IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 213

Originating Summons No 829 of 2017 (Registrar's Appeal No 298 of 2017)
Summons Nos 3664 of 2017 and 4911 of 2017

Between

BTY

… *Plaintiff*

And

BUA

… *Defendant*

GROUNDS OF DECISION

[Arbitration] — [Agreement] — [Scope]

[Arbitration] — [Stay of litigation] — [Mandatory stay under International Arbitration Act]

TABLE OF CONTENTS

BTY
v
BUA and other matters

[2018] SGHC 213

High Court — Originating Summons No 829 of 2017 (Registrar's Appeal No 298 of 2017)
Summons Nos 3664 of 2017 and 4911 of 2017
Vinodh Coomaraswamy J
27 October, 21 November 2017

15 October 2018

Vinodh Coomaraswamy J:

1 A joint venture company and its shareholders enter into a shareholders' agreement. As stipulated in the agreement, the shareholders cause the company formally to adopt new articles of association in agreed form. The new articles restate several provisions found in the shareholders' agreement. After several years pass, the relationship between the shareholders deteriorates. One of the shareholders alleges that the company has breached the articles and commences litigation against the company. The alleged breach of the articles would, if established, also constitute a breach of the shareholders' agreement. The shareholders' agreement contains an arbitration clause. The articles do not. Should the litigation be stayed in favour of arbitration?

2 The assistant registrar stayed the shareholder's litigation. The shareholder's appeal against that decision has come before me. I have allowed the appeal and permitted the shareholder's litigation to continue. The company has, with my leave, appealed to the Court of Appeal against my decision. I now give the grounds for my decision.

The background

The parties

3 The plaintiff in this litigation, *ie* the aggrieved shareholder, is an investment fund. It is a wholly-owned subsidiary of a private-equity firm.[1] I shall refer to the private equity firm as "the plaintiff's parent".

4 The defendant in this litigation, *ie* the joint venture company, has only two shareholders: (a) the plaintiff holding under 50% of its shares; and (b) a company which I shall call "the majority shareholder" holding over 50% of its shares.[2]

5 The majority shareholder is a listed company.[3] Its business is to provide products and services to a particular industry worldwide.[4] The defendant is the holding company under which the majority shareholder consolidated and holds an entire arm of its worldwide business.[5] The plaintiff's parent used the plaintiff as its vehicle to make an investment in that arm.[6]

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1 Plaintiff's affidavit filed on 28 July 2017 at para 4.

2 Plaintiff's affidavit filed on 28 July 2017 at para 6.

3 Plaintiff's affidavit filed on 28 July 2017 at page 114 and para 5.

4 Defendant's affidavit filed on 10 August 2017 at para 11.

5 Defendant's affidavit filed on 10 August 2017 at para 15.

6 Defendant's affidavit filed on 10 August 2017 at paras 6, 11 and 12 and Plaintiff's affidavit filed on 28 July 2017 at para 4.

The plaintiff's investment in the defendant

6 The plaintiff's parent and the majority shareholder entered into negotiations over the investment in 2008.[7] The two companies eventually signed heads of agreement in October 2009.[8] The heads of agreement envisaged both companies establishing a joint venture company into which the majority shareholder would inject part of its business and in which the plaintiff's parent would take a minority stake.[9]

7 The two companies duly incorporated the defendant as their joint venture company in December 2009.[10] There was a third shareholder[11] of the defendant from a time soon after incorporation until several years ago.[12] But the third shareholder is not material to any of the issues which I have to decide on this appeal. I shall therefore treat the majority shareholder and the plaintiff as having been the only two shareholders of the defendant at all material times.

8 Five days after the defendant was incorporated,[13] it entered into a shareholders' agreement with its shareholders.[14] As one would expect, the agreement governs the shareholders' relationship *inter se* as joint venturers and also their relationship with the defendant as their joint venture vehicle. In addition, however, it governs the terms on which the plaintiff was to make its

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7 Defendant's written submissions dated 26 October 2017 at para 12.

8 Defendant's affidavit filed on 10 August 2017 at para 12.

9 Defendant's written submissions dated 26 October 2017 at para 13.

10 Defendant's affidavit filed on 10 August 2017 at para 13.

11 Defendant's affidavit filed on 10 August 2017 at page 27.

12 Plaintiff's affidavit filed on 28 July 2017 at page 113.

13 Defendant's affidavit filed on 10 August 2017 at para 13.

14 Defendant's affidavit filed on 10 August 2017 at para 14.

investment in the defendant. It is for this reason that the shareholders' agreement bears the title "Investment Agreement".

9 The Investment Agreement envisaged a period of time elapsing between its execution as a contract and completion of the plaintiff's investment. It therefore obliged the parties to agree and enter into a number of "agreed form documents"[15] between contract and completion. One of the agreed form documents was a fresh set of articles of association for the defendant. The Investment Agreement thus obliged the parties, as a completion requirement, to procure a shareholders' resolution to be passed causing the defendant to adopt new articles in agreed form.[16]

10 Within five months of signing the Investment Agreement, the majority shareholder and the plaintiff duly passed a special resolution causing the defendant to adopt new articles ("the Articles").[17] In all material respects, the defendant remains governed by the Articles to the present day.

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15 Defendant's affidavit filed on 10 August 2017 at page 26.

16 Defendant's affidavit filed on 10 August 2017 at page 30, 40 and 82 (para 1.10).

17 Defendant's affidavit filed on 10 August 2017 at para 19.

The key provisions

11 The Investment Agreement contains three key provisions which I shall describe before I turn to summarise the factual background. These key provisions: (a) regulate the composition of the defendant's board; (b) stipulate that certain corporate matters require both shareholders' consent; and (c) oblige the parties to arbitrate their disputes.

Composition of the board

12 Clause 12 of the Investment Agreement stipulates that the defendant's board shall consist of no more than six directors. The majority shareholder is entitled to nominate three directors (who may be executive or non-executive). The plaintiff, as the defendant's minority shareholder, is entitled to nominate two non-executive directors.[18]

13 At all material times, the defendant's board has consisted of five directors: three directors nominated by the majority shareholder and two by the plaintiff. The Articles refer to the directors nominated by the majority shareholder as "the A directors" and to the directors nominated by the plaintiff as "the B directors". I shall use the same terminology to refer to them in this judgment.

14 Clause 12 of the Investment Agreement is restated in Art 6 of the Articles.

Matters requiring both shareholders' consent

15 Clause 11 of the Investment Agreement provides that the defendant may not carry out certain acts without the consent of both shareholders.[19] The

[18] Defendant's affidavit filed on 10 August 2017 at page 58, cl 12; at page 153, Art 6.

Investment Agreement calls these acts "Matters Requiring Consent". A detailed list of the matters requiring consent is set out in Schedule 7 of the Investment Agreement.[20] Under para 8.1 of the schedule, "Adopting or approving the annual accounts" of the defendant is a matter requiring consent.[21]

16 The obligation in cl 11 of the Investment Agreement binds the shareholders as well as the defendant itself. Thus, cl 11.1 obliges each shareholder to procure that the defendant does not perform any matter requiring consent without the consent of the other shareholder. Further, cl 11.2 obliges the defendant *itself* not to carry out any matter requiring consent without the consent of both shareholders.[22] The consent required by cl 11 must be in writing and can be given either by the shareholder itself or by one of its nominated directors.[23]

17 Clause 11 of the Investment Agreement is restated in Art 61[24] of the Articles. That article prohibits the defendant from carrying out what it calls "Reserved Matters" without the consent of both shareholders:[25]

> **61. RESERVED MATTERS**
>
> None of the acts specified in Schedule 1 shall be carried out by [the defendant] without both [the majority shareholder's] Consent and [the plaintiff's] Consent … provided that to the extent that this would constitute an unlawful fetter on its statutory powers (for which purpose each paragraph of Schedule 1 shall be a separate and severable undertaking by it).

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19 Defendant's affidavit filed on 10 August 2017 at page 57.

20 Defendant's affidavit filed on 10 August 2017 at page 107.

21 Defendant's affidavit filed on 10 August 2017 at page 104.

22 Defendant's affidavit filed on 10 August 2017 at page 57.

23 Defendant's affidavit filed on 10 August 2017 at pages 28, 30, 35 and 36.

24 Defendant's affidavit filed on 10 August 2017 at page 205, Art 61.

25 Plaintiff's affidavit filed on 28 July 2017 at paras 14 – 15 and pages 114 – 115.

18 Schedule 1 of the Articles[26] sets out the list of reserved matters. It replicates[27] Schedule 7 of the Investment Agreement.[28] Thus, paragraph 8.1[29] of Schedule 1 classifies "adopting or approving the annual accounts" of the defendant as a reserved matter.

19 As in the Investment Agreement, the Articles provide that the shareholders' consent required by Art 61 must be given in writing and can be given either by a shareholder itself or by one of its nominated directors.[30]

The arbitration agreement

20 Clause 29.2 of the Investment Agreement is a paradigm arbitration agreement. It obliges the parties to arbitrate "[a]ny dispute … arising out of or in connection with this Agreement":[31]

> Any dispute, controversy or conflict arising out of or in connection with this Agreement including any question regarding its existence, validity or termination (a "**Dispute**"), shall be referred to and finally resolved by arbitration in Singapore and administered by the Singapore International Arbitration Centre (the "**SIAC**") in accordance with the Arbitration Rules of the SIAC for the time being in force which rules are deemed to be incorporated by reference into this clause 29.

21 Clause 29.2 is not restated in the Articles.

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26 Plaintiff's affidavit filed on 28 July 2017 at page 102.

27 Defendant's affidavit filed on 10 August 2017 at para 39.

28 Defendant's affidavit filed on 10 August 2017 at page 107.

29 Plaintiff's affidavit filed on 28 July 2017 at page 104.

30 Plaintiff's affidavit filed on 28 July 2017 at pages 35 and 37.

31 Defendant's affidavit filed on 10 August 2017 at page 80.

The factual background to this litigation

22 In February 2016, the defendant tabled its accounts for the year ended 31 December 2015 ("the 2015 Accounts") for approval at a meeting of its board of directors.[32] It appears that the A directors were prepared to approve the 2015 Accounts. But the B directors expressed strong objections to substantial aspects of the accounts.[33]

23 In April 2016 and September 2016, the defendant circulated revised versions of the 2015 Accounts to its directors.[34] The B directors expressed strong objections to substantial aspects of all of these versions too.[35]

24 In December 2016, the defendant circulated yet another version of the 2015 Accounts and tabled that version for approval at a board meeting to be held later that month. The B directors took objection to this version of the 2015 Accounts too. Although the December 2016 board meeting went ahead as scheduled, it appears that this version of the 2015 Accounts was not put to a vote at that meeting.[36]

25 On 29 March 2017, the defendant circulated to its directors a resolution in writing resolving to approve the 2015 Accounts.[37] It appears that the three A directors, comprising a majority of the board, duly signed the resolution in writing.[38] The two B directors refused to do so, repeating their objections.[39]

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32 Plaintiff's affidavit filed on 28 July 2017 at para 23.

33 Plaintiff's affidavit filed on 28 July 2017 at paras 24 – 28.

34 Plaintiff's affidavit filed on 28 July 2017 at paras 30 – 31; pages 547 – 548.

35 Plaintiff's affidavit filed on 28 July 2017 at paras 31 – 36.

36 Plaintiff's affidavit filed on 28 July 2017 at para 40.

37 Plaintiff's affidavit filed on 28 July 2017 at para 45.

38 Plaintiff's affidavit filed on 28 July 2017 at paras 61 and 62.

26 Article 44 of the Articles requires any directors' resolution in writing to be "signed by the majority of Directors being not less than are sufficient to form a quorum" for a physical board meeting.[40] Article 43.3 provides that the quorum for a physical board meeting is at least two directors comprising at least one A director and one B director.[41]

27 On 4 July 2017, the defendant gave notice to its shareholders that its Annual General Meeting ("AGM") would be held on 21 July 2017.[42] Item one on the agenda for the AGM asked the shareholders to receive and consider, and, if they thought it fit, to adopt, the 2015 Accounts. A final version of the defendant's 2015 Accounts was circulated to shareholders together with this notice. The directors' statement accompanying the audited accounts was duly signed by two A directors.[43]

28 The plaintiff initiated a correspondence with the defendant, repeating its objections to the 2015 Accounts and asking the defendant to remove the adoption of the 2015 Accounts from the agenda from the AGM.[44] The defendant refused.[45]

29 The plaintiff commenced this litigation on 19 July 2017.[46] But it did not simultaneously seek an interim injunction to restrain the defendant from holding the AGM. As a result, the defendant's AGM went ahead as scheduled on 21

39 Plaintiff's affidavit filed on 28 July 2017 at para 48 and p 837.

40 Plaintiff's affidavit filed on 28 July 2017 at page 91.

41 Plaintiff's affidavit filed on 28 July 2017 at page 90.

42 Plaintiff's affidavit filed on 28 July 2017 at para 62 and p 922.

43 Plaintiff's affidavit filed on 28 July 2017 at para 30 and p 324 at 327.

44 Plaintiff's affidavit filed on 28 July 2017 at p 990 – 991 (para 9 and p 1001 – 1005).

45 Plaintiff's affidavit filed on 28 July 2017 at p 993 – 999.

46 Originating Summons No 829 of 2017.

July 2017.[47] The shareholders did not, however, resolve to adopt the 2015 Accounts at the AGM.

30 In August 2017, the defendant lodged the 2015 Accounts electronically with the Accounting and Corporate Regulatory Authority ("ACRA").[48] It did so because it takes the position that "2015 Accounts are valid and have been properly audited"[49] and because the Companies Act both empowers and obliges it to do so.[50]

The parties' position on the merits

31 I now summarise the parties' positions on the merits. Although the merits of the underlying litigation are not of concern in a stay application such as the one before me, some appreciation of the merits is necessary in order to ascertain whether the statutory prerequisites for a stay have been satisfied.

32 It is common ground that the plaintiff has not consented to the adoption or approval of the 2015 Accounts, whether by its own act or by an act of the B directors, and whether by the directors' resolution in writing dated 29 March 2017, at the AGM held on 21 July 2017 or otherwise.[51]

33 The defendant's position on the merits of this application is that: (a) the directors' resolution in writing dated 29 March 2017 was validly passed and the board has thereby validly approved the 2015 Accounts as circulated on 4 July

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47 Defendant's affidavit filed on 10 August 2017 at para 34.

48 Plaintiff's affidavit filed 6 September 2017 at para 6 and page 9; Defendant's affidavit filed on 14 September 2017 at paras 5 – 6.

49 Defendant's affidavit filed on 14 September 2017 at para 6.

50 Defendant's affidavit filed on 14 September 2017 at para 13.

51 Plaintiff's affidavit filed on 28 July 2017 at paras 47 and 60.

2017;[52] (b) Art 61 applies only to adoption of the accounts by shareholders in general meeting and does not prevent the defendant's board from approving its annual accounts without the plaintiff's consent;[53] and (c) the defendant has been at liberty from 29 March 2017 to table the 2015 Accounts at general meeting for the shareholders to adopt.[54]

34 The plaintiff's position is that: (a) Art 61 requires the plaintiff's consent to the defendant approving or adopting its annual accounts *both* by the directors *and* by the shareholders; (a) the directors' resolution in writing dated 29 March 2017 was not validly passed either: (i) because it dealt with a reserved matter within the meaning of the Articles and did not have the plaintiff's consent as required by Art 61; or (ii) because it was not signed by at least one B director as required by Art 44 read with Art 43.3 (see [26] above);[55] and (c) on both of the foregoing grounds, the alleged approval of the 2015 Accounts by the 29 March 2017 resolution is *ultra vires* the Articles and void.[56]

The defendant's application for a stay

Summary of the parties' cases on the stay

35 The defendant invokes s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") to seek a stay of this litigation, relying on the arbitration agreement in cl 29.2 of the Investment Agreement.[57] It is significant that the defendant's entire legal basis for a stay rests on – and only on – s 6 of

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52 Defendant's affidavit filed on 10 August 2017 at para 49.

53 Defendant's affidavit filed on 10 August 2017 at para 33(a)(i).

54 Defendant's affidavit filed on 14 September 2017 at para 13.

55 Plaintiff's affidavit filed on 28 July 2017 at para 47.

56 Plaintiff's affidavit filed on 28 July 2017 at para 72.

57 Defendant's written submissions dated 26 October 2017 at paras 30 – 33.

the IAA. In particular, the defendant does not seek a stay of this litigation in the exercise of the court's inherent powers of case management, even as an alternative basis to a stay under s 6 of the IAA.[58]

36 Section 6 of the IAA provides as follows:

> **Enforcement of international arbitration agreement**
>
> 6.—(1) … where any party to an arbitration agreement … institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may … apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.
>
> …

37 As the Court of Appeal held in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 at [63], the defendant is entitled to have this litigation stayed if it can establish at least a *prima facie* case on the following three issues:

(a) that there is a valid arbitration agreement between the parties;

(b) that the dispute in this litigation (or any part of the dispute) falls within the scope of the arbitration agreement; and

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

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58 Defendant's affidavit filed 3 November 2017 at page 249, lines 27 – 29 and Defendant's written submissions dated 26 October 2017 at para 51.

38 There is no dispute that, within the meaning of s 6 of the IAA: (a) cl 29.2 of the Investment Agreement is an "arbitration agreement"; (b) the plaintiff and the defendant are each a "party" to that arbitration agreement; and (c) the arbitration agreement is not "null and void, inoperative or incapable of being performed".[59] Of the three issues set out at [37] above, therefore, the only issue which is in contention in this application is whether any part of the dispute in this litigation falls within the scope of the parties' arbitration agreement. If it does, a stay of this litigation is mandatory. If it does not, this litigation must be allowed to continue, there being no alternative prayer for a case-management stay.

39 The defendant argued before the assistant registrar, and argues now before me, that the dispute in this litigation does fall within the scope of the parties' arbitration agreement for the following reasons:

(a) If the substance of the controversy in this litigation is the defendant's alleged breach of Art 61, that is necessarily also a breach of the Investment Agreement and therefore falls squarely within the scope of the parties' arbitration agreement.[60]

(b) In any event, the true substance of the controversy in this litigation is in fact the defendant's "auditing process and [its] alleged failure to comply with the Articles". That once again is a breach of the Investment Agreement and squarely within the scope of the parties' arbitration agreement.[61]

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59 Plaintiff's written submissions dated 26 October 2017 at para 13.

60 Defendant's written submissions dated 26 October 2017 at para 47.

61 Defendant's written submissions dated 26 October 2017 at paras 48 and 66.

(c) On a proper construction of the Investment Agreement, the parties' express intention to resolve disputes arising under or in connection with that agreement by arbitration should prevail over any liberty accorded to the parties to have recourse to litigation by reason of the absence of an arbitration agreement in the Articles.[62]

(d) The actions and omissions of the defendant which underlie the plaintiff's claims in this litigation and those very same actions and omissions seen in the context of the parties' rights and obligations under the Investment Agreement are so closely intertwined that they cannot be untangled or separated.[63]

40 The plaintiff argued before the assistant registrar, and argues now before me, that the dispute in this litigation does not fall within the scope of the parties' arbitration agreement for the following reasons:[64]

(a) The substance of the controversy in this litigation is whether the defendant had corporate capacity to approve the 2015 Accounts.[65]

(b) The dispute in this litigation therefore arises out of the Articles and not out of the Investment Agreement.

(c) The Articles constitute an agreement separate and distinct from the Investment Agreement.[66]

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62 Defendant's written submissions dated 26 October 2017 at para 50.

63 Defendant's written submissions dated 26 October 2017 at para 57.

64 Plaintiff's written submissions dated 26 October 2017 at paras 49 and 54.

65 Plaintiff's written submissions dated 26 October 2017 at para 48.

66 Plaintiff's written submissions dated 26 October 2017 at paras 49 and 51(a).

The assistant registrar's decision

41 The assistant registrar accepted the defendant's submissions and stayed this litigation.[67] She observed that Art 61 is identical to cl 11 of the Investment Agreement and took the view, therefore, that the issue of whether the defendant had adopted or approved the 2015 Accounts in breach of the Articles was in substance the same issue as whether it had done so in breach of the Investment Agreement.[68]

42 The assistant registrar therefore held that the defendant had established a *prima facie* case that the dispute in this litigation fell within the scope of the parties' arbitration agreement.[69] A stay was accordingly mandatory under s 6(1) of the IAA and was accordingly granted.

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67 Defendant's affidavit filed 3 November 2017 at p 256, line 22 – 23.

68 Defendant's affidavit filed 3 November 2017 at p 256, line 8 – 18.

69 Defendant's affidavit filed 3 November 2017 at p 256, line 20 – 22.

Issues to be determined

43 The single issue which is in contention on this application (see [38] above) is whether any part of the dispute in this litigation falls within the scope of the parties' arbitration agreement. Tracking the statutory language of s 6(1), that issue can be reframed as follows: is the "matter" in respect of which the plaintiff brings this litigation any part of the "subject" of cl 29.2 of the Investment Agreement?

44 Determining the issue before me therefore resolves into two sub-issues (see *Tomolugen* at [108]):

(a) What is the "matter" in respect of which this litigation has been brought?

(b) Is that matter the "subject" of the parties' arbitration agreement?

What is the "matter" in this litigation?

The nature of the inquiry

45 The first sub-issue requires me to determine what is the "matter" in this litigation. How this inquiry is to be carried out has been comprehensively analysed by the Court of Appeal in *Tomolugen*. In that case, a minority shareholder brought an action claiming that the affairs of the company were being conducted in an oppressive or unfairly prejudicial manner within the meaning of s 216 of the Companies Act (Cap 50, 2006 Rev Ed). The defendants to the action were: (a) the company itself; (b) the majority shareholder; and (c) certain current and former directors of the company and of its related companies. All of the defendants applied to have the entire action stayed. The majority shareholder applied to stay: (a) part of the action against it on the ground that that part fell within the scope of an arbitration agreement between

itself and the minority shareholder; and (b) the remainder of the action pursuant to the court's inherent powers of case management. The other defendants, none of whom had an arbitration agreement with the minority shareholder, all applied to stay the entire action against them purely on case-management grounds.

46 The two sides in *Tomolugen* urged the court to adopt two diametrically opposed approaches to determining the "matter" in the litigation. The minority shareholder urged the court to adopt a broad approach in which all that the court need do is to identify the "essential dispute" or "main issue" between the parties. Adopting and applying that approach, the minority shareholder submitted that its action raised only one "matter": whether the affairs of the company were being conducted in an oppressive or unfairly prejudicial manner towards the minority shareholder: *Tomolugen* at [109].

47 The majority shareholder, on the other hand, advocated a more granular approach to the inquiry. It contended that a "matter" is each "issue which is material to the relief sought and/or is capable of settlement as a discrete controversy". The majority shareholder thus submitted that the minority shareholder's litigation in fact comprised four "matters", broadly equivalent to each of the four sets of acts alleged to be oppressive or unfairly prejudicial towards the minority shareholder: *Tomolugen* at [109].

48 The Court of Appeal adopted the majority shareholder's approach. It observed that s 6(2) of the IAA expressly accommodates the possibility that only a part of the litigation before the court may be the subject of the parties' arbitration agreement and therefore subject to a mandatory stay. Thus, the Court of Appeal held, the language of s 6(2) itself envisages the more granular inquiry which the majority shareholder advocated and militates against the excessively

broad view which the minority shareholder advocated. To determine whether a "matter" is the subject of an arbitration agreement (at [113]):

> … [The court] should undertake a practical and common-sense inquiry in relation to any reasonably substantial issue that is not merely peripherally or tangentially connected to the dispute in the court proceedings. The court should not characterise the matter(s) in either an overly broad or an unduly narrow and pedantic manner. In *most* cases, the matter would encompass the claims made in the proceedings. But, that is not an absolute or inflexible rule.

49 The Court of Appeal then conducted a practical and common sense inquiry at the intermediate level of conceptual generality. It agreed with the majority shareholder and held that that each of the four sets of oppressive acts alleged by the minority shareholder constituted a separate "matter" within the meaning of s 6(1) of the IAA (*Tomolugen* at [122]).

50 The Court of Appeal in *Tomolugen* (at [115]–[118]) was influenced by the approach taken upon a similar application by Austin J in the New South Wales case of *ACD Tridon v Tridon Australia* [2002] NSWSC 896 ("*ACD Tridon*"). In *ACD Tridon* a minority shareholder commenced litigation against: (a) the company; (b) two individuals who were the majority shareholders and directors of the company; and (c) a wholly-owned subsidiary of the company. The minority shareholder and one of the majority shareholders were parties to a shareholders' agreement which contained an arbitration clause. All of the defendants in *ACD Tridon* applied to stay the litigation in favour of arbitration under s 7(2) of Australia's International Arbitration Act 1974 (Cth), the Australian equivalent of s 6(1) of the IAA.

51 The minority shareholder in *ACD Tridon* tried to draw a distinction between "matters" and "issues". It submitted that its action raised five claims (at [20]) and submitted that each claim constituted a separate "matter" even

though it acknowledged that each "matter" comprised several "issues". Thus, although the minority shareholder accepted that each of the five claims raised an issue relating to the construction of the shareholders' agreement – an issue which was therefore within the scope of an arbitration clause in that agreement – it argued that no stay should be granted because those were merely "issues" and were therefore not "matters" within the meaning of the statutory stay provision (*ACD Tridon* at [102]).

52 Austin J did not accept the minority shareholder's approach. Instead, he adopted a more granular approach and found that the issues relating to the shareholders' agreement comprised in each claim were, in themselves, sufficiently substantial to constitute "matters" (*ACD Tridon* at [110]):

> … I had decided that each of the five claims … involves a "matter" arising out of the Shareholders' Agreement [and the Distribution Agreement] and also one or more matters arising out of claims to statutory and equitable rights. The controversies as to the correct construction of the Shareholders' Agreement concerning each of the first four Claims, and concerning the rights and liabilities of [the parties] under the relevant parts of the Agreement, are controversies discrete from the statutory and equitable claims, both in the sense that the contract claims might have been asserted independently of the statutory and equitable claims, although arising out of the same facts, and in the sense that the parties to the contract claims are only [one majority shareholder] and [the minority shareholder], not the other defendants.

The matter in this litigation

53 The plaintiff submits that the "matter" in this litigation is the defendant's corporate capacity to approve the 2015 Accounts.[70] The defendant submits that the "matter" in this litigation is either: (a) whether the defendant has breached its specific obligation under Article 61; or (b) whether it has breached a general obligation to comply with the Articles.[71]

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70 Plaintiff's written submissions dated 26 October 2017 at para 48.

54 To my mind, each party has characterised the "matter" at too high a level of generality. They have each done so in a self-serving attempt to colour, if not pre-empt, the outcome of the inquiry on the second sub-issue.

55 Thus, the plaintiff characterises the "matter" as one of the defendant's corporate capacity. That is an obvious attempt to set the stage for an argument on the second sub-issue that a dispute over corporate capacity can arise only out of the Articles and never out of the Investment Agreement.

56 Likewise, the defendant characterises the "matter" as a breach of Art 61 and in the alternative as a breach of its own obligation to comply with the Articles. That is an equally obvious attempt to set the stage for its argument on the second sub-issue that both Art 61 and its obligation to comply with the Articles are merely the product of an express obligation which the defendant initially and originally undertook in the Investment Agreement and for which the Investment Agreement is therefore the ultimate contractual source. Clause 11 of the Investment Agreement, as I have explained, is the source of the defendant's obligation in Art 61. Further, para 1.1.1 of Schedule 10 of the Investment Agreement obliges the defendant to conduct its business and deal with its assets in all material respects in accordance with, amongst other documents, its own Articles.[72] There is no express provision to the same effect in the Articles.

57 I do not consider it correct in principle to characterise the "matter" on a s 6 application in this self-serving way.

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71 Defendant's written submissions dated 26 October 2017 at para 48.

72 Defendant's affidavit filed on 10 August 2017 at page 117.

58 The first sub-issue requires me to identify what is the substance of the controversy in this litigation (*Tomolugen* at [133]). That is why the Court of Appeal acknowledged in *Tomolugen* that, in most applications for a stay, the "matter" in any given litigation will encompass the claims made in the litigation (at [113], quoted at [48] above).

59 The inquiry as to the "matter" in this litigation is somewhat unusual. The only matters which this litigation raises for determination are the correct legal conclusions to be drawn from a factual and legal background which is common ground. That is no doubt why the plaintiff chose to commence this litigation by way of originating summons rather than by writ; and also no doubt why the defendant has – at least, so far – accepted that the "matter" in this litigation can be decided summarily, *ie* without resolving disputed facts at trial.

60 Thus, it is common ground that Art 61 prevents the defendant from "adopting or approving" (within the meaning of paragraph 8.1 of Schedule 1 of the Articles)[73] the 2015 Accounts without the plaintiff's consent. It is also common ground that that neither the plaintiff nor the B directors have consented to the 2015 Accounts being "adopted or approved", or to the 29 March 2017 directors' resolution in writing being passed.[74] Neither of these points is in controversy. Accordingly, neither of these points can be the substance of the controversy in this litigation.

61 From this common ground, the parties arrive at opposing legal conclusions. The plaintiff's conclusions are that the 29 March 2017 resolution is void, being *ultra vires* the Articles, either for breach of Art 61 or for breach of Art 44 read with Art 43.3 (see [26] above), the 2015 Accounts have not been

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73 Defendant's affidavit filed on 10 August 2017 at page 104.

74 Plaintiff's affidavit filed on 28 July 2017 at paras 47 and 60.

validly approved by the defendant's board and the 2015 Accounts therefore cannot be placed for adoption before the defendant's shareholders in general meeting or lodged with ACRA. The defendant's conclusions are that the 29 March 2017 resolution was validly passed, the 2015 Accounts have been validly approved and, accordingly, the prerequisites for placing the 2015 Accounts before shareholders at AGM for adoption in accordance with the Articles and for lodgement with ACRA have been met.[75]

62 On the basis that its conclusions will be accepted by the court, the plaintiff seeks the following substantive relief in this litigation:[76]

> 1. A declaration that the directors' resolution approving the annual accounts of the Defendant and its subsidiaries for the financial year ending 31 December 2015 (the "**2015 Accounts**") for submission to the Defendant's Annual General Meeting, whether written, oral or otherwise, which was purportedly passed on 29 March 2017, is void and *ultra vires* for being in breach of the Articles of Association of [the defendant] …;
>
> 2. A declaration that any adoption and approval of the 2015 Accounts at the Annual General Meeting … without the approval of both the Plaintiff and [D], is void and *ultra vires* for being in breach of the Articles of Association of the [defendant];
>
> 3. An injunction restraining the Defendant from distributing and/or disseminating the 2015 Accounts to any third party, and/or relying on the 2015 Accounts, until the 2015 Accounts are properly adopted and approved in accordance with the Articles of Association of the Defendant;
>
> …

63 In light of what it views as the defendant's invalid lodgement of the 2015 Accounts with ACRA after this litigation commenced (see [30] above), the plaintiff has foreshadowed that it will now seek additional relief in this litigation

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75 Plaintiff's affidavit filed on 27 July 2017 at p 994; Defendant's affidavit filed on 10 August 2017 at para 49.

76 Originating Summons No 829 of 2017 dated 19 July 2017 at prayers 1 – 3.

by way of an order to have the 2015 Accounts expunged from ACRA's records.[77] Presumably, the plaintiff's position is that this additional head of relief does not expand the "matter" in this litigation beyond corporate capacity.

64 It is significant to my mind that a breach of the Articles is the *sine qua non* of each of the plaintiff's three current claims for relief and of its foreshadowed claim for additional relief. By those claims, and by the grounds raised in its affidavit in support, the plaintiff has rested this litigation solely upon a breach of the Articles, whether of Art 61 or of Art 44 read with Art 43.3. Looking at the manner in which the plaintiff has framed its claim in this litigation, therefore, it appears to me that the "matter" in this litigation is simply this: has the defendant adopted or approved the 2015 Accounts in breach of the Articles?

65 This characterisation of the "matter" in this litigation amounts to accepting the plaintiff's submissions on the first sub-issue, but without tilting the framing of the "matter" impermissibly towards the conclusion on the second sub-issue which is implicit in framing it explicitly in terms of corporate capacity.

66 I am conscious, however, that the Court of Appeal in *Tomolugen* made it clear that the manner in which a party chooses to frame its claim in any given litigation is not conclusive as to how the substance of the controversy in that litigation should properly be characterised.

67 As Austin J recognised in *ACD Tridon* (at [109]), it is useful to look at the defence which the defendant advances on the merits in order to characterise accurately the "matter" in any given litigation. Of course, in any application to

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77 Plaintiff's written submissions dated 26 October 2017 at para 21.

stay an action commenced by writ, there will be no formal, pleaded defence available when the court deals with the stay application. That is because s 6(1) of the IAA requires the defendant to apply for a stay "before delivering any pleading or taking any other step in the proceedings". In the litigation before me, there is no formal, pleaded defence, but for another reason. Because this litigation has been commenced by originating summons, the defendant will never have to file a formal, pleaded defence.

68 The defendant has, however, foreshadowed in its affidavits in support of this application the defences which it intends to raise, albeit while reserving its right to expand upon or add to these defences in the future. The defences which the defendant has foreshadowed are as follows:[78]

(a) To the claim on prayer 1 (see [62] above):

(i) The 29 March 2017 resolution was not passed in breach of Art 61, because it is not the directors' role to adopt or approve the 2015 Accounts within the meaning of Art 61. That is the role of the defendant's shareholders in general meeting. And the shareholders have not yet adopted or approved the accounts.

(ii) Insofar as Art 61 requires the plaintiff to consent to the directors resolving to place the 2015 Accounts before the shareholders in general meeting, that is an unlawful fetter on the directors' powers under s 201 of the Companies Act and therefore expressly outside the scope of Art 61;

(b) To the claim on prayer 2 (see [62] above):

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78 The defendant's affidavit filed on 10 August 2017 at paras 33 – 36.

(i) It is premature to attempt to declare void and *ultra vires* the result of an AGM which had not yet been held when this litigation was commenced;

(ii) In any event, to commence litigation against *the defendant* to have the adoption and approval of the 2015 Accounts declared void and *ultra vires* is to commence litigation against the wrong party because the defendant cannot control how *the majority shareholder* will cast its vote on the 2015 Accounts at the AGM;

(c) To the claim on prayer 3 (see [62] above), the injunction ought not to be granted because it will have significant adverse impact on the defendant's ability to secure funding and maintain transactions with banks and other creditors.

69 The critical point which emerges from this analysis is that the defence on the merits which the defendant foreshadows occupies precisely the same field as the plaintiff's claim. Thus, the defendant: (a) denies a breach of the Articles; (b) argues that Art 61 must give way to s 201 of the Companies Act by the express terms of the proviso found in Art 61 itself; and (c) argues against an injunction because of the effect it would have on the defendant as a company. In other words, like the plaintiff's claim, the foreshadowed defences implicate only the Articles and the Companies Act and not the Investment Agreement.

70 The defendant's foreshadowed defences therefore reinforce my view that the "matter" in this litigation is simply this: has the defendant adopted or approved the 2015 Accounts in breach of the Articles?

71 A similar situation arose in *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] SGCA 33 ("*Sakae Holdings*"). *Sakae Holdings* was decided after I gave my decision in the present case. I therefore do not rely on it as the basis of my decision. I refer to it merely as *ex post facto* support for it.

72 The dispute in *Sakae Holdings* arose out of a joint venture agreement entered into between two shareholders and their joint venture vehicle. The joint venture agreement contained an arbitration clause. The minority shareholder commenced litigation under s 216 of the Act, alleging oppressive and unfairly prejudicial conduct. The majority shareholder argued that the minority shareholder was obliged to arbitrate their dispute by virtue of the arbitration agreement. The Court of Appeal observed *obiter* that it was "not even clear" that the minority's complaints of oppression fell within the scope of the arbitration agreement. This was because, as noted at [184]:

> … [The minority shareholder's] complaints concerned the making of unauthorised loans, the misappropriation of the Company's assets, the attempt to wrongfully dilute [the minority's] agreed shareholding in the Company as well as the creation of fictitious or sham agreements to conceal the impugned transactions. *All of these actions were oppressive to [the minority shareholder] even without regard to the [joint venture agreement].* [emphasis added]

In other words, the Court of Appeal allowed the minority shareholder's litigation to continue because he did not have to prove or rely on any breach of the parties' joint venture agreement in order to succeed in his oppression claim.

73 The same is the case in this litigation. the plaintiff's complaint is that the defendant has adopted or approved its 2015 Accounts in breach of the Articles.

If the plaintiff is right, the defendant's act is *ultra vires*. That is so without any need whatsoever to have regard to the provisions of the Investment Agreement.

Whether the "matter" is the subject of the parties' arbitration agreement

74 The second sub-issue is the heart of the defendant's stay application. Is the "matter" in this litigation a "dispute, controversy or conflict arising out of or in connection with this Agreement"? The second sub-issue thus raises two questions on cl 29.2:

(a) What does "this Agreement" mean in cl 29.2?

(b) Is a dispute over whether the 2015 Accounts have been adopted or approved in breach of the Articles a dispute "arising out of or in connection with this Agreement" within the meaning of cl 29.2?

75 On both of these questions, I find against the defendant. I accept the plaintiff's submission that the "matter" in this litigation arises out of or in connection with the Articles and not out of or in connection with the Investment Agreement and, further, that the Articles and the Investment Agreement are entirely separate agreements. I find further that the phrase "this Agreement" in the arbitration agreement encompasses only the Investment Agreement and does not extend to the Articles whether as a matter of incorporation, of construction or otherwise.

The law

76 It is well-established that arbitration agreements are to be construed generously: *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3

SLR 414 ("*Larsen Oil*") at [19]. But that is not to say that there is any special rule of construction which applies only to arbitration agreements and which leans in favour of ushering disputes away from litigation and into arbitration. As is the case when construing any agreement, the objective of construing an arbitration agreement is simply to determine and give effect to the objectively-ascertained intention of the parties in agreeing to arbitrate, bearing in mind the context in which they so agreed: *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 ("*Rals International*") at [32] and [34]. Thus, an arbitration agreement must be construed based on the presumed intentions of the parties as rational commercial parties and not on any technical basis: *Tomolugen* at [124].

77 If, taking this approach, the defendant is able to establish a *prima facie* case that the dispute as to whether it has adopted or approved the 2015 Accounts in breach of the Articles – which is what I have found the "matter" in this litigation to be – is the subject of the parties' arbitration agreement, then I am obliged to stay this litigation in favour of arbitration under s 6(1) of the IAA.

78 In my view, the defendant has failed to discharge even the light burden which *Tomolugen* casts upon it. The "matter" in this litigation does not arise either "out of" or "in connection with" the Investment Agreement, as required by the parties' arbitration agreement found in cl 29.2 of the Investment Agreement.

79 The Investment Agreement and the Articles create two separate legal relationships between the parties which operate on two separate legal planes. Clause 29.2 of the Investment Agreement on its proper construction applies only to the private contractual relationship between the parties created by the Investment Agreement itself. Disputes under the Articles are not within the

scope of cl 29.2 and are governed by recourse to the courts in accordance with ordinary principles of company law. By the phrase "company law", I mean the interaction of a company's "constitution" (as that term is now defined in s 4(1) of the Companies Act), the statutory provisions of the Companies Act and the gloss which the common law has applied to those statutory provisions and their precursors.

80 I first explain why I have found that the Investment Agreement and the Articles give rise to two different legal relationships operating on separate planes before turning to explain why I have found that cl 29.2 does not apply to the legal relationship created by the Articles.

Two different relationships on two different planes

Different legal character

81 The Investment Agreement and the Articles both have contractual force. However, each agreement derives its contractual force by a fundamentally different mechanism.

82 The Investment Agreement is a private contract. It derives its contractual force purely from the private law of obligations. The law of contract, which is a branch of the law of obligations, provides that the coincidence of offer, acceptance and consideration gives rise to obligations which are legally binding. At common law, nobody who is not a party to the contract can be bound by its provisions or can claim any rights under its provisions.

83 The Articles are of a fundamentally different legal character to a private contract. The Articles are a component of the defendant's constitution. A company's constitution derives its contractual force from company law, not

private law. Section 39(1) of the Companies Act provides that the constitution of a company binds the company and its members as if the constitution had been signed and sealed by each member and contained covenants on the part of each member to observe its provisions. The constitution is therefore a deemed contract which binds immediately by force of statute upon and by virtue of registration. As such, it binds without any need for offer, acceptance or consideration.

84 In addition to being a deemed contract, a company's constitution is also a public contract. It is public in two senses. It is a public contract in the sense that it is given binding force by a public Act of Parliament and not by a private act of the parties. It is also a public contract in the sense that a company's constitution, which includes its articles, must be lodged with ACRA (s 19(3) of the Companies Act). Thereafter, any member of the public has the right to inspect the company's constitution on ACRA's register (s 12(2)(*a*) of the Companies Act) and may rely on what he finds there in deciding whether to transact or not to transact with the company.

Operating on separate planes

85 The fundamentally different legal character of the two contracts means also that they operate on separate planes. A company's constitution operates on the company law plane (as I have defined the term "company law" (see [79] above)). A shareholders' agreement operates on the private law plane. Five examples serve to illustrate this.

86 First, on the private law plane, a shareholders' agreement can bind any party to the agreement in any capacity the parties intend it to, whether it be as a shareholder of the company, as an employee of the company, as an independent contractor providing services to the company, as a creditor of the company and

even (with considerable caution) as a director of the company. On the company law plane, even though a company's constitution has contractual force, it can bind a shareholder *only in his capacity as a shareholder* and not in any other capacity: *Hickman v Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch 881 at 900, cited with approval in *Guoh Sing Leong alias Quek Sing Leong the Administrator of the Estate of Guoh Koh Boey (deceased) v Hock Lee Amalgamated Bus Co (Pte) Ltd* [1995] SGHC 279.

87 Second, on the private law plane, no person can be bound by a shareholders' agreement unless he accedes to it expressly and separately by contract. On the company law plane, an incoming shareholder becomes a member of the company only if he agrees to do so and only if his name is entered on the register of member (s 19(6A) of the Companies Act). The incoming member is thereupon, by force of company law, immediately and automatically bound by the company's constitution. The incoming shareholders' consent to be bound by the constitution is not, in itself, sufficient.

88 Third, on the private law plane, the provisions of a shareholders' agreement can be modified only with the consent of *all* of the parties to the agreement. On the company law plane, any provision of a company's constitution which is not entrenched within the meaning of s 26A of the Companies Act can be amended by special resolution under s 26 or s 33. Thus, a shareholder who holds under 25% of a company's shares can find himself bound against his will by a modification of a provision in the company's constitution so long as it is carried out in accordance with company law.

89 Fourth, on the private law plane, the most common remedy for a breach of contract is an award of damages. On the company law plane, a shareholder who commences litigation against a company on a claim related to his status as

a member cannot at common law recover damages from the company as a remedy for that claim: *Houldsworth v City of Glasgow Bank* [1874–80] All ER Rep 333 and *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15. That is because an award of damages in these circumstances would constitute the shareholder a creditor of the company and elevate the shareholder into impermissible competition with the company's creditors.

90 Finally, on the private law plane, a shareholders' agreement, just like any other private law contract, can be rectified to bring the written record of the parties' agreement into the form it ought to have been in when executed. On the company law plane, a company's constitution can never be rectified: *Scott v Frank F Scott (London) Limited and others* [1940] Ch 794 ("*Scott*") and *Santos Ltd & Anor v Pettingell & Ors* (1979) 4 ACLR 110.

The private law plane is subordinate to company law

91 In addition to showing that a shareholders' agreement and a company's constitution operates on separate planes, the last three examples I have cited show that company law subordinates a private agreement – such as a shareholders' agreement – to company law on company law matters. To put it another way, on company law matters, company law allows a shareholders' agreement to supplement company law but never to supplant it. As Austin J pointed out in *ACD Tridon* at [165]:

> … Of its nature, *a shareholders' agreement is supplementary to the rights and liabilities of the shareholders conferred by company law.* It does not purport to exclude or replace the shareholders' company law rights. *Indeed, the statutory rights of shareholders cannot, for the most part, be taken away by an agreement.* Instead, *a shareholders' agreement imposes consensual limitations on the way in which certain rights, such as voting rights and the right to transfer shares, may be exercised.* [emphasis added]

92 Company law subordinates a shareholders' agreement to company law on the company law plane even if the shareholders' agreement precedes the company's constitution in time and even if obligations in the shareholders' agreement are the source, whether factually or contractually, of the obligations in the constitution. Any obligation which a company or a shareholder undertakes privately in a shareholders' agreement which is contrary to a mandatory provision of company law must yield to company law.

93 This is typically for three reasons.

94 First, as Austin J pointed out, company law confers many rights on shareholders for their benefit and protection *inter se* and as against the company. If there is a shareholders' agreement running in parallel with a company's constitution, there is no guarantee that *every* shareholder of the company will be a contractual party to that agreement. Therefore, the rights of all shareholders must be governed by company law and not by private agreement.

95 Thus, on the third example (see [88] above), a shareholder who finds himself bound by an amendment to the company's constitution on the company law plane will be bound by that amendment: (a) even if he opposed the amendment; (b) even if the provision in the constitution which is amended is one which has its factual and contractual origin in a shareholders' agreement to which he is a party; and (c) even if the amendment is carried out in breach of the shareholders' agreement. That is so even though his rights under the shareholders' agreement cannot be modified as a matter of private law without his positive assent.

96 Second, company law rules exist not only to benefit and protect shareholders but also to benefit and protect those who extend credit to the

company. Once again, company law must prevail over a private agreement where that might otherwise prejudice creditors.

97 Thus, on the fourth example (see [89] above), the common law rule limiting a shareholder's right to recover damages from the company on a claim related to his status as a member is a limitation imposed ostensibly to protect creditors, as they are outsiders to the company and also to any shareholders' agreement. Thus, no shareholder can contract out of this common law rule by private agreement. Indeed, it was only by statute that the common law rule could be abrogated in English company law: see s 111A of the English Companies Act 1985 (c 6) (UK), now s 655 of the English Companies Act 2006 (c 46) (UK).

98 Finally, a company's constitution is a public document which must be lodged with ACRA and which the public may inspect on ACRA's register and rely upon (see [84] above). Company law therefore ensures that the constitution represents the complete agreement of the shareholders on the company law plane.

99 Thus, on the fifth example (see [90] above), where a provision in a shareholders' agreement is vulnerable to rectification but has been restated in a company's constitution, the shareholders will continue to be bound by the unrectified provision in the constitution on the company law plane until and unless the shareholders amend the constitution in accordance with the Companies Act. That is so even if a court orders rectification of the source provision in the shareholder's agreement. That is because of the public nature of a company's constitution (*Scott* at 802):

> It is quite true that in the case of the rectification of a document, such as a deed inter partes, or a deed poll, the order for rectification does not order an alteration of the document; it

> merely directs that it be made to accord with the form in which it ought originally to have been executed. This cannot be the case with regard to the memorandum and articles of association of a company, for it is the document in its actual form that is delivered to the Registrar and is retained and registered by him, and it is that form and no other that constitutes the charter of the company and becomes binding on it and its members. … In all cases any change in the name or constitution of the company must be registered with the Registrar.

The parties' agreement recognises the separate planes

100 In the case before me, the Investment Agreement expressly recognises that it operates on a plane separate to company law and that it is subordinate to company law. Two provisions make this clear.

101 First, Recital C records the parties' intent in entering into the Investment Agreement as an intent to *regulate* their rights and obligations as shareholders, thereby recognising that those rights and obligations *originate* elsewhere:[79]

> … [the plaintiff and] … [the majority shareholder] … wish to enter into this [Investment] Agreement to, among other things, regulate the rights and obligations … between them as shareholders of [the defendant] and certain aspects of, and their dealings with, [the defendant].

By framing the intent of the Investment Agreement in this way, Recital C acknowledges that the plaintiff's and the majority shareholder's status as shareholders of the defendant does not arise from the Investment Agreement but from the statutory contract that is the defendant's constitution. Indeed, no private contract is capable of conferring the status of shareholders on its parties. Only company law in conjunction with the statutory contract which is the defendant's constitution can do that. In short, Recital C is explicit acknowledgment that the parties to the Investment Agreement intend it – as Austin J noted in *ACD Tridon* – to "[impose] consensual limitations on the way

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[79] Defendant's affidavit filed on 10 August 2017 at p 28.

in which certain rights, such as voting rights and the right to transfer shares, may be exercised".

102 Second, and most importantly, cl 27.10 explicitly provides that the Investment Agreement yields to company law:[80]

> [the defendant] … shall not be bound by any provision of this [Investment] Agreement *to the extent that it would constitute an unlawful fetter on any of its statutory powers* … [emphasis added]

Clause 27.10 expressly disavows any attempt by the Investment Agreement to operate on the company law plane in competition with company law. It acknowledges that the Investment Agreement operates on a plane subordinate to company law as far as issues of company law are concerned and that it is company law which decides the extent to which the Investment Agreement can bind the defendant on matters of company law.

103 These provisions show that it was the parties' intent, objectively ascertained, that the Investment Agreement was to be subordinate to company law, which confers primacy on the defendant's constitution.

Company law determines validity of corporate acts

104 A company's constitution, by virtue of s 23(1) of the Companies Act, determines a company's corporate capacity and therefore the validity of its acts. As noted in *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR(R) 121 at [44], s 25(1) of the Companies Act has made corporate capacity very much a non-issue for outsiders to the company. Nevertheless, the *ultra vires* doctrine retains considerable relevance for insiders to the company. Shareholders can rely on the *ultra vires* nature of a company's act in litigation

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80 Defendant's affidavit filed on 10 August 2017 at p 77.

against the company (s 25(2)(*a*) of the Companies Act). And both the shareholders and the company can rely on the *ultra vires* doctrine in litigation against present or former officers of the company (s 25(2)(*b*) of the Companies Act). Further, where an *ultra vires* act is to be carried out in the future pursuant to a contract, the court may, if it considers it just and equitable, set aside and restrain the performance of the contract (s 25(3) of the Companies Act).

105 A shareholders' agreement, on the other hand, says nothing about – and indeed cannot in law say anything about – the validity of corporate acts. That concept is the exclusive domain of company law. No doubt the defendant has a contractual obligation to its shareholders under cl 11.2 of the Investment Agreement not to adopt or approve its annual accounts without the plaintiff's consent. But the only consequence of acting in breach of that obligation is civil liability on the private law plane for breach of contract. The corporate act itself remains valid on the company law plane until and unless it is invalidated on that plane in accordance with company law.

106 To be clear, I am prepared to accept the defendant's submission that an arbitral tribunal is empowered to grant the relief sought by the plaintiff in this case. The Court of Appeal in *Tomolugen* noted that the IAA confers wide remedial power on arbitral tribunals: *Tomolugen* at [97]. Section 12(5)(*a*) of the IAA stipulates that an arbitral tribunal "may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court". This is of course subject to public policy considerations and the rights of third parties.

107 But my readiness to accept the defendant's submission on relief does not take the defendant's case for a stay very far. The plaintiff raises the issue of relief not to argue against a stay on the grounds that an arbitral tribunal is unable

to grant the relief it seeks in this litigation. The plaintiff raises the issue as support for its principal argument that the two agreements in question here – the Investment Agreement and the Articles – are of a fundamentally different character and that the dispute in this litigation arises out of the agreement which is not subject to an arbitration clause. I accept the plaintiff's submissions on this issue.

The plaintiff's careful framing of this litigation

108 It is to my mind irrelevant that, as the defendant argues, the Investment Agreement contains an express provision requiring the defendant to comply with the Articles of Association. It is true that the Articles are silent on the defendant's obligation to comply with the Articles. But that is not because the true source of that obligation is the Investment Agreement. The Articles are silent on this obligation because the Articles operate on the company law plane and a company's obligation to comply with its Articles is axiomatic as a matter of company law. That obligation arises by force of law under s 39 of the Companies Act. In my view, the true source of the defendant's obligation to comply with the Articles is neither the Articles nor the Investment Agreement but company law itself.

109 Counsel for the defendant contends that the plaintiff is trying to "slice and dice to find a way to get into court rather than into arbitration".[81] Even if this is so, absent bad faith, a litigant has the freedom to frame his cause of action in any way which is more advantageous to him: *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [47]–[48]. There is no suggestion that the plaintiff is acting in bad faith in choosing to frame its cause of action in this litigation as arising from a breach of the Articles alone.

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81 Notes of Argument dated 27 October 2017 at p 17.

110 Indeed, no such argument could succeed. An action in which a plaintiff deliberately selects and pursues one available cause of action and omits another is not by that fact alone an action brought in bad faith. Nor does it become one simply because the cause of action which is omitted is arguably governed by an arbitration agreement while the cause of action which is pursued is arguably not. Clause 29.2 of the Investment Agreement does not operate to oblige the plaintiff to pursue a cause of action against the defendant which arises both under the Articles and under the Investment Agreement in a manner which triggers cl 29.2.

111 It therefore appears to me that the connection between this litigation and the Articles – and the omission of any reference to the Investment Agreement in both the plaintiff's claim and the defendant's currently foreshadowed defences to the claim – is a matter of substance and not simply a contrivance arising from the form in which the plaintiff has chosen to frame this litigation.

Does cl 29.2 of the Investment Agreement apply to disputes arising under the Articles?

112 I now consider whether the parties' objectively-ascertained intention is that cl 29.2 of the Investment Agreement should apply to disputes arising from the separate legal relationship between the parties created by the Articles.

113 As a starting point, the fact that the parties have two agreements which, as I have found, create two separate legal relationships operating on two separate legal planes points away from an objectively-ascertainable intention that a dispute arising out of one agreement should be the subject of an arbitration clause found in the other agreement. In this regard, the case of *Robotunits Pty Ltd v Mennel* [2015] VSC 268 ("*Robotunits*") is instructive.

114 In that case, a company commenced an action against a former director, who was also a shareholder and employee of the company. The company alleged that the director had caused the company to make certain payments to him without a basis at law or in equity, and therefore in breach of his duties as a director. The company and the director were parties to an express shareholders' agreement and also to an express employment agreement. The shareholders' agreement contained an arbitration clause while the employment agreement did not. The director applied to stay the action on the basis of the arbitration agreement in the shareholders' agreement: *Robotunits* at [4]–[5] and [8].

115 The court in *Robotunits* found that there were two matters to be determined in the company's litigation against the director. First, whether the *shareholders'* agreement provided a legal or equitable basis for the director to cause the company to make the payments. Second, whether the *employment* agreement provided a legal or equitable basis for the director to cause the company to make the payments.

116 The court held that the first matter fell within the scope of the arbitration agreement in the shareholders' agreement, whereas the second did not. In reaching its decision, the court noted that the arbitration agreement did not expressly limit its scope to matters relating to the shareholders' agreement. But a reasonable person in the position of the parties would not have understood the arbitration agreement to extend to matters arising outside the shareholders' agreement. Matters arising under the employment agreement did not therefore fall within the arbitration clause, because the employment agreement governed "the parties' relationship as employee and employer and thus relates to a separate transaction altogether": *Robotunits* at [28], [47] and [56]–[58].

117 Similarly, in the case before me, as I have found, the Investment Agreement and the Articles create two separate legal relationships between the parties operating on two separate planes. A reasonable person in the position of the parties would thus not have understood the arbitration agreement in the Investment Agreement, without more, as extending to disputes arising under the Articles.

118 The defendant argues for three reasons that the parties *did* manifest an objectively-ascertainable intent that cl 29.2 should apply to disputes arising under the Articles.[82] First, the Investment Agreement stipulates the Articles as an agreed form document. Second, the Investment Agreement expressly provides that it is to prevail over any conflicting or inconsistent provision in the Articles. Finally, the Investment Agreement also expressly provides that the Articles are a part of the parties' "entire agreement".

119 For the reasons that follow, I reject all three of these arguments.

Articles are not incorporated into the Investment Agreement

120 By its very words, cl 29.2 applies only to "this Agreement".[83] The words "this Agreement" in the context of the Investment Agreement refer to the Investment Agreement alone, and do not extend to the agreed form documents. The drafting convention used in the Investment Agreement distinguishes between "this Agreement", *ie*, the Investment Agreement, and the agreed form documents. Thus, whenever the Investment Agreement refers to an agreed form document, and in particular to the Articles, it does so expressly. This can be seen, for example, in the following provisions of the Investment Agreement:

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82 Defendant's written submissions dated 26 October 2017 at para 23.

83 Defendant's affidavit filed on 10 August 2017 at p 80.

(a) Clause 6.3 provides:[84]

> [e]ach of [the majority shareholder and] the [plaintiff] … waives any rights of pre-emption and any other restrictions on the issue of shares conferred on it (if any) which may exist by virtue of *the articles of association of the Company* (as in force as at the date of this Agreement), *the Articles of Association, this Agreement* or otherwise … [emphasis added]

(b) Clause 11.4 provides:[85]

> [n]otwithstanding any other provision of *this Agreement or the Articles of Association*, any right of action … [the defendant] … may have against (a) [the plaintiff] … shall be prosecuted on behalf of [the defendant] solely by the [[D]] Directors … [emphasis added]

(c) Clause 17.9.1 provides:[86]

> any Drag Shares held by a Dragged Seller on the date of such default shall cease to confer the right to receive notice of … any general meeting of [the defendant] … and the relevant shares shall not be counted in determining the total number of votes which may be … required under *the Articles or this Agreement* … [emphasis added]

(d) Clause 18.2 provides:[87]

> … a Shareholder … may Encumber … the Ordinary Shares … which it holds in favour of a bona fide third party financial institution (the "**Lender**"), provided that at the time of creation … the Lender acknowledges … that any such Encumbrance is subject … to the terms of *this Agreement and the Articles of Association* … [emphasis added in italics]

(e) Clause 18.6 provides:[88]

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84 Defendant's affidavit filed on 10 August 2017 at p 51.

85 Defendant's affidavit filed on 10 August 2017 at p 57.

86 Defendant's affidavit filed on 10 August 2017 at pp 66 – 67.

87 Defendant's affidavit filed on 10 August 2017 at p 68.

88 Defendant's affidavit filed on 10 August 2017 at p 69.

> [e]ach Shareholder may assign all of its rights under *this Agreement* … in accordance with *this Agreement and the Articles of Association* … [emphasis added]

(f) Clause 23 provides:[89]

> [i]f there is any conflict or inconsistency between the provisions of *this Agreement* and *the Articles of Association* … *this Agreement* shall prevail. If requested to do so by [the plaintiff] or [the majority shareholder], [the defendant] shall procure, and each of [the plaintiff] and [the majority shareholder] will, severally, use their respective rights and powers to procure (so far as they are able) that *the Articles of Association* … are amended so as to accord with and give effect to the provisions of *this Agreement* … [emphasis added]

121 Further, where the Investment Agreement intends to extend the scope of cl 29.2 so as to apply to a dispute under an agreed form document, it again says so expressly. One of the agreed form documents under the Investment Agreement is the Deed of Adherence, by which future shareholders are to accede to the Investment Agreement. The *pro forma* Deed of Adherence in the Investment Agreement incorporates cl 29.2 expressly. Clause 5 of the Deed of Adherence states "[t]he terms of clauses 29.2 to 29.11 … of the Agreement shall apply to the Deed as if they were incorporated in it."[90] No such clause is found in the Articles of Association.

122 I therefore find that the parties' objectively-ascertained intention was that the words "this Agreement" in cl 29.2 of the Investment Agreement should encompass the Investment Agreement alone.

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89 Defendant's affidavit filed on 10 August 2017 at p 73.

90 Defendant's affidavit filed on 10 August 2017 at p 127.

Supremacy clause

123 Next, the defendant relies on cl 23 of the Investment Agreement which provides that the Investment Agreement is supreme and prevails over any conflicting or inconsistent provision in the Articles:[91]

> **23. Supremacy of this agreement**
>
> If there is any conflict or inconsistency between the provisions of this Agreement and the Articles of Association … this Agreement shall prevail. If requested to do so by [the plaintiff] or [D], [the defendant] shall procure, and each of the [the plaintiff] … and [the majority shareholder] will, severally, use their respective rights and powers to procure (so far as they are able) that the Articles … are amended so as to accord with and give effect to the provisions of this Agreement …

I shall refer to cl 23 as "the supremacy clause".

124 The defendant submits that, by the supremacy clause, the parties "specifically agreed that [the Articles] were to be controlled by the Investment Agreement through clause 23".[92] I reject this argument also.

125 The supremacy clause operates on the private law plane, not on the company law plane. Its commercial intent is two-fold. First, it creates an immediate contractual obligation requiring the parties to adhere to their rights and obligations under the Investment Agreement and to disregard their rights and obligations under the Articles where those rights or obligations are in conflict or are inconsistent. Second, it creates a longer-term contractual obligation requiring the parties to address and resolve that conflict or inconsistency by amending the Articles on the company law plane. Indeed, if the effect of the supremacy clause was as the defendant submits, there would be no need for the second half of the supremacy clause imposing the longer-term

91 Defendant's affidavit filed on 10 August 2017 at page 73.

92 Defendant's affidavit filed on 10 August 2017 at p 73.

contractual obligation. The supremacy clause would simply prevail over the Articles on the company law plane also simply by virtue of the conflict of inconsistency.

126 Further, the parties could not have intended a "conflict or inconsistency" within the meaning of cl 23 to arise simply because a provision which is present in the Investment Agreement is absent from the Articles. If that were the case, the effect of cl 23 would be to import automatically into the Articles all of the terms which are found in the Investment Agreement but which are absent in the Articles, and to remove from the Articles all of the terms found in the Articles which are absent from the Investment Agreement. The effect would be to make the Articles identical in content to the Investment Agreement, making the entire scheme of having the two separate agreements run in parallel on their separate planes entirely redundant. Not only does such an outcome serve no commercial purpose, it is also contrary to the expressly-stated purpose of the Investment Agreement, which was to *supplement* the Articles.

127 It is also arguable that, if the effect of the supremacy clause is as argued by the defendant, then the entire Investment Agreement constitutes an impermissible attempt to amend the Articles without complying with the procedure in s 26 of the Companies Act and without making the amendments manifest to the public on ACRA's register as required by the Companies Act.

128 I therefore reject the argument that cl 23 of the Investment Agreement operates to allow cl 29.2 of that agreement to "prevail" over the absence of an arbitration agreement in the Articles.

Entire agreement clause

129 Finally, the defendant relies on cl 24.1[93] of the Investment Agreement to argue that the parties' "entire agreement" includes not just the Investment Agreement but also the "Transaction Documents" (which, as defined, include the Articles)[94] and the heads of agreement. I set out cl 24 in full, including its heading, so that cl 24.1 can be seen in context:[95]

> **24. ENTIRE AGREEMENT AND NON-RELIANCE**
>
> 24.1 This Agreement, the other Transaction Documents and the Heads of Agreement constitute the entire agreement and supersedes any previous agreements between the parties relating to the subject matter of this Agreement.
>
> 24.2 Each party acknowledges and represents that it has not relied on or been induced to enter into this Agreement by a representation, warranty or undertaking ...
>
> 24.3 No party is liable to another party (in equity, contract or tort (including negligence), under the Misrepresentation Act or in any other way) for a representation, warranty or undertaking that is not set out expressly in this Agreement, any other Transaction Document or the Heads of Agreement.
>
> 24.4 Each party to this Agreement acknowledges and represents that it has not relied on or been induced to enter into this Agreement, any other Transaction Document or the Heads of Agreement by any representation, warranty or undertaking ...
>
> 24.5 Nothing in this clause 24 shall have the effect of restricting or limiting any liability arising as a result of any fraud, wilful misrepresentation or wilful concealment.

130 I reject this argument of the defendant also. The commercial intent of cl 24.1 is not to constitute the Investment Agreement, the Transaction Documents (including the Articles) and the heads of agreement (which preceded the Investment Agreement) a single monolithic "Agreement", which then comes

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93 Defendant's affidavit filed on 10 August 2017 at pp 73 – 74.

94 Defendant's affidavit filed on 10 August 2017 at page 42, cl 1.1.

95 Defendant's affidavit filed on 10 August 2017 at pp 73 – 74.

within the meaning of the words "this Agreement" in cl 29.2 of the Investment Agreement and therefore subject to the arbitration agreement there.

131 As noted in *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*") at [25]:

> [e]ntire agreement clauses appear as a smorgasbord of variously worded provisions. *The effect of each clause is essentially a matter of contractual interpretation and will necessarily depend upon its precise wording and context.* Generally, such clauses are conducive to certainty as **they define and confine the parties' rights and obligations within the four corners of the written document thereby precluding any attempt to qualify or supplement the document by reference to pre-contractual representations**. [emphasis added in bold]

Taking cl 24 of the Investment Agreement as a whole, and in particular light of its stated purpose in its heading, I am satisfied that the commercial intent of cl 24.1 in the context of the Investment Agreement is exactly as was stated in *Lee Chee Wei* – to preclude any attempt to argue reliance on pre-contractual representations.

132 I therefore reject the argument that cl 24 of the Investment Agreement constitutes the Articles a component of the parties' "Agreement" within the meaning of cl 29.2 of the Investment Agreement.

Fractured dispute resolution

133 I am cognisant that the effect of this construction of cl 29.2 means that disputes under the Investment Agreement will be resolved by arbitration whereas disputes under the Articles will be resolved by litigation, even though a given dispute may engage provisions in the two contracts which are identical in form and content. Nevertheless, I do not consider that this result contradicts the principle established by *Fiona Trust & Holding Corporation v Privalov*

[2008] 1 Lloyd's Rep 254 ("*Fiona Trust*"). In that case, the House of Lords recognised that commerce favours one-stop dispute resolution. Lord Hoffmann said at [13] that:

> … the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered … to be decided by the same tribunal. The clause should be construed in accordance with this presumption *unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.* [emphasis added]

134 As the Court of Appeal said in *Rals International* at [34], "the rule of construction formulated in *Fiona Trust* is not to be applied irrespective of the context in which the underlying agreement was entered into or the plain meaning of the words." Closer to the context of this case, Austin J stated in *ACD Tridon* at [177]:

> … I have been urged to resist such a construction of the clauses, on the ground that the Court should not attribute to the parties an intention to have different parts of their dispute resolved before different tribunals … That does not seem to me to be a compelling argument in the case of a Shareholders' Agreement, where the contractual arrangements are superimposed on company law rights. In any case, where the language is clear, and clearly leads to bifurcated dispute resolution processes, there is no warrant to depart from it.

In the case before me, for the reasons I have set out above, the objectively-ascertained intention of the parties leads to the conclusion that cl 29.2 does not apply to the Articles. The result I have arrived at is therefore in accordance with the parties' commercial intent. And in this litigation, no practical difficulty arises from this construction because the dispute underlying this litigation is confined to the company law plane without implicating the Investment Agreement, whether on the plaintiff's claim or on the defendant's foreshadowed defences.

Gulf Hibiscus

135 Finally, I turn to the defendant's submissions on *Gulf Hibiscus Ltd v Rex International Holding Ltd and another* [2017] SGHC 210 ("*Gulf Hibiscus*"). *Gulf Hibiscus* involved a dispute between three shareholders. Their shareholders' agreement contained an arbitration clause. The plaintiff commenced litigation against the defendants, seeking relief for conspiracy, unjust enrichment and wrongful interference. None of the defendants were parties to the shareholders' agreement. They applied to stay the action under the court's case management powers.

136 The defendant relies on the following portions of *Gulf Hibiscus*:[96]

> 83 It is true, as the Plaintiff submits, that the conspiracy claims do not directly invoke the [shareholders' agreement]. Nonetheless … these claims are still likely to involve a determination of the nature of the actions taken or omissions of various persons, including the directors and the Shareholders. In particular, the conduct of the Shareholders in this regard is a matter governed by the [shareholders' agreement]. As submitted by the Defendants, the gravamen of the complaint by the Plaintiff is the dilution of its interests in Lime PLC and thus its say or participation in the various associated companies. In determining that essential issue, the findings of the court … is likely to overlap with the various findings that may be made in the arbitration between the Plaintiff and RME in relation to the actions or omissions of the Shareholders.
>
> …
>
> 85 At a holistic level, it is unlikely for the connections between the conspiracy claims here and the actions or omissions of the Shareholders as bound by the [shareholders' agreement] to be untangled and separated. Furthermore, given that the risk of inconsistent findings between the arbitral tribunal and the court is a relevant consideration in determining whether [a] stay should be granted … another reason thus operates: there is to my mind a significant risk that there may be inconsistent findings between the court proceedings and arbitration …

96 Defendant's written submissions dated 26 October 2017 at para 56.

137 The defendant acknowledges that the court in *Gulf Hibiscus* did not consider s 6(1) of the IAA and instead considered only whether the litigation should be stayed in the exercise of the court's case-management powers. Indeed, that is made clear at [69] of *Gulf Hibiscus*. To my mind, that makes all the difference. As the court in *Gulf Hibiscus* noted at [59]:

> … The power to order a case management stay is part of the court's own inherent and immediate powers to control proceedings before it. While the existence of an arbitration agreement between the parties would give strong grounds for a stay of court proceedings taken in contravention of that agreement, there are already express statutory provisions conferring the power to stay under s 6 of the [IAA] … Instead, the *inherent power is invoked to deal with situations without an express agreement between the relevant parties to the court proceedings. Furthermore, the jurisprudential basis for the exercise of the power to stay in the absence of an agreement is the wider need to control and manage proceedings between the parties for a fair and efficient administration of justice; it is not predicated on holding parties to any agreement* – the absence of such an agreement is therefore irrelevant. [emphasis added]

138 The considerations which arise when a court is asked to grant a case-management stay are conceptually quite different from those which arise when a court is asked to stay litigation under s 6(1) of the IAA. A stay under s 6(1) of the IAA is mandatory and the considerations are narrow. The court is concerned only with whether the applicant for the stay has established a *prima facie* case that the one or more of the matters in the litigation are in fact the subject of an arbitration agreement between the parties which is not null and void, inoperable or incapable of being performed. If they are, the stay is mandatory. If they are not, there is no *statutory* basis for a stay.

139 A case-management stay, on the other hand, is entirely discretionary. The considerations are wide. The court considers factors such as whether there will be a duplication of the witnesses and the evidence and whether there is a risk of inconsistent findings of fact or holdings of law between the tribunal and

the court: *Gulf Hibiscus* at [63]. It was with these "wider" factors in mind that the court in *Gulf Hibiscus* noted that it was unlikely for the connections between the claims and the shareholders' agreement to be untangled and separated.

140 Here, as noted at [35], the defendant seeks only a statutory stay under s 6(1) of the IAA, not a case management stay. *Gulf Hibiscus* does not assist the defendant. It also does not assist the defendant that there appear to be parallel arbitration proceedings touching on the 2015 Accounts.[97]

Actions and omissions cannot be untangled or separated

141 The defendant alleges that the connections between the plaintiff's claim in this litigation and the actions or omissions of the defendant in the light of its obligations under the Investment Agreement cannot be "*untangled and separated*".[98] I do not find that to be the case. As I have shown, all of the claims and all of the foreshadowed defences raise only company law issues, without implicating the Investment Agreement.

142 In any event, even if the defendant's submission were correct, it does not mean that this litigation falls with the scope of the arbitration agreement in the Investment Agreement. Unless it can succeed on that critical issue, the defendant has no entitlement to a stay under s 6(1) of the IAA. I have found against the defendant on that issue. The defendant advances no other basis for a stay.

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97 Defendant's affidavit filed on 10 August 2017 at para 44.

98 Defendant's written submissions dated 26 October 2017 at para 57.

Conclusion

143 Clause 29.2 of the Investment Agreement on its proper construction applies only to the legal relationship between the parties which arises out of the Investment Agreement itself. The Articles create a separate legal relationship between the parties which operates a separate legal plane. A dispute under the Articles is not within the scope of cl 29.2 and are governed by recourse to the courts in accordance with ordinary principles of company law. This dispute arises only under the Articles. The defendant has failed to establish the only basis on which it sought to stay this litigation. The assistant registrar should have dismissed the application. The plaintiff's appeal against the assistant registrar's decision to the contrary ought to be allowed.

Arbitrability

144 I have found that the "matter" in this litigation is not the subject of the parties' arbitration agreement, and therefore a statutory stay under s 6(1) of the Companies Act is not available. But it also seems to me that it could be argued that an application to challenge the filing of documents on ACRA's register is not arbitrable because the outcome could affect a public register and thereby could affect third parties who may have acted in reliance on the accuracy of that register.

145 Before the assistant registrar, the plaintiff appears to have conceded that the dispute underlying this litigation is arbitrable.[99] However, on appeal before me, the plaintiff raised the issue of arbitrability in its written submissions, albeit only obliquely:[100]

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99 Defendant's affidavit filed 3 November 2017 at page 253, line 2.

100 Plaintiff's written submissions dated 26 October 2017 at para 49(c).

> [The defendant] has stated that the invalidation of the accounts will have a significant impact as they need to be provided to banks and other creditors in order to secure funding and maintain transactions. The *in rem* effect on third party rights militate against the matter falling within the ambit of arbitration.

The plaintiff is making two points in this paragraph of its written submissions, only one of which I am prepared to accept might be valid.

146 The first point which it makes, and the one which I reject, is that the order which the plaintiff seeks in this litigation will operate *in rem*. That is not so. If the plaintiff succeeds in this litigation, it will secure an order invalidating the approval of the accounts which the plaintiff alleges has taken place. But that order will operate only as between the plaintiff and the defendant, as the parties to this litigation. It will not operate against the whole world. It would, for example, be open to any person not a party to this litigation – such as the majority shareholder – to proceed on the basis that the accounts had been validly approved. So too, a creditor who had secured a copy of the defendant's audited accounts from ACRA's register and relied upon them in making a credit decision would not be bound by any invalidation which might be ordered in this litigation.

147 The second point which the plaintiff makes, and which I accept might be a valid consideration on the question of arbitrability, is that any order which might be made in this litigation has the potential to affect third party rights. I bear in mind that the plaintiff made the point on arbitrability in its written submissions only in passing and did not pursue the point in oral submissions with any great enthusiasm. I have therefore rested my decision on the proper construction of s 6(1) of the IAA and cl 29.2 of the Investment Agreement and not on arbitrability. But since the plaintiff has raised arbitrability, is nevertheless apposite that I make a few remarks on it.

148 As the Court of Appeal in *Tomolugen* noted, there is a class of disputes which is not capable of settlement by arbitration. At the core of this class are disputes which are of a public character and disputes whose outcome will affect the interests of persons beyond the immediate disputants. An agreement to resolve any such dispute by arbitration is ineffective and cannot ground a stay: *Tomolugen* at [71] and [74].

149 The limits of arbitrability where third party rights intrude have been explored in cases such as *Larsen Oil*, *Tomolugen*, and *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333 ("*Fulham Football*").

150 *Larsen Oil* concerned a dispute over payments made by a company and its subsidiaries under a management agreement, before the appointment of liquidators. The liquidators, after appointment, commenced litigation against the counterparty to the management agreement, seeking to avoid the payments on the grounds that they were unfair preferences, transactions at an undervalue or payments made with intent to defraud. The counterparty applied to stay the litigation in favour of arbitration, relying on an arbitration clause in the management agreement.

151 The Court of Appeal accepted that there is ordinarily a presumption of arbitrability. Nevertheless, in the context of a company under the control of insolvency officeholders, the court drew a distinction between a dispute arising only upon insolvency and by reason only of the insolvency regime (an insolvency law dispute) and a dispute arising from the insolvent company's pre-insolvency rights and obligations (a private law dispute).

152 The Court of Appeal held that an insolvency law dispute is not arbitrable. Part of the purpose of the insolvency regime is to enable insolvent

companies to recover assets for the collective benefit of the company's creditors. This very often requires pursuing insolvency law claims against the company's pre-insolvency management. This aspect of the insolvency regime's purpose could be compromised if management were permitted to bind the company's insolvency officeholders to arbitrate insolvency law disputes. Further, the insolvency regime envisages that a single insolvency law dispute could arise against multiple persons, some of whom might be counterparties to an arbitration agreement with the insolvent company but others of whom might not be counterparties to *any* agreement with the insolvent company at all, let alone an arbitration agreement. Having all insolvency law disputes determined under the collective procedure set out in the insolvency regime, regardless of the presence or scope of an arbitration agreement, prevents conflicting findings by different adjudicators: *Larsen Oil* at [44]–[46].

153 On the other hand, the Court of Appeal considered that a private law dispute is arbitrable, at least where it does not affect the substantive rights of the creditors. Where an arbitration agreement obliges a company's insolvency officeholders to arbitrate a private dispute, there is usually no good reason not to give effect to the arbitration agreement: *Larsen Oil* at [51]. This is despite the fact that the arbitration agreement affects the *procedural* rights of all of the insolvent company's creditors in the following two senses. First, the creditors collectively have the real economic interest in the outcome of the private law dispute but can be compelled to submit to having the dispute resolved through arbitration even though the creditors are not parties to any arbitration agreement: *Larsen Oil* at [48]. Second, an arbitration agreement can be seen as an attempt to contract out of the specialised procedure for resolving private law disputes which is mandated by the insolvency regime, *ie*, by the lodgement and adjudication of proofs of debt (*Larsen Oil* at [49]). But where an arbitration

agreement affects the *substantive* rights of the creditors, the liquidator cannot be compelled to arbitrate the private law dispute: *Larsen Oil* at [50].

154 The facts of *Tomolugen* have been stated at [45] above. The Court of Appeal in *Tomolugen* held that the liquidation of an insolvent company is not arbitrable because it is a process in which the public has an interest. The interest arises because any state's insolvency regime necessarily reflects public policy in how to distribute amongst the company's creditors the inevitable loss arising from the company's insolvency and also the point at which the state should intervene in the affairs of the insolvent company to mandate that distribution. The public interest in insolvency is why public notice of an application for an insolvent winding-up must be given by way of advertisement as required by the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed). On the other hand, litigation under s 216 of the Companies Act does not engage the public interest. That class of litigation almost always arises in the context of a solvent company and is concerned with the shareholders' private interest in protecting their commercial expectations. That is why an application under s 216 of the Companies Act does not have to be advertised, even if winding up is sought as relief: *Tomolugen* at [82]–[89].

155 *Tomolugen* also considered the case of *Fulham Football*. In that case, the appellant ("Fulham"), was a member of the second respondent ("FAPL"). As a member of FAPL, Fulham was required to comply with FAPL's articles of associations and rules, and also with the rules of the English Football Association ("the FA rules"). Fulham presented a petition under s 994 of the English Companies Act 2006, which is substantially similar to s 216 of the Companies Act. Fulham alleged that the first respondent had breached the FA rules and had thereby caused FAPL to conduct its affairs in a manner which was unfairly prejudicial to Fulham's interests. The first respondent applied to stay

the litigation in favour of arbitration, relying on the arbitration clauses in FAPL's rules and the FA rules. Fulham resisted the stay application, arguing that a petition under s 994 of the English Companies Act 2006 was not arbitrable.

156 The English Court of Appeal rejected Fulham's argument and found that the dispute was arbitrable (at [77]):

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

157 The present case is superficially similar to *Fulham Football*. Both cases concern a dispute about an alleged breach of a company's articles of association. But the dispute in *Fulham Football* was entirely contractual. As the English Court of Appeal held, the parties' dispute there did not "engage the rights of creditors or impinge on statutory safeguards imposed for the benefit of third parties". That is not the case in the present litigation: statutory safeguards for the benefit of third parties are impinged upon.

158 Just as the liquidation process (see [154] above) engages statutory safeguards for the benefit of third parties, so too does a company's obligation to lodge documents with ACRA under the Companies Act. ACRA's register is the public face of a company. Thus, the register is open to inspection by any person for any reason or for no reason subject only to payment of the prescribed fee: s 12(2) of the Companies Act. There is an obvious public interest in ensuring that a company fulfils its filing obligations. Thus, a failure to file documents as required by the Companies Act is a criminal offence: s 407(1) of the Companies Act. And any member or creditor of a company which is in default of a filing obligation can, if the default is not cured after 14 days' notice, seek a court order to compel the company and its officers to comply with that obligation: s 13(1) of the Companies Act. There is equally a public interest in ensuring that a company, in any document which it lodges, takes care to state accurately the particulars required by the Companies Act. Thus, s 12B of the Companies Act provides that a company cannot correct any particular recorded in ACRA's register without a Court order. The only exception is if the particular to be corrected is a mere typographical or clerical error which is unintended and has not caused prejudice to any person. Only in that case does the Companies Act permit ACRA's register to be corrected without a court order under s 12C or s 12D of the Act.

159 A company's obligation to lodge its accounts under the Companies Act is of a particularly public character. The purpose of that obligation is so that creditors and potential creditors can access the accounts to assess the creditworthiness of the company before taking a decision to extend credit to or withdraw credit from the company. That is why the Companies Act requires a company's accounts to reflect a true and fair view of its financial position and performance and, if it is a parent company, to be consolidated to reflect a true and fair view of the group's financial position and performance: ss 201(2) and

201(5) of the Companies Act. That is also why the Companies Act requires a company's accounts to be lodged and available for public inspection: s 197(2) of the Companies Act read with Regulations 36(1)(*c*) and 36(2) of the Companies (Filing of Documents) Regulations (Cap 50, Rg 7, 2005 Rev Ed).

160 I am conscious that the "matter" in this litigation, as I have found, is whether the defendant has adopted or approved the 2015 Accounts in breach of the Articles. Whether the 2015 Accounts reflect a true and fair view of the defendant's financial position and performance for the 2015 financial year is no part of the dispute in this litigation. But if the plaintiff is correct: (a) the public face of the defendant has disclosed inaccurate information – to put it neutrally – to its creditors and potential creditors since August 2017; and (b) that information will have to be expunged from the register. To my mind, that engages the public interest in the "matter" which is at the heart of this litigation.

161 I need say nothing further on arbitrability. As I have said, the plaintiff raised it only obliquely in its written submissions and did not argue it with any great enthusiasm in its oral submissions. In any event, having rested my decision on the proper construction of s 6(1) of the IAA and cl 29.2 of the Investment Agreement, it is not necessary for me to decide the question of arbitrability in order to dispose of this appeal.

Conclusion

162 For the reasons above, I have allowed the plaintiff's appeal and set aside the assistant registrar's stay of this litigation. I have also ordered the Company to pay the plaintiff's costs fixed at $18,000 including disbursements.

163 Also before me is the Company's application for an order sealing the court's file in this litigation. That application is premised on a stay being granted and the parties' dispute being referred to arbitration. If I had agreed with the Company's submissions, the sealing order would have followed virtually as a matter of course to preserve the confidentiality of the arbitration. My decision against the Company, however, defeats the premise of the sealing application. I have therefore dismissed the sealing application and ordered the Company to pay the plaintiff's costs of that application fixed at $500 including disbursements.

164 I mentioned at the outset that the defendant's appeal to the Court of Appeal has been brought with my leave. When I granted that leave, the defendant asked for an interim stay of this litigation pending the outcome of the appeal and, in the meantime, for the court's file in this matter to be sealed and for these grounds of decision to be anonymised.[101] That application was not opposed by the plaintiff. It is for that reason that these grounds are now anonymised even though I have held that this litigation is not within the parties' arbitration agreement.

Vinodh Coomaraswamy
Judge

Kelvin Koh, Niklas Wong, Nanthini Vijayakumar and Thara Gopalan
(TSMP Law Corporation) for the plaintiff;
Suresh Nair and Bryan Tan (Nair & Co LLC) for the defendant.

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[101] Certified Transcript, 21 November 2017, page 17, line 4 to page 18, line 6.