On the publication of the second edition of Singapore International Arbitration Law and Practice (2nd edition) (LexisNexis, 2018), David Joseph QC and David Foxton QC, the editors, offer some thoughts on some of the key developments in Singapore arbitration law since the publication of the first edition in 2013

The second edition of Singapore International Arbitration Law and Practice was published by LexisNexis in May 2018: https://store.lexisnexis.com.sg/products/singapore-international-arbitration-law-practice-2nd-edition-skuSkusg035/details

The book provides a comprehensive analysis of the law relating to international arbitration in Singapore. Under the general editorship of **David Joseph QC** and **David Foxton QC**, the book is written by team of authors drawn from a number of jurisdictions. Most chapters are cowritten by a leading Singapore arbitration practitioner and an international practitioner or academic.

The writing team includes a number of members of Essex Court Chambers. In addition to the two editors, **Colin Liew**, **David Mildon QC**, **Jern-Fei Ng QC** and **Sam Wordsworth QC** are contributors. The team also includes two overseas associates of Essex Court Chambers, **Michael Hwang SC** and **Dominic O'Sullivan QC**, and two serving judges who are former members of Chambers – Dame Geraldine Andrews DBE of the English High Court and **Sir Bernard Eder**, an International Judge of the Singapore International Commercial Court and an international arbitrator at Arbitrators at 24 Lincoln's Inn Fields.

The four years since the first edition have seen a large number of important decisions on arbitration law from the Singapore Courts, as Singapore consolidates its position as one of the world's leading arbitration seats.

In addition, Singapore arbitration institutions, including SIAC, have continued to revise their rules, including the new SIAC Investment Arbitration Rules. There has also been an important legislative provision in the form of the Civil Liability (Amendment) Act 2017, which allowed third party funding of arbitration in Singapore. Finally, there has been the formation of the Singapore International Commercial Court, an international court with a cadre of Singaporean and international judges, which seeks to bring many of the advantages of international arbitration procedure into a municipal court framework. As would be expected, all of these, and many other developments are reflected in the second edition, which features new chapters on Third Party Funding, and two chapters on the Singapore International Commercial Court. Against this background, **David Joseph QC** and **David Foxton QC** highlight some of the many interesting developments considered in the second edition.

Separability

The principle of the separability of arbitration agreements from the contracts with which they are associated is a long-established principle of Singapore arbitration law. The limits to that principle were noted by Stephen Chong J in *BCY v BCZ* [2017] SGHC 249. In that case, numerous drafts of a proposed contract had been exchanged but there was a dispute

as to whether they had resulted in a finalized agreement. The judge rejected the argument that the arbitration agreement could have become binding independently of whether those negotiations had culminated in the conclusion of a binding contract: "separability does not insulate the arbitration contract from the substantive agreement for all purposes" ([26]). The decision also endorsed a strong presumption under Singapore law that, absent express choice to the contrary, the proper law of the arbitration agreement will be the same as any proper law expressly chosen in the substantive contract to which it is ancillary. This represents a departure from a previous decision which had suggested that the law of the arbitration agreement would presumptively be the law of the seat: *FirstLink Investments Corp Ltd v GT Payment Pte Limited* [2014] SGHCR 12. While there is undoubtedly a convenience in the curial court being able to find that the law of the arbitration agreement is the law of the suit, particularly when the seat's arbitration statute provides for various default rules which will take effect as terms of that arbitration agreement absent a sufficient indication to the contrary, the argument that parties who have chosen the law of state X to govern the substantive contract intended a different law to govern the arbitration clause is not persuasive. The decision in *BCY* rests Singapore law on a more analytically sound footing.

Staying court proceedings in favour of arbitration

One of the most important Singapore court decisions on arbitration since the first edition is *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57. The case addressed a series of important legal issues concerning applications to stay court proceedings in favour of arbitration, reviewing a significant body of case law from model law and non-model law jurisdictions, as well as international arbitration commentary, in the process. The Court held that the appropriate standard of review on a stay application was a *prima facie* standard, with a stay being ordered if the applicant was

> *"able to establish a prima facie case that there is a valid arbitration agreement between the parties to the court proceedings, the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and the arbitration agreement is not null and void, inoperative and incapable of being performed"*.

The correct approach on this last issue – the burden on the issue of whether the arbitration agreement is not null, void, inoperative or incapable of being performed – has required a little further analysis. The suggestion that the applicant bears the burden of proving a negative, if only to a *prima facie* standard of review, is somewhat counter-intuitive. In *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2016] SGHC 23, Vinodh Coomaraswamy J held that the burden was on the party resisting the stay to satisfy the court that the arbitration agreement is "*null and void, inoperative or incapable of being performed*". On the appeal from Vinodh Coomaraswamy J ([2017] SGCA 32), the Court of Appeal held that, even applying the *prima facie* review standard, it is incumbent on the applicant *"to advance the interpretation that would support its contention that the dispute in question could conceivably be brought within the arbitration agreement"* and to persuade the court of its preferred interpretation. Where the issue is one of which of two

competing jurisdiction clauses applies, the Court will not simply apply a *prima facie* review (which standard might conceivably be met by both of the competing jurisdiction clauses) but will decide which dispute resolution clause the parties objectively intended to apply : *Oie Hong Leong v Goldman Sachs International* [2014] SGHC 128 [25]-[26].

The Court of Appeal in *Tomolugen Holdings Limited v Silica Investors Ltd* also undertook a comprehensive survey and restatement of the circumstances in which the Court would stay proceedings under its inherent jurisdiction, pending an arbitration between the parties, or one of them and a third party, in circumstances in which the claim before the court was not itself subject to an agreement to arbitrate. The Court held that it is necessary to balance the plaintiff's right to choose who it wants to sue and where; the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and the court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of the dispute. The Court held that in circumstance in which a party seeks a stay pending an arbitration which does not involve the same parties, it is open to the court to make the granting of a stay conditional on the applicant's agreement to be bound by the findings of fact in the arbitration. The Court noted relevant considerations when considering whether to grant a stay included whether the claims brought in court were effectively derivative from those advanced in arbitration; the extent of the factual and legal overlap between the court and arbitration proceedings; whether claims of the type being pursued in court could also be pursued in the arbitration; whether there was scope for a finding that one or more of the parties to the court proceedings would be bound by findings in the arbitration as privies to those parties; and the extent of duplication of witnesses and evidence between the two sets of proceedings.

The right to be heard

A number of Singapore High Court decisions have given further guidance on the circumstances in which an award may be susceptible to challenge because one party has been given an insufficient opportunity to make submissions.

In a relatively rare decision overturning an arbitration award, the Singapore High Court in *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] SGHC 126 held that a tribunal had failed to give the parties a reasonable opportunity to present their case and to respond to their opponents' case. The Tribunal's reasons in their award were divorced from the way in the case had been conducted, and no directions had been given to the parties to address the point which formed the basis of the award. The closest the tribunal had come to raising this point was putting it to JVL's counsel in the course of his oral closing submission. The Court noted that if a "new idea" occurred to the tribunal in the course of deliberations, it was incumbent on them to invite further submissions from the parties before reaching a decision on that point.

However, the case does not represent any change in the general approach of the Singapore courts to challenges to arbitration awards based on failure to give the unsuccessful party a sufficient opportunity to be heard. The proper approach is that set out by the Singapore Court of Appeal n *AKN v ALC* [2015] SGCA 18, which substantially reversed an overturning of an award at first instance. The Court reiterated the fact that the courts could not interfere with the merits of an arbitral award, and the need to be cautions to ensure that

arguments over the right to be heard are not used as cover for such challenges. It must be "clear and virtually inescapable" that the tribunal has not considered an issue

Multi-tiered dispute resolution clauses

The construction and implementation of multi-tiered dispute resolution clauses continues to throw up issues of interest. One such case is the Court of Appeal's decision in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30. The dispute resolution clause was on the standard terms of the 1999 edition of the *Conditions of Contract for Construction: For Building and Engineering Works Designed by the Employer*, and provided that: (a) a dispute between the parties was to be referred to a Dispute Adjudication Board ('DAB') for its decision; (b) the DAB's decision would be 'binding' on the parties unless revised by amicable settlement or an arbitral award; (c) a party may within 28 days of the DAB's decision give notice of its dissatisfaction with the decision, but if it fails to do so the DAB's decision becomes 'final and binding' on the parties; (d) where a notice of dissatisfaction has been given, parties shall attempt to settle the dispute amicably before commencing arbitration, which may be commenced 56 days after the giving of the notice of dissatisfaction, regardless of any attempt at amicable settlement; (e) unless settled amicably, any dispute in respect of which the DAB's decision has not become 'final and binding' shall be finally settled by arbitration; and (f) any failure by a party to comply with a DAB decision that has become 'final and binding' may be referred to arbitration.

The question for the Court of Appeal was whether a separate dispute over a non-final DAB decision (as opposed to the underlying dispute which gave rise to it) itself had to be referred to a DAB for its decision and then to amicable settlement before it could be arbitrated. The majority of the Court of Appeal held that it was 'self-evidently' the case that compliance with the preconditions to arbitration was not necessary in such a situation, noting the inordinate delay that would otherwise result. The reasoning in the case has been criticized, but reflects the tension between: (a) the court's desire to give full effect to the different stages in multi-tiered dispute resolution clauses; and (b) the delay which can result from doing so, which may be seen as inimical to the prompt resolution of disputes, particularly in cases in which it is already apparent that neither party will let their position rest anywhere short of a final and binding determination.

In *Heartronics Corporation v EPI Live Pte Ltd* [2017] SGHCR 17, a case in which **Colin Liew** appeared for the successful party, the defendant sought a stay of court proceedings in reliance on a dispute resolution clause which provided that any dispute be submitted to the SMC-SIAC Med-Arb Procedure. The defendant had refused to engage with the mediation element of that procedure, but contended it was nonetheless entitled to stay the court proceedings. The plaintiff contended that the dispute resolution agreement was to be treated as a unitary arbitration agreement, and that the effect of the defendant's conduct was the arbitration agreement was null, void, inoperative or no longer capable of being performed. The Court found that the defendant's conduct had deprived the plaintiff of substantially the whole benefit that the dispute resolution clause was intended to grant, and that the plaintiff had been entitled to treat the defendant's conduct as a repudiatory breach of the dispute resolution agreement which it had accepted. The defendant's argument that each separate tier of the dispute resolution clause operated independently was rejected.

Investment treaty arbitration

The final case we wanted to highlight is *Lesotho v Swissbourgh Diamond Mines (Pty) Ltd and Others* [2017] SGHC 195, surely the first of many Singapore court decisions arising from investment treaty arbitrations. The defendants in the challenge proceedings claimed that their investments in Lesotho had been unlawfully expropriated, and brought a challenge before the Southern African Development Community ("SADC") Tribunal. The SADC Tribunal was shut down, leading the defendants to claim before an investment treaty tribunal administered by the Permanent Court of Arbitration ("PCA"). The arbitration agreement of which the defendants sought to take advantage was contained in Article 28(1) of Annex 1 of the SADC Protocol, which provided that disputes "between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall […] be submitted to international arbitration". The defendants succeeded before the arbitrators, but Lesotho successfully challenged jurisdiction before the Singapore High Court. The challenge succeeded on four bases, each of which was held to be jurisdictional: (i) the right to submit disputes to the SADC Tribunal was not an "investment" under Article 28(1) of Annex 1, nor was it "admitted"; (ii) the dispute over shutting down the SADC Tribunal did not concern any obligation of the Kingdom in relation to the purported investment; (iii) the defendants failed to exhaust local remedies; and (iv) the Protocol did not protect the investments of domestic investors.

The case illustrates the width of points which may come before a curial court in an investment treaty arbitration dispute, because of the number of issues which investment treaties (at least on certain interpretations) have characterized as going to the tribunal's jurisdiction. The result, in this context, is a more extensive curial review of the underlying facts than is traditionally seen in international commercial arbitration. The successful state was represented by two of the contributing authors, **Sam Wordsworth QC** and Paul Tan, and the case is going on appeal.

Any commentary on that decision will need to await the third edition.