal to …

60 Thus, the Concession Agreement stipulates the manner of computing or assessing the damages which shall be payable to the Respondent in the event that the Concession Agreement is terminated as a result of certain

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[17] Appellants' Submissions at para 25.

[18] Sachin Kerur's 1st Affidavit at p 59.

[19] Sachin Kerur's 1st Affidavit at p 127.

political events or expropriation. The Respondent was at pains to emphasise that the Appellants had not in fact purported to exercise their right to expropriate the Airport. It emphasised that what had happened here, at least in its view, was a gross breach of the Concession Agreement, for which the Appellants should be liable in damages. We accept that as at the date of the oral arguments, the Appellants had not purported to exercise their power of expropriation. Mr Daniel too confirmed this. But, in our view, the aforesaid provisions are relevant to show that the parties had contemplated the possibility of having to assess the compensation payable to the Respondent in the event of a premature termination of the Concession Agreement by reason of a "Political Event" or an "Expropriation". In those circumstances, it cannot then be said that damages for breach of contract (however gross the breach may eventually be found to be) are too difficult or impossible to assess.

61 In the course of the oral arguments, Mr Daniel also accepted that if the arbitral tribunal in the 2nd Arbitration found that the Appellants were wrong in their asserted case that the Concession Agreement was void *ab initio* and/or had been frustrated, but the Appellants had by then already gone ahead with the taking over of the Airport, they would *at least* be liable to compensate the Respondent for having expropriated the Airport. This arose in the course of the arguments when we observed that the power of the Appellants to take over the Airport by way of an expropriation could not be doubted. This does not mean that we found that the Appellants had expropriated the Airport or that the remedies for "Expropriation" that were provided in the Concession Agreement were the full extent of the remedies available to the Respondent. We have made no such finding. As we have observed at the very outset, the substantive questions, including whether the Appellants are entitled to do what they have alleged they will do and, if so, what the Respondent's remedies are,

are matters for the relevant arbitral tribunal. Nothing we have said here can or should constrain the arbitral tribunal in coming to its determination on these substantive questions.

62 What we do observe is that on these facts, the Respondent faced a very difficult task in persuading us that we should: (a) prevent the Appellants from acting as they have intimated that they would do; and (b) hold that in all the circumstances, damages would not be an adequate remedy for the Respondent.

(2) The Appellants' financial ability to pay damages

63 The Respondent also did not adduce sufficient evidence to make out its next contention, which was that MACL and/or the Maldives Government would be unable to pay it damages for any losses that it might incur if the Injunction were not granted and if the arbitral tribunal in the 2nd Arbitration later determined that the Appellants were not entitled to act as they have threatened to do. All that the Respondent adduced in support of this contention were press articles reporting on financial issues that the Maldives Government had been facing.[20] On the side of MACL and the Maldives Government, Mr Mohamed Ahmed, the financial controller of the Ministry of Finance and Treasury of the Republic of the Maldives, affirmed in an affidavit that the Maldives Government would honour any valid and legitimate claim made against it. He also stressed that the Maldives Government had never defaulted on any of its payments.[21]

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[20] Sachin Kerur's 1st Affidavit at pp 353–359.

[21] Mohamed Ahmed's 1st Affidavit at para 36.

64 The press articles adduced by the Respondent could not be taken to be conclusive or even probative of the Maldives Government's financial position, especially when they were directly contradicted by the affidavit of the financial controller of the Maldives Government. Separately, there was no evidence that whatever financial predicament the Appellants faced had come about due to a change in the circumstances after the Concession Agreement was entered into. This is significant because the Respondent had been content to enter into the Concession Agreement based on the financial standing of the Appellants at the time of the agreement and to take the "credit risk" that this entailed. It follows, therefore, that the Maldives Government's financial position would be a neutral factor in the balance of convenience.

65 Hence, in our judgment, the Respondent was not able to satisfy us that there would be no adequate remedy in damages should it transpire that the Appellants were not entitled to act as they had threatened to do.

(ii) Practical problems associated with the enforcement of the Injunction

66 The Appellants also argued that the Judge erred in failing to appreciate that the court would not ordinarily grant an injunction requiring parties to a complex contract to continue working together once it was shown that there had been a serious breakdown of mutual trust and confidence such that there was no longer any willingness to cooperate. The court, it was submitted, would also not grant injunctions which would result in numerous follow-up applications raising issues of compliance or non-compliance with the injunctions granted.[22] This was all the more so where the underlying events

[22] Appellants' Submissions at para 26.

were taking place in another jurisdiction altogether. The Appellants cited *SSL International plc and another v TTK LIG Ltd and others* [2012] 1 WLR 1842 ("*SSL International*"), an English Court of Appeal case which is helpful in this regard.

67 In *SSL International*, the claimants sought injunctions and damages against the defendants arising from the breakdown of the relationship between the claimants and some of the defendants. The first defendant was a manufacturer and was the claimants' principal supplier. The claimants sued the defendants for breach of outstanding supply contracts and sought an injunction for specific performance. An interim injunction for specific performance was also sought, but this was declined by the court. One of the reasons given for this was that the description of the documents which the first defendant had to produce in order to comply with the terms of the interim injunction sought was much too vague. This led the court to conclude (at [95]):

> … [T]he Court was asked to make an order that would require an *unacceptable degree of supervision in a foreign land. … The room for dispute as to the requirements of the order, if granted, is obvious. The evidence relevant to any such dispute would be in India, and the costs, difficulties and complications of enforcement proceedings in this country are obvious.* Moreover, since it is the Claimants' case that the Defendants have failed to comply with the order made by the [Company Law Board] in India, I see no reason to believe that they will be more cooperative in relation to an order made by our courts. [emphasis added]

68 Similarly, the Injunction, if upheld, would have presented several practical problems for the Appellants in terms of compliance. The sheer width of the Injunction would have made it difficult for the parties, particularly the Maldives Government, to have any certainty of what was required of them in order to ensure that they were acting in compliance with the terms of the

Injunction. Given the broad scope of the Injunction, it would have been inevitable that disputes would arise over a broad spectrum of acts, including many involving other agencies of the Maldives Government. The parties would have had to return repeatedly to the court in Singapore to obtain clarification on whether a particular act did or did not contravene the Injunction. An interim injunction must be certain and should not be granted in terms which leave it to be argued in contempt proceedings what it does and does not require of the party to whom it is directed: *Electronic Applications (Commercial) Ltd v Toubkin and Another* [1962] RPC 225 at 227.

69 Moreover, the Injunction reached beyond the scope of the contractual dispute between the parties into the realm of restricting the operations and duties of domestic regulators whose regulatory functions encompass aspects related to the operation of the Airport. According to the Appellants,[23] the Respondent had already relied on the Injunction by writing to the Maldives Civil Aviation Authority requiring it not to cancel the Respondent's aerodrome licence.[24] The Respondent had also informed the Maldivian Department of Immigration and Emigration that the latter would be acting unlawfully and in contempt of the Singapore court if visas for any of the Respondent's employees were cancelled.[25] It is crucial here to bear in mind the potential for an interim injunction to affect third parties because of the principle that third parties must not aid or abet a breach, or deliberately

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[23] Appellants' Submissions at para 30.

[24] Bundle of Post-Hearing Correspondence and Newspaper Articles at pp 4–5.

[25] Bundle of Post-Hearing Correspondence and Newspaper Articles at pp 6–7.

frustrate the purpose of an injunction: Steven Gee QC, *Commercial Injunctions* (Sweet & Maxwell, 5th Ed, 2004) at para 4.001.

70 Other Maldivian governmental bodies involved in the regulation of transportation, tourism and even defence might also have been affected had the Injunction remained in place. The uncertainty in the full extent and reach of the Injunction therefore worked against the Respondent. This was not a point that arose purely as a matter of the *drafting* of the Injunction. The relationship between the parties was one that concerned the operation of the national airport of a sovereign State. The Respondent wanted to preserve its right to continue that operation under and in accordance with the terms of a complex concession agreement. In these circumstances, it was simply inevitable that the actions of the Respondent would spill over into and affect the operations of other governmental entities and agencies in the Maldives. This was the real source of the difficulty.

71 Lastly, as the court held in *SSL International*, interim injunctive relief should not be granted if it requires an unacceptable degree of supervision in a foreign land. That would precisely be the case if the Injunction were maintained. It is, of course, not the apprehension of the Appellants disobeying the Injunction that justifies its being denied. That would not be a good justification (*Castanho v Brown & Root (UK) Ltd and Another* [1981] AC 557 at 574), although the court should generally be satisfied that: (a) any injunction which it grants can be practically obeyed; and (b) if the injunction is not obeyed, the court would be in a position to enforce the injunction (*Locabail International Finance Ltd v Agroexport and Another* [1986] 1 WLR 657 at 665). We are not so satisfied in this case, given the vague terms and the width of the Injunction as well as its restrictions on the Maldives' State

machinery in respect of everyday operations (and it was not evident how these restrictions could practically be narrowed while securing what the Respondent was seeking). Therefore, the practical problems associated with the grant and enforcement of the Injunction militate strongly against its being granted or upheld.

(iii) Clause 21.5 of the Concession Agreement

72 The Judge appears to have been significantly influenced by the Respondent's argument that cl 21.5 of the Concession Agreement sets out the default position, and this appears to envisage that the parties will continue to adhere to the Concession Agreement even in the event of a dispute, pending the resolution of the dispute. Clause 21.5 reads:[26]

> Notwithstanding anything herein to the contrary, *during the pendency of any Dispute and the resolution thereof, both Parties shall continue to perform all their respective obligations under this Agreement* (including for [the Respondent] continuing [*sic*] to carry out the Airport Services and to perform the Works in accordance with the provisions of this Agreement, the Works Construction Contracts and the Works Plan) except to the extent that the obligation constitutes the subject matter of such Dispute. [emphasis added]

73 For the reasons we have set out at [48] above, we are doubtful that cl 21.5 even applies in the present circumstances. However, we put this to one side in deference to the arbitral tribunal whose task it remains to determine the precise construction of the Concession Agreement.

74 The Judge was referred by Mr Pillay to the decision of the English High Court in *Sabmiller Africa BV and Tanzania Breweries Limited v East*

[26] Sachin Kerur's 1st Affidavit at p 132.

African Breweries Limited [2009] EWHC 2140 (Comm) ("*Sabmiller*"). In *Sabmiller*, the parties were breweries which entered into various share purchase, distribution and shareholders' agreements to increase cooperation. The respondent subsequently purchased shares in another third-party rival brewery in breach of a restraint clause in the distribution agreement. Clause 23 of the distribution agreement, which provided for disputes to be resolved by mediation followed by arbitration, also provided:

> 23.7. The parties shall continue to perform their respective obligations under this agreement to the extent possible notwithstanding commencement of any proceedings in accordance with the rules. Such proceedings shall be conducted so as to cause the minimum inconvenience to the performance by parties of such obligations.
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> …
>
> 23.15. The provisions of this Agreement *shall not prevent* or delay either party *from seeking an urgent order for specific performance or interim or final injunctive relief or any other relief of a similar nature* from any court having jurisdiction on a "without notice" basis or otherwise and none of the foregoing provisions of this clause 23, shall apply to any circumstances where any such remedies are sought.
>
> [emphasis added]

75 The applicant applied for injunctions restraining the respondent from, among other things, completing the purchase of the shares in the rival brewery, breaching the restraint clauses in the distribution agreement and terminating the distribution agreement until further order of the arbitral tribunal which had yet to be constituted. Christopher Clarke J granted the injunctions.

76 First, he held (at [178]) that damages would be an inadequate remedy for the applicant should the injunctions not be granted as the rival brewery would be more competitive and that would be detrimental to the goodwill and

sales of the applicant. Second, while trust and confidence between the parties was a relevant consideration, the overall relationship between the parties in that case did not require such a degree of continual cooperation as would make the granting of the injunctions inappropriate: at [195]. Importantly, Clarke J noted (at [196]) that the relationship might yet be salvaged as the former managing director who was involved in the respondent's conduct had been replaced by a different individual. Third, cl 23.7 was a "powerful factor" (at [198]) in favour of granting the injunctive relief. Fourth, not granting the injunctions might result in irremediable injustice. Finally, the fact that the parties could raise the issue of injunctive reliefs before the arbitral tribunal when that was constituted meant that the court's order was not final.

77 It will be evident that cl 23.7 was but one of a host of factors that led Clarke J in *Sabmiller* to arrive at the conclusion that he did. In our view, *Sabmiller* involved a set of circumstances materially different from those before us and, hence, it offers us little assistance. This is so for several reasons:

(a) First, while damages in *Sabmiller* were found to be inadequate, for the reasons set out above (at [55]–[65]), we are not persuaded that this is the case here.

(b) Second, unlike the injunctions sought in *Sabmiller*, the Injunction here does not seek to prevent or restrain specific breaches. Instead, the Injunction is open-ended in that any act which directly or indirectly *interferes* with the Respondent's performance of its obligations under the Concession Agreement is caught. The Injunction also impacts third parties such as regulators with important ongoing duties and responsibilities.

(c) Third, the running of an airport requires a deep degree of cooperation between the government, public authorities and private partners in a host of areas affecting national interests and policy, including immigration, security, airspace control, tourism and transportation. The level and depth of interaction required is unquestionably of a far greater degree than that under an agreement between two private parties to distribute beer. At the same time, quite apart from the degree of cooperation, trust and confidence that would be required for the successful performance of the Concession Agreement, it is evident that the Maldives Government is not interested in continuing its partnership with the Respondent in this venture (*cf* the possibility of the parties' relationship being salvaged in *Sabmiller*). As mentioned above (see [68]–[71] above), the significant practical difficulties that have been presented simply cannot be overlooked in this case.

78 The court's reliance on cl 23.7 of the distribution agreement in *Sabmiller* also has to be seen in its proper context. Specifically, cl 23.15 of the distribution agreement in that case provided that the parties would be entitled to seek urgent injunctive relief (see [74] above). The injunctions sought by the applicant were precisely the sort of remedies which the parties had contracted for. In contrast, there is no equivalent to cl 23.15 in the Concession Agreement. While this is not fatal to the Respondent's case, it brings us back to the question of whether the Injunction was practicable in this case. For all these reasons, we did not find *Sabmiller* to be directly relevant. On the totality of the circumstances of this case, we did not think cl 21.5 of the Concession Agreement displaced the assessment which we formed earlier (see [55]–[71] above).

(iv) The Respondent's ability to make good on its cross-undertaking

79 We mention a final factor. Mr Sachin Kerur, a partner of the firm of solicitors acting for the Respondent, affirmed the Respondent's willingness to give a cross-undertaking in damages in respect of any loss caused to the Appellants arising from the grant of the Injunction. However, he qualified this by observing that the Respondent "[did] not propose to provide any actual security for this undertaking as it would *plainly be able to satisfy any award that may be made* in [the Appellants'] favour"[27] [emphasis added]. There is no evidence to substantiate the Respondent's claim that it would plainly be able to satisfy any adverse award of damages. The Respondent's position was also attacked by MACL, which stated that the Respondent did not have any significant assets in or outside the Maldives.[28]

80 The Judge appeared to have been influenced by Mr Pillay's contention that the Respondent was a company of good financial standing, given its paid-up capital of US$40.2m.[29] While this might be true, a company's paid-up capital is not proof of its creditworthiness, and, if it had come down to it, the absence of evidence on this score would also have weighed against the granting of the Injunction.

Conclusion

81 In all the circumstances, we were not convinced that granting or upholding the Injunction carried the lower risk of injustice in the event that it

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[27] Sachin Kerur's 1st Affidavit at para 12.2.

[28] Mohamed Ibrahim's 1st Affidavit at para 12.

[29] Certified transcript of the Judge's minute sheet dated 3 December 2012 at p 8.

should subsequently transpire that the Appellants were wrong in their legal position. For all these reasons, we allowed the appeal and set aside the Injunction. We also ordered that the costs of the appeal and of the proceedings below be reserved to the arbitral tribunal in the 2nd Arbitration when it is constituted and disposes of the matter.

Sundaresh Menon	Andrew Phang Boon Leong	Woo Bih Li
Chief Justice	Judge of Appeal	Judge

Christopher Anand Daniel, Kenneth Pereira, Ganga d/o Avadiar and Foo Li Chuan Arlene (Advocatus Law LLP) for the appellants;
Mohan Reviendran Pillay, Linda Esther Foo Hui Ling and Tong Wai Yan Josephine (MPillay) for the respondent.