IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 28

Originating Summons No 1114 of 2016
Originating Summons No 1115 of 2016

In the matter of Section 15 of the Legal Profession Act (Cap 161, 2009 Rev Ed)

And

In the matter of Originating Summons No 490 of 2016

And

In the matter of Originating Summons No 784 of 2016

And

In the matter of Originating Summons No 787 of 2016

And

In the matter of an application by **HARISH SALVE**, Senior Advocate of India

Harish Salve

… *Applicant*

JUDGMENT

[Legal Profession] — [Admission] — [Ad hoc]

TABLE OF CONTENTS

Re Harish Salve and another matter

[2017] SGHC 28

High Court — Originating Summons Nos 1114 and 1115 of 2016
Steven Chong J
18 January 2017

17 February 2017 Judgment reserved.

Steven Chong J:

Introduction

1 These are two applications for Mr Harish Salve, a Senior Advocate of India ("the Applicant"), to be admitted to represent 20 plaintiffs (to whom I shall refer as the "Sellers") in Originating Summonses Nos 784 and 787 of 2016 ("OS 784" and "OS 787", or collectively "the OSes") to set aside a Final Arbitral Award dated 29 April 2016 (the "Award"). The amount awarded was in excess of $500 million. The defendant in the OSes (to whom I shall refer as the "Buyer") had successfully applied in Originating Summons No 490 of 2016 ("OS 490") for leave to enforce the Award against all 20 Sellers, which the Sellers are also seeking to set aside. Five plaintiffs in OS 787, who are the 5th and 9th to 12th defendants in OS 490, are minors ("the Minors"). The Minors are separately represented in these proceedings though in the arbitration, all 20 Sellers were represented by the same counsel and no specific submission was made in relation to the legal status of the Minors.

2 The applications are somewhat out of the ordinary. For starters, it is the first occasion a Senior Advocate from the Indian Bar is seeking admission. That in itself does not warrant a treatment which is different from the usual cases involving Queen's Counsel from the English Bar. The same regime governs the admission of *all* foreign counsel. Next, the admission is sought for the Applicant to only argue *some* but not all the issues in OS 784 and OS 787. It is acknowledged by the Applicant that the law governing the OSes is Singapore law and those issues which relate to Singapore law will be addressed by Singapore counsel, both of whom are Senior Counsel – Mr Alvin Yeo SC and Mr Lee Eng Beng SC. Finally, the Applicant seeks admission to address the court only on foreign law issues, specifically the disputed issues on Indian law.

3 Given that it is common ground that the setting aside applications in the underlying OSes are governed by Singapore law in particular the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), what then is the relevance of Indian law to the dispute? The Indian law connection stems from the fact that the arbitration arose from an agreement which is subject to Indian law. Essentially, the Applicant claims that the treatment of Indian law on the disputed issues by the majority decision of the Arbitral Tribunal ("the Tribunal") was so wrong that it should be set aside as being contrary to Singapore's public policy. In particular, it is alleged that the Tribunal relied on a High Court decision which had been overruled by the Indian Supreme Court in a case which was successfully argued by the Applicant. What is somewhat curious is that the Indian Supreme Court decision was not raised by any party in the arbitration. It was not even mentioned in the dissenting opinion by the former Chief Justice of the Supreme Court of India ("Dissenting Opinion"). It now appears to occupy centre stage of the Sellers' submission in the OSes. It is also alleged that the

Award exceeded the Tribunal's jurisdiction when it *purportedly* awarded consequential damages in breach of the arbitration agreement.

4 Assuming that Indian law is relevant in the OSes (a point which is disputed by the Buyer), this judgment will examine how such a limited role of the Applicant will fit into the current admission regime. Since foreign law needs to be "proved", what then is the role of the Applicant, particularly when the parties have each retained two experts on Indian law, all of whom are either retired judges of the Indian Supreme Court or former Chief Justices of Indian State Courts? All of the experts have already filed their reports. Under these circumstances, I invited the Sellers' counsel to consider an application under O 28 r 4(3) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") for leave to cross-examine the experts to assist the court hearing the OSes to determine the correct position under Indian law. I considered this both desirable and preferable especially since the substantive arguments to be presented by local counsel in the OSes, insofar as they relate to Indian law, would in turn be entirely dependent on the court's determination of the disputed Indian law issues with reference to the expert reports already before the court. The Sellers, however, declined the invitation and elected, as is their prerogative, to pursue the applications to admit the Applicant.

Background

5 The underlying dispute concerns a Share Purchase and Share Subscription Agreement ("SPSSA") dated 11 June 2008 under which the Buyer purchased the shares held by the Sellers in a company incorporated in India ("the Company").[1] The SPSSA is governed by Indian law, although the Buyer

[1] 1st affidavit of Doralyn Chan Hui Min in OS 1114 dated 28 October 2016 ("DCHM 1st Affidavit"), para 20.

disputes whether the arbitration agreement encapsulated in Article 13.14 of the SPSSA ("Arbitration Agreement") is governed by Indian law as well. The transaction closed on 7 November 2008 with the Buyer acquiring a controlling stake in the Company.

6 Trouble surrounding the SPSSA stemmed from an investigation into the Company by US regulators and authorities. These investigations were ongoing during the period of negotiations leading up to the signing and completion of the SPSSA.[2] Although the Buyer was aware that investigations were being carried out, the parties disagree about the quality of its knowledge in relation to the source and severity of the investigations when it entered into the SPSSA. As things panned out, under the Buyer's direction, the Company eventually signed a consent decree with a US regulator in January 2012. The cost of compliance with this consent decree is estimated at US$35m to US$50m per year.[3] The Company also had to fork out a further US$500m as a penalty in a settlement agreement with a US government department on 13 May 2013.

The arbitration

7 Against this backdrop, the Buyer initiated arbitration proceedings against the Sellers on 12 November 2012. The thrust of the Buyer's claim was that the Sellers had fraudulently misrepresented the level of risk posed by the investigations and suppressed key reports evidencing widespread and intentional breaches.[4] It was averred that this conduct constituted fraud under the Indian Contract Act 1872 (Act No 9 of 1872) ("Indian Contract Act") and

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2 DCHM 1st Affidavit, paras 17, 18 and 21.

3 DCHM 1st Affidavit, para 22.

4 1st affidavit of Choo Li Yuet Victoria in OS 1114 dated 17 November 2016 ("VCLY 1st Affidavit"), para 26; 1st affidavit of the Sellers' representative (the first plaintiff in OS 784) in OS 784 dated 14 August 2016 ("MMS 1st affidavit"), para 28.

that but for the fraud, the Buyer would not have acquired equity in the Company at all. The Buyer did not seek rescission but relied on s 19 of the Indian Contract Act to seek damages that would put it in the same position as if the representations had been true.[5] It also sought pre-award and post-award interest.

8 Before the Tribunal, the Sellers vigorously contested their liability for fraud. I need not traverse their defences in detail as they are not relevant for present purposes. It is however worth noting that the Minors did not run any defences of proportionality, incapacity or non-attribution of their guardians' fraud *in contrast* to the position they are now adopting for the purposes of the OSes. In addition, the Sellers disputed the Buyer's computation of damages and the appropriate measure of damages under s 19 of the Indian Contract Act.[6] It was argued that the Buyer had not suffered any actionable loss. Central to this argument was the fact that the Buyer had managed to enter into a share swap agreement with a third party ("Third Party") sometime in April 2014. The Buyer sold the shares acquired under this swap in the open market on 21 April 2015 for a sum exceeding the Buyer's original investment in the Company.[7]

The Award

9 On 29 April 2016, by a majority of 2–1, the Tribunal rendered the award. The Tribunal found that the Sellers were liable for fraudulently misrepresenting and/or concealing from the Buyer the source and severity of the Company's regulatory problems and that the elements of s 17 of the Indian Contract Act had been satisfied.[8] The fact that the Buyer had agreed to forgo any express

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5 MMS 1st affidavit, p 422.

6 DCHM 1st affidavit, para 31.

7 DCHM 1st affidavit, para 32.

8 MMS 1st affidavit, p 475.

representation, warranty or liability in the SPSSA did not preclude the Buyer from suing for fraud.

10 Of particular interest is the Tribunal's basis for calculating the damages awarded, for it is the focus of the contest in the OSes. The Tribunal recorded that it was "not disputed" that under Indian law, the measure of damages recoverable under s 19 of the Indian Contract Act would be similar to those recoverable for fraudulent misrepresentation under general tort principles.[9] This was taken to mean that in deceit claims, the plaintiff is entitled to be put back in the position he would have been in had the wrong not been committed. For this proposition, the Tribunal relied on the Gujarat High Court decision of *R C Thakkar v Gujarat Housing Board* AIR 1973 Guj 34 ("*R C Thakkar* High Court Decision") as well as the English House of Lords decision of *Smith New Court Securities Ltd v Citibank N A* [1997] AC 254 ("*Smith New Court*") in which a similar position was adopted.

11 It was repeatedly emphasised by the Tribunal that *both* parties accepted that it should apply the principles in *Smith New Court*, though they disagreed on how it applied to the facts.[10] *Smith New Court* was examined meticulously in the Award. With these principles in the background, the Award was directed at restoring the Buyer to its position pre-acquisition. This was calculated as the difference between what the Buyer paid for the shares and the actual worth of the shares, less any benefits it has received, together with pre and post-award interest.[11] The precise quantification merited numerous expert reports but it is unnecessary to set out the components of the quantum[12] awarded in greater

9 MMS 1st affidavit, p 423.

10 MMS 1st affidavit, pp 424 and 447.

11 MMS 1st affidavit, p 429.

12 MMS 1st affidavit, p 458.

granularity than this. I shall make just two further observations on the quantum. First, to ensure it did not breach the prohibition on "punitive, exemplary, multiple or consequential damages" in the Arbitration Agreement, the Tribunal benchmarked the sum awarded against alternative quantum calculations.[13] Second, liability for damages was joint and several among all the Sellers, with no distinction made with respect to the Minors or proportion in shareholding.

12 The dissenting arbitrator issued a separate opinion. A crucial point of departure was his view that a party had to elect to *either* rescind the contract under s 19 of the Indian Contract Act *or* be put in the position as if the representation were true.[14] In the circumstances, since the Buyer had not rescinded the SPSSA, he took the view that the Buyer had waived its right to damages for misrepresentation.[15]

Applications to set aside the Award

13 In OS 784 and OS 787, the Sellers seek to set aside the Award. In order to appreciate the specific issues raised by the Sellers for which the Applicant seeks admission, it will be useful to recap who the parties in each of the OSes are and to identify their respective grounds of challenge.

OS 784

14 OS 784 is an application by the Sellers who are the adult and corporate sellers of the shares in the Company, *ie*, the Sellers *excluding* the Minors, to set aside the Award. I shall refer to the plaintiffs in OS 784 as the "Individual and Corporate Sellers". They are the 1st to 4th, 6th to 8th and 13th to 20th

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13 MMS 1st affidavit, p 459.

14 MMS 1st affidavit, p 505.

15 MMS 1st affidavit, p 507.

defendants in OS 490, in which they are resisting the enforcement of the Award. They have raised five grounds for setting aside and resisting enforcement of the Award. However, as the Applicant is seeking *ad hoc* admission only to argue the issues of Indian law, only the two grounds that engage Indian law issues are relevant for present purposes. These grounds are:[16]

(a) that the Award contained decisions on matters beyond the scope of submission to arbitration ("the Excess of Jurisdiction Challenge"); and

(b) that the Award is contrary to the public policy of Singapore ("the Public Policy Challenge").

15 Both grounds are principally concerned with the manner in which the Tribunal arrived at the quantum of damages awarded. In essence, the Excess of Jurisdiction Challenge asserts that the Tribunal had awarded "punitive, exemplary, multiple and/or consequential damages", which were expressly prohibited by the Arbitration Agreement. The Individual and Corporate Sellers argue that this should be determined in accordance with Indian law since the Arbitration Agreement is governed by Indian law.

16 In particular, the Individual and Corporate Sellers argue that the Tribunal had erred in awarding a measure of damages that puts the Buyer back in the position as if the representation had not been made, even though the Buyer had elected to affirm the SPSSA. According to the Individual and Corporate Sellers, this measure is (a) contrary to s 19 of the Indian Contract Act; and (b) based on the erroneous authority of the *R C Thakkar* High Court Decision.

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16 OS 1114 Applicant's Submissions, para 18.

17 In the Public Policy Challenge, it is contended that the Award is contrary to the public policy of Singapore because it is at root contrary to the most basic notions of morality and justice of Indian law. The source of offense is the Tribunal's purportedly erroneous reliance on the *R C Thakkar* High Court Decision when the decision had been overruled on appeal by the Order and Judgment of the Supreme Court of India dated 18 November 1986 ("*R C Thakkar* Supreme Court Decision"). At the hearing, counsel for the Applicant in OS 1114, Ms Smitha Menon, confirmed that the *R C Thakkar* Supreme Court Decision was not brought to the Tribunal's attention during the arbitration. This decision was also not discussed in the Award or the Dissenting Opinion.

Disputed issues of Indian law in OS 784

18 It is common ground between the parties that the grounds of setting aside are governed by the IAA read with the 1985 Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law ("the Model Law"). However, as is apparent from the above discussion, issues of Indian law will have to be *proved* as an *anterior question* in the course of establishing these grounds of challenge.

19 At this juncture, I pause to note that the Buyer actually took the view that Indian law is irrelevant to the OSes. It gave a few reasons for this position: first, the Arbitration Agreement, which has purportedly been breached, is governed by Singapore law; second, the merits of the arbitration decided under Indian law cannot be re-litigated; and third, Indian public policy is irrelevant to a setting aside application under Singapore law. I find these objections to be more germane to the substantive OSes. In any event, it is a fact that both the Sellers *and the Buyer* have engaged Indian law experts for the OSes. Thus, I am prepared to proceed on the basis that the Sellers' grounds of challenge raise

anterior questions of Indian law.

20 Turning then to the disputed issues in OS 784, the Applicant listed up to 12 issues of Indian law in his written submissions, all of which he claims are unsettled, complex and difficult.[17] Upon reviewing the parties' submissions and documents, it appears to me that the disputed issues of Indian law boil down to the following ("the Damages Issues"):

(a) What is the measure of damages permissible under s 19 of the Indian Contract Act, in particular whether a party who has elected to affirm the contract may be awarded damages that put it back in the position as if the misrepresentation had not been made?

(b) The status of the authorities of *Smith New Court* and the *R C Thakkar* High Court Decision in Indian contract law.

(c) What constitutes consequential damages under the Indian Contract Act?

21 In my view, the remaining issues identified by the Applicant in its submissions (*eg*, whether the Award was for consequential damages and whether the Award used a permissible methodology for quantifying damages) involve interpretations of the Award rather than questions of Indian law.

22 The Indian law experts called by both parties in OS 784 disagree on the Damages Issues. This is not unusual in itself. It is necessary to set out their differing views in order to evaluate the extent to which the Applicant has special qualifications or experience for the case and the necessity of his admission to argue the factual and legal Indian law issues in dispute. In summary, the view

17 OS 1114 Applicant's Submissions, paras 49 and 55.

of the Individual and Corporate Sellers' expert, retired Justice of the Supreme Court of India, Mr B N Srikrishna, on the Damages Issues is as follows:[18]

(a) Under s 19 of the Indian Contract Act, a party who elects to affirm the contract (as the Buyer did in this case) is only entitled to be put in a position as if the representation were true.

(b) The *R C Thakkar* High Court Decision, having been overruled by the *R C Thakkar* Supreme Court Decision, would not be treated as a binding precedent on any issue whatsoever.

(c) *Smith New Court* is not persuasive authority in Indian contract law because it is inconsistent with the provisions of the Indian Contract Act and the decision of the Supreme Court of India in *Trojan & Co v RM N N Nagappa Chettiar* AIR 1953 SC 235 on damages for the tort of fraudulent misrepresentation.

(d) The "award of opportunity cost is tantamount to award of consequential damages under Indian law".

23 The Buyer's expert, Mr Vikramajit Sen, also a retired Justice of the Supreme Court of India, provided his contrasting view on the Damages Issues:

(a) In restoring the Buyer to the position it would have been in had the representations not been made, the Tribunal has "carried out the mandate and postulation of Section 19 of the Indian Contract Act".[19]

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18 OS 1114 Applicant's Bundle of Documents ("OS 1114 ABOD") Vol II Tab 3, pp 15–17.

19 OS 1114 ABOD Vol II Tab 4, p 12.

(b) The *R C Thakkar* High Court Decision correctly elucidates the law on s 19 of the Indian Contract Act and continues to have precedential value. Its "analysis, appreciation and application of the legal principles" remain "untouched" by the *R C Thakkar* Supreme Court Decision, which overruled it on the facts only.[20]

(c) Rather than being inconsistent with s 19 of the Indian Contract Act, *Smith New Court* is persuasive authority in interpreting s 19.

(d) The award of damages for restitution/rescission does not constitute consequential or speculative damages.[21]

24 Having distilled the issues in OS 784, we turn now to OS 787, which raises different grounds of challenge premised on distinct issues of Indian law.

OS 787

25 In OS 787, the Minors seek an order setting aside the Award. The Minors are also the 5th and 9th to 12th defendants in OS 490, in which they are resisting the Buyer's enforcement of the Award on identical grounds to OS 787. As mentioned earlier, the Minors were not separately represented in the arbitration. In OS 787, the Minors, who are jointly and severally liable for the full extent of the Award, now contend that the Award should be set aside for the following reasons:

(a) that the Award contained decisions on matters beyond the scope of submission to arbitration ("the Minors' Excess of Jurisdiction Challenge"); and

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20 OS 1114 ABOD Vol II Tab 4, pp 14–17.

21 OS 1114 ABOD Vol II Tab 4, p 12.

(b) that the Award is contrary to the public policy of Singapore ("the Minors' Public Policy Challenge").

26 The Minors' Excess of Jurisdiction Challenge is similar to the Excess of Jurisdiction Challenge mounted by the Individual and Corporate Sellers in OS 784, *ie*, that the Tribunal awarded punitive, consequential, multiple and/or exemplary damages, which were prohibited by the Arbitration Agreement. Thus, the factual and legal issues identified at [15]–[16] and [18] above in relation to this argument arise in OS 787 as well, including the Damages Issues.

27 It is the Minors' Public Policy Challenge that raises distinct issues. The Minors argue that the Award is contrary to the public policy of Singapore for two independent reasons. First, it fails to protect the best interests of the Minors because it pins liability on the Minors for the fraudulent actions of their guardian.[22] Second, the Minors contend that their liability under the Award is completely disproportionate to their interest and involvement in the SPSSA.[23] During the arbitration, these defences were not advanced on behalf of the Minors. Instead, a common defence was raised on behalf of the Sellers that the consequences of the alleged fraud by the representative of the Sellers (who is the 1st plaintiff in OS 784) would not bind them.[24]

Disputed issues of Indian law in OS 787

28 The Minors argue that in determining the Minors' Public Policy Challenge, the Court should consider Indian law and public policy in relation to the protection of minors. The Applicant accepts that it is unsettled whether

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22 OS 1115 Applicant's Submissions, para 16(b)–(c).

23 OS 1115 Applicant's Submissions, para 16(b).

24 OS 1115 Applicant's Bundle of Documents ("OS 1115 ABOD"), Vol II Tab 3, p 10, para 2f.

foreign public policy may be taken into account in a challenge of an arbitral award that is premised on Singapore public policy.[25] Assuming that foreign public policy is relevant, this would engage the following questions of Indian law, on which the parties to OS 787 disagree ("the Minors' Issues"):[26]

(a) what is the law of India regarding the protection and welfare of minors and whether this forms part of the public policy of India;

(b) whether minors have legal capacity to appoint an agent under Indian law and may be held liable for the fraudulent actions of their guardian or their guardian's agent under Indian law and public policy; and

(c) whether the Minors' liability under the Award is disproportionate to their interests under the SPSSA and therefore offends Indian public policy.

29 Mr Ajit Prakash Shah, the Indian law expert for the Minors in OS 787 and former Chief Justice of the Madras High Court and Delhi High Court, opines that the protection of minors' rights and interests in common law and statute are fundamental principles of Indian public policy.[27] As minors have no capacity to contract or appoint an agent in India, as a matter of Indian public policy, minors cannot be liable for the fraudulent acts of their guardians, who by acting fraudulently have breached their fiduciary duties to the minors. Lastly, Mr Shah is of the view that the Award is an "extreme violation of the principle of proportionality" which forms part of India's public policy.

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25 OS 1115 Applicant's Submissions, para 21.

26 OS 1115 Applicant's Submissions, paras 17 and 20; OS 1115 ABOD, Vol II Tab 3, para 3.

27 OS 1115 ABOD, Vol II Tab 3, paras 8, 10, and 18.

30 The contrary view of Mr Mukul Mudgal, the Indian law expert for the Buyer in OS 787 and former Chief Justice of the Punjab and Haryana High Court, is that a guardian does not breach its fiduciary duties *to the minor* by virtue of committing fraud on the counterparty to a transaction from which a minor has benefitted. Since the Minors benefitted from the transaction, which is valid as between the Minors and their guardians, the Minors should be liable for damages under it.[28] As to the proportionality objection, Mr Mudgal opines that joint and several liability should not be viewed as disproportionate because, in the event that the Minors are called upon to satisfy the Award, the Minors may demand proportionate contributions from the other judgment debtors.[29]

31 The disputed issues of Indian law in OS 784 and OS 787, in particular what has been referred to above as the Damages Issues and the Minors' Issues (collectively "the Indian Law Issues"), form the context for the present applications in OS 1114 and OS 1115. It must be emphasised that these applications are to admit the Applicant to argue only the disputed points of Indian law, with local Senior Counsel arguing the remaining aspects of the cases for setting aside the Award.

The present applications

Overview of ad hoc *admissions regime*

32 The law governing the *ad hoc* admission of foreign counsel has been well-established by several recent decisions. The governing provision is s 15 of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA"), relevant portions of which are as follows:

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[28] OS 1115 Respondent's Bundle of Documents ("OS 1115 RBOD"), Vol 5 Tab 8, p 15.

[29] OS 1115 RBOD, Vol 5 Tab 8, p 17.

> **Ad hoc admissions**
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> **15.**—(1) Notwithstanding anything to the contrary in this Act, the court may, for the purpose of any one case, admit to practise as an advocate and solicitor any person who —
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> (*a*) holds —
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> (i) Her Majesty's Patent as Queen's Counsel; or
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> (ii) any appointment of equivalent distinction of any jurisdiction;
>
> (*b*) does not ordinarily reside in Singapore or Malaysia, but has come or intends to come to Singapore for the purpose of appearing in the case; and
>
> (*c*) has special qualifications or experience for the purpose of the case.
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> (2) The court shall not admit a person under this section in any case involving any area of legal practice prescribed under section 10 for the purposes of this subsection, unless the court is satisfied that there is a special reason to do so.
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> …
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> (6A) The Chief Justice may, after consulting the Judges of the Supreme Court, by notification published in the *Gazette*, specify the matters that the court may consider when deciding whether to admit a person under this section.

33 As succinctly set out in *Re Beloff Michael Jacob QC* [2014] 3 SLR 424 ("*Re Beloff*") at [54], the court evaluates every application for *ad hoc* admission in two stages. First, the court must be satisfied of the three mandatory requirements in s 15(1) of the LPA. If these requirements are not met, the application must fail and the question of discretion does not arise. If the mandatory requirements are satisfied, the court goes on to decide whether to exercise its discretion to admit the applicant, having regard to the matters specified in para 3 of the Legal Profession (Ad Hoc Admissions) Notification 2012 (S 132/2012) ("Notification Matters"):

> **Matters specified under section 15(6A) of Act**
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> **3.** For the purposes of section 15(6A) of the Act, the court may consider the following matters, in addition to the matters specified in section 15(1) and (2) of the Act, when deciding whether to admit a person under section 15 of the Act for the purpose of any one case:
>
> (*a*) the nature of the factual and legal issues involved in the case;
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> (*b*) the necessity for the services of a foreign senior counsel;
>
> (*c*) the availability of any Senior Counsel or other advocate and solicitor with appropriate experience; and
>
> (*d*) whether, having regard to the circumstances of the case, it is reasonable to admit a foreign senior counsel for the purpose of the case.

34 The overarching principle guiding the exercise of the court's discretion is that foreign senior counsel should only be admitted on the basis of "need" (*Re Beloff* at [65]). "Need" should be assessed not only from the perspective of the litigant but also with regard to the court's need for assistance with the issues in contention (*Re Wordsworth, Samuel Sherratt QC* [2016] 5 SLR 179 ("*Re Wordsworth*") at [36] and [39]). However, the Court of Appeal cautioned in *Re Beloff* that foreign senior counsel should not be admitted merely because it was "desirable or convenient or sought as a matter of choice" (at [42]).

The parties' arguments

35 As I mentioned earlier, at the outset of the hearing, I invited the Sellers to consider applying for leave to cross-examine the Indian law experts instead. Since the Sellers' instructions were to proceed with the applications for *ad hoc* admission, I heard the parties' arguments for OS 1114 and 1115.

36 In support of OS 1114, the Applicant urged that OS 490 and 784 raise unsettled, complex and difficult questions of Indian law on which both parties'

Indian law experts have taken starkly differing positions (see [18] above).[30] It was submitted that the Applicant is not only an expert in Indian law generally but also an authority in contract and arbitration law.[31] At the hearing, emphasis was placed on the Applicant's ability to address the court on the appropriate measure of damages for misrepresentation and the Applicant's role as counsel before the Supreme Court of India in the *R C Thakkar* Supreme Court Decision, which lies at the heart of both the Excess of Jurisdiction Challenge and the Public Policy Challenge (see [16]–[17] above). Given the lack of local counsel with expertise on these "esoteric" issues of Indian law, it was argued that the assistance of foreign counsel is necessary for the court to determine issues of significant importance under Indian law which are likely to influence the development of jurisprudence in India.[32]

37 The arguments in support of the Applicant's admission in OS 1115 were similar in tenor, namely that the determination of OS 490 and 787 will require close examination of India's law and public policy. In this regard, the Minors highlighted that the Applicant was formerly the Solicitor General of India and hence would be familiar with Indian public policy.[33] Further, it was argued that with his experience in international arbitration, the Applicant has expertise to assist the court on how the existing Indian law principles on proportionality and the protection of minors should play out in the realm of arbitration.[34] It was similarly submitted that there is a lack of local counsel able to competently argue the complex and novel issues of Indian law at stake.

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30 OS 1114 Applicant's Submissions, paras 49 to 58.

31 OS 1114 Applicant's Submissions, para 35.

32 OS 1114 Applicant's Submissions, paras 68 and 76.

33 OS 1115 Applicant's Submissions, para 40.

34 OS 1115 Applicant's Submissions, para 44.

38 Unsurprisingly, the Buyer opposes both applications in OS 1114 and 1115. In the Buyer's view, s 15(1)(*c*) is not satisfied because there is insufficient nexus between the Applicant's general expertise in Indian law and the issues raised in OS 784 and 787, to which Indian law is irrelevant (see [19] above). In any event, the Indian Law Issues framed by the Sellers have been adequately ventilated through the expert opinions and are not complex or novel simply because the experts disagree. Lastly, the Buyer highlights that Mr Alvin Yeo SC and Mr Lee Eng Beng SC are sufficiently competent to make submissions on the divergent opinions on foreign law. For these reasons, the Applicant's admission is not necessary from the perspective of the Sellers and/or the court.

39 The Attorney-General supported the applications. Mr Jeyendran Jeyapal, appearing for the Attorney-General, urged the court to take a "generous" view of the applications. In his view, questions of Indian law and public policy form the crux of the OSes. He accepted that these issues are novel and complex, and submitted that the Applicant would greatly assist the court in navigating the gamut of diverging expert evidence on Indian law, with which the court may not be fully *au fait*. At the hearing, it became clear from Mr Jeyapal's submissions that the "governing factor" for the Attorney-General was the fourth notification matter of reasonableness. In this regard, he submitted that the public interest in enhancing the attractiveness of Singapore as a venue for international arbitration serves as *further support* for the reasonableness of admitting the Applicant.

40 The Law Society, on the other hand, opposed the applications. It cast doubt on whether the s 15(1)(*c*) requirement of special qualifications or experience was satisfied because no link had been established between the Applicant's expertise and the issues in the OSes. The Law Society also took the view that a dispute over foreign law, which is to be proven as a fact, is

insufficient basis to admit foreign counsel just to argue the disputed Indian law issues. It suggested that the appropriate method for resolving disputes of foreign law was to subject the Indian law experts to cross-examination, rather than for Indian counsel to make submissions on Indian law. It also highlighted that the eminent local Senior Counsel engaged by the Sellers were competent to address the court on proof of Indian law. In fact, the Sellers had not engaged Indian lead counsel in the arbitration where the issues of Indian law were live.

Mandatory requirements

41 Since it was undisputed that the Applicant satisfies the two formal requirements under s 15(1)(*a*) and (*b*), I need not dwell on them for long. I would only note out of interest that this is the first application for *ad hoc* admission by a Senior Advocate from the Indian Bar. While unusual, the same legal principles apply to applications for *ad hoc* admission of all foreign counsel regardless of their jurisdiction of practice. Section 15(1)(*a*) can be satisfied by any appointment of equivalent distinction to that of a Queen's Counsel.

42 This requirement is met in the present case, as the title of Senior Advocate is conferred under s 16(2) of the Indian Advocates Act 1961 on deserving advocates by virtue of their standing at the Indian Bar or special experience or qualifications. Equivalent designations in other jurisdictions (*eg*, Senior Counsel in Hong Kong appointed under s 31A of the Legal Practitioners Ordinance (Cap 159); Senior Counsel or Silks in South Africa appointed under s 84(2)(k) of the Constitution of the Republic of South Africa 1996) would be accorded the same treatment.

Special qualifications and experience

43 Section 15(1)(*c*) requires that an applicant for *ad hoc* admission possess

special qualifications or experience relevant to the *specific* issues which arise in the case at hand (*Re Rogers, Heather QC* [2015] 4 SLR 1064 ("*Re Rogers*") at [17]). As I clarified in *Re Fordham, Michael QC* [2015] 1 SLR 272 ("*Re Fordham*") at [50], the focus here is on the *relevance* of counsel's qualifications and experience to the specific issues and not on whether those issues are difficult or complex. This evaluation requires the issues to be clearly identified in a fair manner (see *Re Beloff* at [68] and *Re Rogers* at [22]). This means that the issues should be sufficiently particular to capture the essence of the underlying dispute while being sufficiently general to remain neutral to the outcome of the admission application. In respect of these issues, specific subject matter expertise must be shown. It is certainly inadequate to argue, in a vague and general fashion, that an applicant has "special qualifications or experience" merely by reference to his/her expertise in a generic practice area (*Re Rogers* at [17]).

44 At this stage, it is important to recall that the Applicant seeks admission only to argue the disputed issues of Indian law in OS 490, OS 784 and OS 787. The specific Indian Law Issues in contention in the OSes have been identified at [20] and [28] above. To recap, the essence of the Damages Issues concerns the appropriate measure of damages for misrepresentation under the Indian Contract Act while the Minors' Issues engage Indian law and public policy on the protection of minors.

45 In his affidavits in support of these applications, after listing the disputed issues of Indian law, the Applicant proceeded to describe his qualifications and experience in the following manner:[35]

…

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[35] 1st affidavit of Harish Salve in OS 1114 and OS 1115 dated 28 October 2016.

7. The above issues involve an extensive knowledge of Indian law and fall within my domain of expertise.

8. Further, *I am also the counsel for the 1st to 4th and 8th Plaintiffs in OS 784 for similar proceedings in India*. I am appearing on their behalf before the Honourable Delhi High Court in proceedings commenced by [the Buyer] … to enforce the Award (the "**Indian Proceedings**").

9. The 1st to 4th and 8th Plaintiffs in OS 784 are resisting the enforcement of the Award in the Indian Proceedings. In my experienced opinion, it is likely that the Honourable Delhi High Court will also refuse to enforce the Award on the ground that, *inter alia*, the Award is contrary to the fundamental principles of Indian law and the Contract Act.

…

11. In this regard, I confirm the following —

> …
>
> d. I am widely-regarded as a leading practitioner in India. I have been described as a '*Star Individual*' in the field of dispute resolution. *I am an expert in Indian law and in arbitration and commercial disputes, in particular matters concerning contractual disputes.* I am regularly instructed by multi-national corporations and governments alike. I regularly appear before various international tribunals as well as the Supreme Court of India and various High Courts. *I am regarded as an authority in the fields of Constitutional, Commercial, Contractual, Arbitration and Tax Laws.* Some of the recent cases of great significance in Indian jurisprudence, some also having an international impact that I have appeared in are:
>
> …
>
> e. *In fact, I had appeared on behalf of the Gujarat Housing Board before the Honourable Supreme Court of India in the matter wherein the decision of the Gujarat High Court in* R.C. Thakkar *was set aside.*
>
> …
>
> g. I believe that my considerable expertise in Indian law is relevant to, and will assist the Honourable Court in determining the integral issues of Indian law arising in OS 490, OS 784 and OS 787. …
>
> [emphasis added in italics]

46 The Applicant is clearly a leading practitioner in India who is highly regarded in the fields of commercial law and arbitration, amongst others. However, the question raised by the Buyer and the Law Society is whether sufficient nexus has been shown between the Applicant's avowed expertise and the issues identified (see *Re Rogers* at [35]). I think their doubts are well-founded. The affidavits contained largely general averments that the Applicant is an expert in Indian law and, at best, in commercial and contractual disputes. Little attempt was made to draw a link between the cases previously conducted by the Applicant and the issues arising in the present case. However, the Applicant did stress two specific qualifications, which I shall now address.

47 First, the primary link drawn between the Applicant's past experience and the Damages Issues was the Applicant's role as counsel before the Supreme Court of India in the *R C Thakkar* Supreme Court Decision. Ms Menon argued on his behalf that his background knowledge of the Supreme Court hearing would assist the Singapore court in making sense of the Supreme Court's extremely brief order.

48 On the face of the *R C Thakkar* Supreme Court Decision (which in essence is an Order of the Supreme Court), there is no discussion whatsoever on the appropriate award of damages for fraudulent misrepresentation. That appears to be because the *R C Thakkar* High Court Decision was reversed on the basis that the Indian Supreme Court was "fully satisfied that the Gujarat Housing Board (Board) was not guilty of any fraud and the High Court was in error in recording a *finding* adverse to the appellant on this score" [emphasis added]. As such, the Applicant's prior involvement in the *R C Thakkar* Supreme Court Decision does not demonstrate that he had previously argued the specific issue of the appropriate measure of damages for misrepresentation in India. I am constrained to arrive at this view by the very terms of the *R C Thakkar*

Supreme Court Decision. There is no material on the face of the *R C Thakkar* Supreme Court Decision to support the Applicant's expertise as regards the appropriate measure of damages for fraudulent misrepresentation in India. The Applicant has not referred to any other case to support his expertise on this issue.

49 I should also add that the Singapore court has no jurisdiction to *develop* the substantive law of India. Its role in the OSes vis-à-vis Indian law is limited to ascertaining the preferred position in Indian law *as a fact*. In this regard, the dispute over the Damages Issues apparently centres on a binding Order of the Supreme Court of India, however brief. Since the Applicant, as counsel, cannot supplement the Supreme Court's grounds extra-judicially beyond the face of the order, the Applicant's understanding of the genesis of the order is of limited utility.

50 The second specific qualification was the Applicant's role as lead counsel for certain Sellers in parallel enforcement proceedings against the Buyer in India. While the Applicant would undoubtedly be familiar with his clients' case, I do not think this necessarily qualifies as special experience or expertise within s 15(1)(*c*) in this case. Since the Sellers have instructed local Senior Counsel to conduct the enforcement proceedings in Singapore, I expect that local Senior Counsel would have as thorough an understanding of the events and factual nuances as the Applicant does for the purposes of the Indian court enforcement proceedings. The case might be more compelling if the Applicant had been the lead counsel in the arbitration proceedings and had made extensive submissions on issues that are inextricably linked to those now arising in the OSes (see *Re Joseph David QC* [2012] 1 SLR 791 at [54] and *Re Wordsworth* at [68]).

51 With respect to the Minors' Issues, the Applicant's position is weaker. In fact, it was conceded that there is no Senior Advocate in India who has specific experience dealing with the Minors' Issues.[36] This being the case, I do not see how the Applicant can be of greater assistance than the equally distinguished Indian law experts who have submitted their reports to assist the court in the *fact-finding exercise* to ascertain the preferred position under Indian law. As I had observed in *Re Fordham* at [50], the focus is on the *relevance* of counsel's qualifications and experience to the specific issues and not on whether those issues are difficult or complex. Therefore, even assuming that the Minors' Issues are complex, it does not assist the Applicant since he does not possess the specific expertise for dealing with the Minors' Issues.

52 Finally, with regard to the point highlighted by the Minors that the Applicant was formerly the Solicitor General of India and hence would be familiar with Indian public policy, I should state that his general familiarity with Indian public policy does not satisfy the requirement of "special qualifications or experience" for the purposes of the specific issues in the OSes. In any event, it is accepted that whether Indian public policy is relevant at all for the purposes of setting aside the Award as being contrary to Singapore public policy is ultimately a question to be resolved under Singapore law with the assistance of the parties' respective local Senior Counsel.

53 Therefore, I concluded that the Applicant had failed to show that apart from his general expertise in Indian law, he had the requisite "special qualifications or experience" for the purposes of the specific issues in this case under s 15(1)(*c*).

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[36] 2nd affidavit of Leong Yu Chan Alyssa in OS 1115 dated 12 December 2016, para 16.

Notification Matters

54 Since I found that the requirement in s 15(1)(*c*) had not been satisfied, the question of the court's discretion does not strictly speaking arise. However, I shall go on to consider the Notification Matters because there are important observations to be made about a case where *ad hoc* admission is sought for foreign counsel solely to argue disputed issues of foreign law. I shall preface my consideration of the Notification Matters with some remarks on this issue, bearing in mind that each of the Notification Matters is directed at assessing if it is necessary to admit the Applicant (*Re Wordsworth* at [27]).

Observations on the role of foreign counsel in proving foreign law

55 It is well established that foreign law is an issue of fact which must be proved either by directly adducing raw sources of foreign law as evidence or by adducing the opinion of an expert in foreign law (*Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [54]). Such a fact finding inquiry should be and has always been addressed by way of submissions made by local counsel with the assistance of expert law reports. This is unlike the Singapore International Commercial Court ("SICC"), in which a different procedure was consciously adopted. In the SICC, foreign law may be determined on the basis of submissions instead of proof (O 110 r 25 of the ROC).

56 Local counsel have argued in numerous cases involving proof of foreign law. In *Accent Delight International Ltd and another v Bouvier, Yves Charles Edgar and others* [2016] 2 SLR 841, the defendants applied to stay a suit against them on the basis that Switzerland was the more appropriate forum. Thus, anterior questions arose as to, *inter alia*, whether Swiss courts would take jurisdiction under Swiss private international law rules, and whether equivalent

causes of action would be available under Swiss law. The stay application, however, was indisputably governed by Singapore private international law rules. All parties filed expert opinions on Swiss law; their foreign counsel also filed affidavits (see [12]). Significantly, it was local Senior Counsel, including Mr Alvin Yeo SC, who made submissions on the basis of the expert opinions which were not always in agreement (see [65]–[72]). The parties' presentation of their cases did not appear compromised due to the lack of foreign counsel. To the contrary, the court was assisted to reach a conclusion on the issues of Swiss law (see [78] and [84]) as part of its analysis on *forum non conveniens*.

57 In *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR) and others* [2015] 4 SLR 529, third parties had intervened in garnishee proceedings to assert entitlement to certain advances held by the bank pursuant to either a commission agency relationship or a trust under Serbian law. For the trial, experts on Serbian law provided opinions on whether the third parties had beneficial ownership under Serbian law, if it was the applicable law. The trial was conducted entirely by local counsel, including Mr Lee Eng Beng SC. Submissions made by local counsel on the evidence of Serbian law were discussed in detail in the judgment (see [48]–[57]). In the final analysis, Edmund Leow JC preferred the opinions of the judgment creditor's experts because they were logical, cogent and substantiated by case law and commentaries (at [47]). I should note that the conclusions on these issues were untouched by the Court of Appeal (see *The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR) v Westacre Investments Inc and other appeals* [2016] 5 SLR 372 at [53] and [63]).

58 The court may be further assisted to reach a finding on foreign law by cross-examination of the foreign law experts, similar to other factual witnesses. This proved helpful in *Lim Weipin and another v Lim Boh Chuan and others*

[2010] 3 SLR 423, a suit under the Intestate Succession Act (Cap 146, 1985 Rev Ed) where the court had to determine the authenticity and status of adoption and kinship certificates under Chinese law and the binding status of ancestral books in Chinese courts. Cross-examination by local counsel revealed that the plaintiffs' Chinese law expert lacked credibility and was unable to present a defensible opinion (see [31] and [42]); as such, the court concluded that the views of the defendant's Chinese law expert were to be preferred. In a related vein, cross-examination (in particular, through "hot-tubbing") also has the potential to narrow the areas of disagreement between foreign legal experts (see *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545 at [30]).

59 Thus, where foreign law has to be proved as a fact, the court has always handled this evidential inquiry by way of foreign law experts rather than submissions by foreign counsel. I think it is important to emphasise that I am not suggesting that foreign counsel should *never* be admitted to argue disputed questions of foreign law. The crucial difference here is that foreign law has to be proved as an anterior fact. In this context, I think it would set an undesirable precedent to allow foreign counsel to be admitted to argue cases when foreign law is to be proved. I see force in the Law Society's submission that this would impact the entire landscape of both the admissions regime and the proof of foreign law.[37]

60 This should be contrasted with cases where the substantive issues are governed by foreign law or where there is no dispute that foreign law is no different from Singapore law. In such cases, foreign counsel have been admitted to argue the disputed questions of foreign law which are determinative of the

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37 Law Society's Submissions, para 48.

issues before the court. In doing so, the foreign counsel is not purporting to "prove" foreign law. This is the critical difference which must be made clear.

61 A recent example of this latter type of case is *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372. This was a case in which Mr Toby Landau QC and Mr David Joseph QC were admitted to argue issues of international arbitration law that governed the substantive applications. A threshold issue was whether the appellant was entitled to resist enforcement of the awards in Singapore even though it had not applied to set aside the awards. Although the IAA was the controlling statute, the interpretation of the IAA on choice of remedies turned on a mastery of the principles and policies contained in the Model Law and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"). The decision on this threshold issue alone merited extensive discussion of international materials and commentaries as well as foreign authorities applying the Model Law.

62 In a similar vein, when I allowed the admission of Mr Samuel Sherratt Wordsworth QC to argue OS 492 of 2016 (see *Re Wordsworth*), I observed that the principal issues were "intrinsically in the realm of public international law" (at [43]). Since the jurisdiction of the arbitral tribunal was to be determined *de novo* by the Singapore court, the substantive issues were governed by the interpretation of three treaties or international instruments and the application of principles of public international law (at [52]). Needless to say, in making submissions on public international law, foreign counsel is not aiming to "prove" this law.

Nature of factual and legal issues in this case

63 In the light of the above observations, I shall now consider the Notification Matters in turn. The first Notification Matter is concerned with whether the issues are complex, difficult, novel or of significant precedential value so as to require foreign counsel's assistance on matters beyond the competence of local counsel (*Re Beloff* at [61]). In *Re Landau, Toby Thomas QC* [2016] SGHC 258 ("*Re Landau*"), I identified a number of general principles to guide this qualitative evaluation of the issues (at [39]–[43]). It is relevant and useful to consider how the issues are likely to be argued and how the court hearing the case is likely to resolve the factual and legal issues. Where factual issues are in dispute, the court should consider whether the nature of the supporting evidence is so convoluted or esoteric as to be beyond the understanding of able local counsel. Where legal issues are in dispute, the court should take into account the existence of conflicting authorities and the breadth and depth of research required.

64 Notwithstanding that foreign law is to be dealt with by way of evidence rather than submissions (see [55] above), the Applicant sought to persuade me that foreign counsel should be admitted. First, it was argued that this case is unique because the Indian Law Issues are so complex and novel that the presence of Indian counsel would assist the court in reaching a conclusion. As evidence of complexity, the Applicant pointed to the absence of binding precedents in India and the sharp divergence between the experts and within the Tribunal on both the conclusions and the status of the authorities. It was also argued that the finding of the Singapore courts on the Indian Law Issues is likely to have significant impact on the development of Indian law. Finally, the Applicant tried to emphasise that the role of Indian counsel would be distinct from that of the Indian law experts. Given the "unusual complexity" and sharp

divergence in views, it was said that the expert evidence is of limited utility on its own and that "being able to engage the Applicant orally at the hearing will bring much needed clarity to understanding the Indian law issues".[38] Put another way, the Applicant would be able to "orally [explain] the evidence and [address] any queries that this court [has] on the conflicting expert views".[39] Even if cross-examination were ordered, it was said that the Applicant would have a role in effectively cross-examining the experts on Indian law.

65 For a start, I highly doubt that any finding by the Singapore courts on the Indian Law Issues – which, in any case, must be a finding of fact and not a determination of law – will have precedential value in India. It is important to clarify that it is irrelevant to consider the precedential value of the OSes in respect of issues arising under Singapore law. Those are *not* the issues which the Applicant is seeking admission to argue. Therefore, the Applicant's submission that the decision would have significant precedential value in future commercial arbitration cases (*eg*, on the extent to which Singapore public policy should take into account foreign public policy) was simply beside the point.[40] In any event, as I had observed at [52] above, that task would fall on the local Senior Counsel and not the Applicant.

66 In evaluating the issues, it is crucial to underscore that the Indian Law Issues arise in the OSes as matters of fact to be presented by evidence. The manner in which these issues will be presented at the hearing cannot be ignored. Since the Indian Law Issues do *not* govern the substantive setting aside applications under Singapore law, the question is not whether these issues are difficult as a matter of Indian law *in vacuo*. Instead, the question is whether the

38 OS 1114 Applicant's Submissions, para 84.

39 OS 1115 Applicant's Submissions, para 56.

40 OS 1115 Applicant's Submissions, para 22.

evidence on Indian law is so exceptionally complex, convoluted or esoteric as to require *Indian* counsel to make submissions with reference to the expert reports.

67 In this regard, it is not obvious to me that the evidence on Indian law is unusually complex or difficult so as to be beyond the competence of local counsel. First, as shown at [56]–[57] above, subject matter knowledge of foreign law is not a prerequisite for local practitioners to ably conduct cases involving evidence of foreign law. Further, I agree with the Buyer that the experts' divergence in views does not in itself demonstrate complexity or novelty. In relation to the Damages Issues, the position appears to turn on how two to three cases should be reconciled with the Indian Contract Act and how the doctrine of precedent operates in India. Testing the soundness of the experts' views on these matters does not seem particularly complex, since we are dealing with a relatively limited pool of material. Turning to the Minors' Issues, the difficulty appears to be an absence of clear authority in India. Nevertheless, it is rightfully within the legal experts' roles to predict the likely decision of the Indian courts in these circumstances (see *Pacific Recreation* at [82]). As long as these views are backed by objectively verifiable reasons, it is not unduly complex to make submissions on the state of the expert evidence. It cannot be gainsaid that the Singapore court has no role in developing Indian law to reach a correct or desirable position if the proposition simply has not been established in India.

68 Given that the Applicant has repeatedly stressed the sharp disagreement between the experts, I should add that I am mindful of the concerns expressed by Andrew Phang Boon Leong J (as he then was) in *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd and others* [2006] 4 SLR(R) 451 ("*Wu Yang Construction*") (at [14]–[15]). In that case, expert witnesses testified as to the legality of certain agreements under PRC law. Phang J found the expert

evidence to be "singularly unhelpful" because the experts were "diametrically opposed" and offered no nuanced explanation that would aid the court in arriving at an informed and just decision. Pertinently, the experts had not referred to relevant treatises or articles to demonstrate an objective basis for their respective conclusions. It was in this context that Phang J observed that there was "great potential disadvantage" to the rule as to proof of foreign law. However, his observations were understandably made in the context of a case where the experts' views were not supported by independent material. Such difficulties should be addressed with reference to the quality of the expert reports and not by way of foreign counsel making submissions on foreign law where the experts are strongly opposed.

69 As I have stated, unlike the SICC (see [55] above), that is not the procedure in this court. Indeed, if it is contemplated that the Applicant would have a role in (a) informing the court of the contents of Indian law, (b) explaining what status the Indian authorities have, or (c) predicting how Indian courts are likely to rule on the unsettled Minors' Issues, he would be inappropriately performing the role of a legal expert from the bar (see *Pacific Recreation* at [76]).

70 More significantly, having reviewed the expert evidence filed in the OSes, I see little risk that the obstacles faced in *Wu Yang Construction* will arise here. The expert evidence tendered has been well supported by objective material including Indian statutes, case law and commentaries. As such, there is an objective basis for the court to ascertain the content of foreign law and prefer certain explanations over others.

71 Furthermore, the parties have the option of applying to cross-examine the foreign law experts under O 28 r 4 of the ROC. As I indicated above, this

appears to be the preferable approach. Mr Jeyapal, appearing for the Attorney-General, agreed with me that cross-examination of the Indian law experts is "both plausible and eminently reasonable". There is certainly precedent for doing so in the context of applications to set aside arbitral awards: see *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68 and *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep 550. I fail to see the need for the Applicant to orally explain the content of Indian law and the status of the authorities when the persons in the best position to do so should be and are in fact the Indian law experts. I therefore do not see the need to admit foreign counsel to make submissions on these issues of foreign law.

Necessity of foreign counsel and availability of local counsel

72 The second and third Notification Matters tend to be considered together as these matters inevitably overlap (*Re Wordsworth* at [53]). The smaller the pool of local lawyers with the appropriate experience or expertise, the greater the need to engage foreign counsel. Appropriate experience is assessed with reference to the counsel's ability to put forward and argue the case competently, having regard to the specific issues raised in the underlying case (*Re Wordsworth* at [54]). In this regard, it should be emphasised that "necessity" for foreign counsel's services denotes a higher threshold than "desirability" or "preference" (*Re Beloff* at [62]). Necessity may be shown by demonstrating that a litigant would be substantially prejudiced in the conduct of his case if he were precluded from retaining foreign counsel.

73 The size of the pool of suitable local counsel will vary depending on the evaluation of the issues. The Applicant submitted that the issues in the OSes are not local-centric. Consequently, there are no local lawyers with the appropriate

expertise or experience to argue the esoteric and complex Indian Law Issues competently. It is therefore inadequate for foreign counsel to merely contribute to written submissions (see *Re Fordham* at [86]).

74 These arguments lose their force once we recognise the proper place of Indian law in the OSes. The lack of local lawyers with expertise in Indian law is precisely why foreign legal experts are called to give an opinion; it is not a reason for the admission of Indian counsel. Since Indian law is to be proved by evidence and not by submissions, the relevant experience and expertise needed are those of evaluating the competing expert evidence and making submissions with the assistance of expert reports. A requirement for counsel to have subject matter knowledge of Indian law is hence misplaced.

75 There is an adequate pool of local counsel capable of making submissions with the assistance of foreign legal experts (see [56]–[59] above). It is certainly within the range of competence of the Senior Counsel retained by the Sellers to argue the OSes. My view is bolstered by the Sellers' own conduct of the arbitration proceedings. The Sellers did not engage Indian lead counsel for the arbitration even though that was the proper forum for the full ventilation of the merits of all these issues of Indian law. Instead, Mr Davinder Singh SC was instructed as lead counsel on behalf of all the Sellers. If the matter appeared to be within the competence of Singapore Senior Counsel at the arbitration, it is baffling how the presence of Indian lead counsel can be said to be necessary in the OSes where the Indian Law Issues feature only as anterior facts to be proven.

Reasonableness

76 A final consideration that merits some discussion is the Attorney-General's submission on the policy of promoting Singapore as a venue for

international arbitration. In *Re Wordsworth*, I had indicated that it may be relevant to consider the potential impact of the decision on admission on the main setting-aside application where there was a lack of local practitioners with the expertise to address the issues thereunder (at [69]). This merely expressed the simple observation that a litigant may be prejudiced in the presentation of his case if he is unable to engage suitable counsel. Were necessity not otherwise established under the other Notification Matters, I am not persuaded that the promotion of Singapore as a venue for international arbitration should be a dominant or "governing" reason for admitting foreign counsel. My view is reinforced by Mr Jeyapal's candid concession that the "logical effect" of the Attorney-General's submission would be that foreign counsel should be admitted for *all* and *any* arbitration-related proceedings since such a "generous" approach will enhance Singapore as an arbitration hub. Surely this would dilute the underlying rationale of "need" behind the admissions regime (see *Re Wordsworth* at [35]).

77 For all the reasons set out above, even if I had found that the Applicant possesses the "special qualifications or experience" for the purposes of the issues in the OSes, I would have dismissed the applications in any event.

Conclusion

78 For the foregoing reasons, I find that this is not an appropriate case to admit the Applicant. I therefore dismiss the applications with costs fixed at $8,000 inclusive of disbursements. Consistent with the costs order in *Re Rogers* (see [66]–[68]), such costs are to be paid by the "true party" who stood to benefit from these two applications, *ie*, the plaintiffs in the OSes and not the Applicant.

Steven Chong
Judge

Smitha Menon, Stephanie Yeo and Doralyn Chan
(WongPartnership LLP) for the applicant in OS 1114;
Kelvin Poon, Alyssa Leong and Matthew Koh
(Rajah & Tann Singapore LLP) for the applicant in OS 1115;
Suresh Divyanathan, Aaron Leong and Victoria Choo
(Oon & Bazul LLP) for the respondent in OSes 1114 and 1115;
Christopher Anand Daniel and Harjean Kaur
(Advocatus Law LLP) for the Law Society;
Jeyendran Jeyapal, Elaine Liew and May Ng
(Attorney-General's Chambers) for the Attorney-General.