WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka
[2002] SGHC 104

Case Number : OS 601627/2001, SIC 600107/2002

Decision Date : 13 May 2002

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : VK Rajah and Aurill Kam (Rajah & Tann) for the plaintiffs; Vinodh Coomaraswamy and Pradeep Pillai (Shook Lin & Bok) for the defendants

Parties : WSG Nimbus Pte Ltd — Board of Control for Cricket in Sri Lanka

Arbitration – Agreement – International arbitration – Ex parte application under s 12(6) of International Arbitration Act (Cap 143A, 1995 Ed) – Requirement of urgency for such applications – Whether plaintiffs' application urgent – s 12(6) International Arbitration Act (Cap 143A, 1995 Ed) – O 69A r 3(3) Rules of Court

Arbitration – Agreement – International arbitration – Plaintiffs obtaining injunction against defendants proceeding with action in foreign court – Relevant principles – Whether reference to arbitration exists – Whether to discharge injunction

Arbitration – Agreement – International arbitration – Plaintiffs obtaining injunction against defendants dealing with third parties in relation to disputed subject-matter – Application for discharge of injunction – Balance of convenience – Whether damages an adequate remedy

Civil Procedure – Judgments and orders – Issue estoppel – Criteria to satisfy – Foreign court ruling that no agreement to arbitrate – Plaintiffs applying to object to court's exercise of jurisdiction – Whether plaintiffs submitting to court's jurisdiction – Whether against public policy to recognise foreign judgment

Courts and Jurisdiction – Jurisdiction – International arbitration – Meaning of 'arbitration agreement' – Clause in agreement allowing either party to opt for arbitration in case of dispute – Whether agreement an 'arbitration agreement' within meaning of International Arbitration Act (Cap 143A, 1995 Ed) – Whether court has jurisdiction in dispute – ss 2 & 12(6) International Arbitration Act (Cap 143A, 1995 Ed)

Words and Phrases – 'Arbitration agreement' – s 2 International Arbitration Act (Cap 143A, 1995 Ed)

Judgment

Cur Adv Vult

GROUNDS OF DECISION

1 The Plaintiffs are a company incorporated in Singapore. The Defendants are the national association for cricket in Sri Lanka constituted pursuant to the Sri Lankan Sports Law No. 25 of 1973. The legal personality of the Defendants was initially the subject of some dispute. The Defendants had alleged that they were not a body corporate and did not have the capacity to be sued. However they eventually withdrew this preliminary objection on a without prejudice basis and that question is no longer in issue before me.

2 On 29 October 2001, on the Plaintiffs *ex parte* application under s 12(6) of the International Arbitration Act ("the Act"), I made a number of interim orders of which the first two were the substantial ones. These are, respectively, a prohibitive injunction restraining the Defendants from dealing with the subject matter of the dispute with any third party, and an anti-suit injunction restraining the Defendants from proceeding with an action they had commenced in the High Court of the Western Province of Holden in Colombo, Sri Lanka ("the Colombo High Court"), until further order. The terms of these orders are as follows:

1. The Defendant, whether by its officers, servants, agents or any of them or otherwise howsoever, be restrained forthwith from entering into any contract, arrangement or commitment with any third party to deal with any of the commercial rights which form the subject matter of the Master Rights Agreement dated 3 December 2000 made between the Plaintiff and the Defendant as amended by the Terms of Settlement dated 5 February 2001 made between the Plaintiff and the Defendant, pending further order by this Court;

2. The Defendant, whether by its officers, servants, agents or any of them or otherwise howsoever, be restrained forthwith from proceeding with the action brought by it against the Plaintiff in Sri Lanka in the High Court of the Western Province of Holden in Colombo under High Court (Civil) Case No. 246 / 2001, pending further order by this Court;

3 On 22 January 2002 the Defendants took out this summons, *iner alia*, to discharge those injunctions. Before embarking on the grounds for the application, I should set out the background facts.

Background

4 On 3 December 2000 the parties entered into an agreement, called the "Master Rights Agreement" ("MRA"), under which the Plaintiffs obtained the commercial rights (including broadcasting and transmission rights outside Sri Lanka) to cricket matches between the Sri Lankan national cricket team and visiting test playing sides for 14 tours in the period January 2001 to December 2003. Clause 19 of the MRA provides for English law to be the governing law and makes a reference to arbitration in Singapore in accord with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC"). Whether this clause is an arbitration agreement within the meaning of the Act is a matter of considerable dispute between the parties and I shall return to this issue later.

5 Differences soon arose between the parties in respect of payments to be made by the Plaintiffs to the Defendants. On 29 January 2001, the Defendants commenced proceedings against the Plaintiffs in the Colombo High Court by way of Plaint No. HC (Civil) 20/2001(1) ("the First Action"). The following day, 30 January 2001, the Defendants applied *ex parte* for and obtained an interim injunction restraining the Plaintiffs *"from interfering with and/or obstructing the right of the Defendants to enter into contractual and/or other arrangements of whatsoever nature . . . to secure and promote the Defendants right in respect of the International Cricket Matches to be played in Sri Lanka during the period January 2001 to December 2003 until the application for Interim Injunction is heard and determined"*, such injunction to be operative until 13 February 2001.

6 On 2 February 2001 the Plaintiffs filed a motion to have the First Action dismissed pursuant to s 5 of the Arbitration Act No 11 of 1995 ("the Sri Lankan Arbitration Act"). Simultaneously, they filed a motion to have the interlocutory orders dated 30 January 2001 set aside on grounds of various alleged suppressions and misrepresentations of material facts by the Defendants.

7 On 5 February 2001 the parties arrived at a settlement of the First Action and executed a document entitled "Terms of Settlement". On 6 February 2001 the Plaintiffs consented to judgment and decree being entered in terms of the Terms of Settlement. Clause 8 of thereof stipulates that *"the parties agree that upon the terms of settlement now entered herein the [MRA] will continue to operate and subsists as amended by these terms of settlement and these terms will be treated as part and parcel of the said agreement."* The parties agree that there is nothing in the Terms of Settlement that alters Clause 19 of the MRA.

8 Differences continued to plague the relationship between the parties mainly over payments under the

terms of the MRA. Matters came to a head on 15 October 2001 when the Defendants gave notice to the Plaintiffs that the MRA had ceased to operate by reason of the Plaintiffs breaches of paragraphs 1(a), 1(b) and 1(d) of the Terms of Settlement which relate to payment of certain sums and the provision of a guarantee. The Plaintiffs claimed that they received this notice only on 16 October 2001 and that they had in fact effected payment on 15 October, which was the extended deadline given by the Defendants.

9 On 16 October 2001 the Defendants took out a second action against the Plaintiffs in the Colombo High Court by way of Plaint No. HC (Civil) 246/2001(1) ("the Second Action") for *inter alia* damages for breach of the terms of the MRA and the Terms of Settlement. On the same day they applied *ex parte* for and obtained an interim injunction enjoining the Plaintiffs from *"preventing [the Defendants] and/or interfering with [the Defendants] negotiating with any party and/or entering into contracts with any party and/or taking any steps in connection with entering into any contracts with any party in respect of matters covered by the [MRA]."*

10 On 17 October 2001 the Defendants called for expressions of interest for the sale of the commercial rights which form the subject-matter of the MRA and issued tender packages. The deadline for submission was fixed for 25 October but this was later extended to 29 October. On 18 October the Defendants placed a press advertisement giving notice that the Plaintiffs had failed to perform their obligations under the Terms of Settlement.

11 On 19 October the Plaintiffs took out a motion in the Colombo High Court to raise the Plaintiffs objection to it exercising jurisdiction in the Second Action. This came up for hearing on 24 October but it was adjourned to 26 October. On that date it was further adjourned to 29 and 30 October.

12 On 26 October the Plaintiffs notified the Defendants of their intention to commence proceedings in Singapore, which they did on 29 October in the form of the present action.

13 The hearing of the Plaintiffs motion in the Colombo High Court was conducted on 29 and 30 October and the parties filed written submissions on 2 November. On 7 November the Colombo High Court dismissed the motion. The Colombo High Court held that Clause 19 of the MRA gave the parties a choice to elect between arbitration and litigation and was therefore not an "arbitration agreement" within the meaning of s 5 of the Sri Lankan Arbitration Act, which applied only to compulsory arbitration clauses. The Colombo High Court ruled that it therefore had jurisdiction over the Plaintiffs and the subject-matter of the Second Action. The Plaintiffs then withdrew from further participation in the Second Action. The action was fixed for *ex parte* trial. On 23 November 2001 the Plaintiffs lodged a petition in the Supreme Court of Sri Lanka for leave to appeal against the Order of Court dated 7 November. This was heard and dismissed by the appeal court on 11 January 2002.

14 Meanwhile on 19 October 2001 the Plaintiffs, by their solicitors in Singapore, issued a Notice of Arbitration to the Defendants pursuant to Clause 19 of the MRA. The notice advised that the Plaintiffs would be appointing Mr Christopher Bathurst, QC as their arbitrator and that they would be seeking the following relief:

(i) an interim injunction against the Defendants acting contrary to the MRA and the Terms of Settlement;

(ii) a declaration that the MRA and Terms of Settlement continue to be in full force and effect;

(iii) an order of specific performance of the MRA and Terms of Settlement; and

(iv) damages, interest and costs.

On the same day the Plaintiffs duly notified the SIAC of the reference to arbitration. On a without prejudice basis, the Defendants appointed their arbitrator, Mr Stanley Goonawardane on 9 November 2001. Mr Joseph Grimberg, SC was appointed the presiding arbitrator. Under Article 16 of the Model Law, the tribunal is competent to rule on its own jurisdiction, including any question of the existence of the arbitration agreement. The Defendants have raised this as a preliminary question and the tribunal has fixed this for hearing on 23 to 25 May 2002. That is the status of the dispute between the parties.

Grounds for discharge

15 The Defendants application to discharge the injunctions initially proceeded on a number of grounds. However at the start of their submissions in reply on 6 May 2002, the Defendants withdrew their grounds that (a) the incorrect originating process was used; (b) the Defendants were not a legal entity; and (c) the Plaintiffs had failed to make full and frank disclosure. Towards the end of their submissions in reply the Defendants confirmed that they would proceed only essentially on a single ground, namely that the Colombo High Court having made a determination that Clause 19 of the MRA is not an arbitration agreement, in which action the Plaintiffs have participated, the Plaintiffs are estopped from submitting otherwise in the present action ("issue estoppel"). Accordingly in the present action, the Court would not have any jurisdiction to make any order under s 12(6) as it is predicated on the existence of an arbitration agreement which the Plaintiffs are estopped from asserting. In the event that the Court should rule against them on issue estoppel, the Defendants are prepared, for the purpose of this application and without prejudice to their entitlement to raise any further points on the question of jurisdiction or on the construction of Clause 19, to accept that this Court has jurisdiction under s 12(6) of the Act to grant the anti-suit and prohibitive injunction. The Defendants would then limit their submissions to the question of discretion to grant the injunctions.

16 On their part, the Plaintiffs reserved the right to argue before an arbitral tribunal or anywhere else that the decision of the Court in respect of the construction of Clause 19, if in their favour, raises an issue estoppel against the Defendants.

Whether Court has jurisdiction under s 12(6) of the Act

17 Notwithstanding the Defendants concession on the question of jurisdiction should I find against them on the question of issue estoppel, in my view it is necessary first to consider whether this Court has jurisdiction to make the orders under s 12(6) of the Act. This would depend on whether the arbitration in question is one to which Part II of the Act applies. That question turns on whether Clause 19 of the MRA is an arbitration agreement falling within the definition of that term in the Act. That definition is found in s 2 and it provides as follows:

> "arbitration agreement" means an agreement in writing referred to in Article 7 of the Model Law

The relevant paragraph of Article 7 of the Model Law is paragraph (1), which provides as follows:

> *Article 7. Definition and form of arbitration agreement*

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

18 The question is whether Clause 19 of the MRA falls within Article 7(1). Section 4 of the Act provides that, for the purposes of interpreting the Model Law, reference may be made to *travaux prparatoires* of the

UNCITRAL and its working group relating to the Model Law. UNCITRAL has published a commentary on the draft Model Law on 25 March 1985 (Document A/CN.9/264 entitled "Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration"). Paragraph 2 of the commentary on the draft of Article 7(1) (which is substantially the same as the final text) states as follows:

> 2. The model law recognizes not only an agreement concerning an existing dispute ("compromis") but also an agreement concerning any future dispute ("clause compromissoire"). Inclusion of this latter type of agreement seems imperative in view of its frequent use in international arbitration practice and will, it is hoped, contribute to global unification in view of the fact that at present some national laws do not give full effect to this type.

This statement affirms the intention of the Model Law to apply to *ad hoc* agreements to refer an existing dispute to arbitration as well as an agreement to refer future disputes to arbitration.

19 Clause 19 of the MRA is entitled "LAW/ARBITRATION" and provides as follows:

> This Agreement shall be governed by and construed in accordance with the laws of England and Wales. In the event that the parties have a dispute over any term or otherwise relating to this Agreement they shall use their best endeavours to resolve it through good faith negotiations. In the event that they fail to do so after 14 days then either party may elect to submit such matter to arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force which rules are deemed to be incorporated by reference with this Clause to the exclusive jurisdiction of which the parties shall be deemed to have consented. Any arbitration shall be referred to three arbitrators, one arbitrator being appointed by each party and the other being appointed by the Chairman of the SIAC and shall be conducted in the English language.

20 The Defendants had submitted to the Colombo High Court that the words "may elect" in Clause 19 confers on the parties a wide discretion in that either of them may elect for arbitration or to go to the Courts and there was no reason to give the word "may" a mandatory meaning. Since s 5 of the Sri Lankan Arbitration Act applies only when there is a compulsory arbitration clause, Clause 19 was not an arbitration agreement within the meaning of that Act. The Defendants had made an election to litigate when they commenced the action in the Colombo Court.

21 In my view, this submission hinges on taking the word "may" out of the context of Clause 19 and, after associating that word with notions of discretion and a lack of any mandatory meaning, these notions are then linked with the word "arbitration" to arrive at the conclusion that there is no compulsory arbitration clause. But in order to arrive at the proper construction of Clause 19 it is necessary to consider the provision in its entirety and see how the words relate to one another to convey the intention of the parties. Taking this approach, the first sentence deals with the governing law which is to be English law. The remainder of the clause relates directly to arbitration and on a plain reading, this is what it provides. In the event of a dispute, the parties are required first of all to use their best endeavours to resolve it through good faith negotiations. It is only if this is unsuccessful after 14 days that the right is given to either party to elect to submit the dispute to arbitration. Upon such an election, both parties are bound to submit to arbitration in Singapore in accordance with the Arbitration Rules of the SIAC for the time being in force. Arbitration shall be conducted by three arbitrators with each party to appoint one and the SIAC Chairman to appoint the third. While it is true that under Clause 19, there is no compulsion to arbitrate until an election is made, once a party makes such election, arbitration is mandatory in respect of that dispute.

22 Another problem with the Defendants submission is that there is no express mention in Clause 19 of any election to resolve the dispute by court action nor that once any party takes out an action in court, the other party is precluded from electing to submit the dispute to arbitration. It is the right of a party to a contractual dispute to commence an action in a court of competent jurisdiction for the determination of his claims. But this is subject to any agreement that the parties shall resolve such disputes by way of arbitration. If there is such an agreement then the court may, on the defendants application, stay the action on that ground. This is certainly the position in Singapore and it is not disputed that it is so in Sri Lanka. When Clause 19 is construed within this legal matrix, it is clear that it is not a question of making an election for arbitration or litigation, but whether any party has opted for arbitration. This construction is consistent with the approach taken by the English High Court in *Wesfal Larsen & Co A/S v Ikerigi Compania Naviera SA (The Messiniaki Bergen)* [1983] 1 All ER 382 and *Lobb Partnership Ltd v Aintree Racecourse Company Ltd* [2000] BLR 65.

23 The question whether a clause which confers the parties an option to arbitrate is an arbitration agreement was considered in *Wesfal Larsen & Co A/S v Ikerigi Compania Naviera SA (The Messiniaki Bergen)*. The contract there contained the following arbitration clause:

> Any dispute arising under this charter shall be decided by the English courts to whose jurisdiction the parties agree whatever their domicile may be: Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act, 1950, or any statutory modification or re-enactment thereof for the time being in force. Such election shall be made by written notice by one party to the other not later than 21 days after receipt of a notice given by one party to the other of a dispute having arisen under this charter.

Bingham J held that by itself this did not constitute an agreement to arbitrate. It merely confers an option which may but need not be exercised. But once a party duly elects to refer the dispute to arbitration, a binding arbitration agreement comes into existence. He held that the arbitration clause was an "arbitration agreement" within the meaning of s 32 of the U.K. Arbitration Act 1950.

24 In *Lobb Partnership Ltd v Aintree Racecourse Company Ltd* the English Court had to deal with an unusual arbitration clause. This provided that:

> Disputes may be dealt with as provided in paragraph 1.8 of the RIBA Conditions but shall otherwise be referred to the English Courts. The construction, validity and performance of this Agreement shall be governed by English law.

Paragraph 1.8.1 of the RIBA Conditions states as follows:

> any difference or dispute arising out of the Appointment shall be referred by either parties to arbitration by a person to be agreed between the parties or, failing agreement within fourteen days after either party has given the other a written request to concur in the appointment of an arbitrator, a person to be nominated at the request of either party by the President of the Chartered Institute of Arbitrators

25 Colman J did not agree with the defendants argument that the arbitration clause gave the party claiming relief in respect of a dispute the right to elect to bring this claim before an arbitrator or the courts. He was of the view that the parties had intended by this clause to give the right to either party, in the event of a dispute between them, to insist on its being dealt with in accordance with paragraph 1.8 of the RIBA Conditions. He referred to the *Wesfal-Larsen case* and said (at p 68):

> The English courts have consistently taken the view that, provided that the contract gives a reasonably clear indication that arbitration is envisaged by both parties as a means of dispute resolution, they will treat both parties as bound to refer disputes to arbitration even though the clause is not expressed in mandatory terms.

Colman J said that while it was possible to have a situation in which parties are given the right to opt for litigation, which would be useful if third parties are required to be joined, he felt that this was not the construction of the clause before him. He said as follows at p 69:

> It is true that there might be an underlying procedural purpose in a unilateral right to elect to arbitrate or litigate, in as much as the claimant might wish to have the facility of starting an action in court not only against the opposite party to the contract, but also against other parties not subject to an agreement to arbitrate. He might therefore wish to have only a non-mandatory arbitration clause so as to avoid the operation of the stay jurisdiction under section 9 of the Arbitration Act 1996. However, I do not consider this consideration a pointer strong enough to outweigh the general effect of the words in their ordinary and natural meaning being to make the arbitration facility under paragraph 1.8 available to either party, whichever of them initiated the claim arising out of the dispute.

26 The Defendants refer to *Hammond v Wolt* [1975] VR 108, a decision of the High Court of Victoria, in which Menhennitt J had to consider the following clause:

> 23(a) In the event of any dispute arising . . . either party may give to the other notice in writing of such dispute and he shall simultaneously therewith notify the President . . . of the Housing Industry Association . . . of such dispute and shall lodge with the said President . . . the sum of $200 . . . with a request to the said President . . . to appoint a person (hereinafter called the arbitrator). Any Award or Assessment made by the said Arbitrator shall be final and binding . . . and neither [party] shall be entitled to commence or maintain any action upon any such dispute which has been so referred to Arbitration until such dispute has been determined by the Arbitrator and then only in accordance with any Award Assessment or direction given by such Arbitrator.

27 The defendant there alleged that court proceedings had been brought by the plaintiff in breach of an arbitration agreement and ought to be stayed under s 5 of the Victorian Arbitration Act 1958. The judge had to determine whether this clause was "a submission", defined in that Act as *"a written agreement to submit present or future differences to arbitration whether or not an arbitrator is named therein or not"*. Menhennitt J held as follows (at p 116):

> In my opinion, it is also the position that, under disputes cl. 23, all the parties have is an option to have differences referred and there is no agreement to submit until the option has been exercised. The prime reason for this conclusion is, I think, the presence of the word "may" in the provision for giving notice of the dispute to the opposite party and to the president . . . . It is entirely in the option of the parties as to whether or not they give notice and until they do, nothing is submitted to anyone. The conclusion is reinforced by the absence of any language directly referring the dispute to anyone. As I have said, the conclusion that a dispute or disputes are referred is a matter of implication, and, in my view, the true construction of the clause is that there is to be implied a provision that if one party gives to the other party and

> to the president . . . notice of a dispute and pays the required sum and a person is nominated by the president . . . , the dispute is then referred to the person nominated and, until that happens, there is no agreement to submit any differences to anyone. . . .
>
> The question remains whether an agreement which gives either party an option to have differences submitted to arbitration is an agreement to submit differences to arbitration within the meaning of the definition in s.3 of the Act and, by incorporation, s.5. In my opinion, it is not. The expression used is agreement to submit and the word to requires, I think, that the parties have agreed that the differences are to be submitted, not that, at the option of one or other of them, they may be.

28 Menhennit J held, in effect, that a clause in which the parties are given an option to elect for arbitration is not an agreement to submit differences to arbitration within the meaning of the Arbitration Act 1958. However this view was soundly rejected by the Victorian Court of Appeal in *Manningham City Council v Dura Constructions (Australia) Pty Ltd* [1999] VSCA 158, in which Phillips JA said at 8:

> 8. In *Hammond v. Wolt* [1975] V.R. 108, Menhennitt, J. took the view that the clause in the contract under which the parties there had an option to have differences referred to arbitration did not until the option had been exercised constitute an agreement to submit disputes to arbitration. That view has since been authoritatively rejected. The contract may contain an arbitration agreement notwithstanding that the reference of a particular dispute to arbitration will depend upon the exercise of an option. In reaching his conclusion, Menhennitt, J. drew upon the decisions of the High Court in *John Grant & Sons Ltd. v. Trocadero Building and Investment Co. Ltd.* (1938) 60 C.L.R. 1 and *Plucis v. Fryer* (1967) 126 C.L.R. 17. Both were relied upon to sustain the conclusion that there was no arbitration agreement in the case of *Hammond*, but, with great respect, both were concerned with a somewhat different aspect.

29 The arbitration clause in the *Manningham City Council case* had provided for dispute resolution by either litigation or arbitration but with an overriding right on the part of any party to opt for arbitration. The Victorian Court of Appeal held that such a clause was an "arbitration agreement" within the meaning of the Commercial Arbitration Act 1984 in which the term was defined as *"an agreement in writing to refer present or future disputes to arbitration"*. Buchanan JA said that it is such an agreement if the parties are bound to resort to arbitration in the event that certain conditions are fulfilled. He reasoned as follows (at 27):

> 27. The agreement in the present case requires resolution of a dispute by arbitration once a notice of referral to arbitration has been given under clause 13.03 and provision has been made for the security required by clause 13.04. Thereupon, according to clause 13.04, the dispute "shall be and is hereby referred to arbitration." The agreement in terms contemplates that a dispute may be resolved by litigation, thereby making express that which was implicit in the agreement considered by the High Court in the *PMT Case*. However, it remains an agreement by which the parties are bound to have their disputes arbitrated if certain conditions are fulfilled. If a notice is properly given under clause 13.03 referring the dispute to arbitration and security for costs is provided, the dispute is referred to arbitration because the parties have already agreed that the dispute will be resolved by arbitration upon the occurrence of those events.

30 In the light of these authorities, it is clear that an agreement in which the parties have the option to

elect for arbitration which, if made, binds the other parties to submit to arbitration is an arbitration agreement within the meaning of the Act. This is plainly in accord with the policy behind the Act which is to promote the resolution of disputes by arbitration where the parties have agreed to achieve it by this method. I would therefore hold that Clause 19 is an arbitration agreement for the purpose of this application and accordingly this Court has jurisdiction to make orders under s 12(6) in respect of this arbitration.

Issue estoppel

31 The Defendants submit that the Colombo High Court had, in the Second Action, conclusively determined a number of issues which the Plaintiffs cannot now re-litigate before me. The Colombo High Court had made the following findings:

> (a) Clause 19 of the MRA gives the parties a choice to elect between arbitration and litigation;
>
> (b) Clause 19 is therefore not an "arbitration agreement" within the meaning of section 5 of the Sri Lankan Arbitration Act, which applies only to compulsory arbitration clauses; and
>
> (c) Accordingly, the Colombo High Court has jurisdiction over the Plaintiffs and the subject-matter of the Second Action.

32 In relation to these findings, the Defendants submit that the conditions are met to raise an estoppel *per rem judicatam* against the Plaintiffs. Those conditions, as summarised by the House of Lords in *The Sennar (No. 2)* [1985] 1 Lloyds Rep 521, are as follows:

> (i) The earlier judgment (a) was made by a court of competent jurisdiction; (b) is final and conclusive; and (c) was made on the merits;
>
> (ii) The parties in the earlier action must be the same as those in the later action in which that estoppel is raised as a bar;
>
> (iii) The issue in the later action must be the same as that decided by the judgment in the earlier action.

33 The Court of Appeal had cited *The Sennar (No. 2)* with approval and followed it in *Official Assignee of the estate of Tang Hsiu Lan, a bankrupt v Pua Ai Seok & Ors* [2001] 2 SLR 436. The Plaintiffs have no dispute on the law. But they submit that:

> (a) the Colombo High Court was not a court of competent jurisdiction because the Plaintiffs had not submitted to its jurisdiction;
>
> (b) the issues before it are not the same as the issues here; and
>
> (c) in any event, the order of the Colombo High Court should not be recognised as it would be against public policy to do so.

(a) No submission to jurisdiction

34 The Plaintiffs contend that they are not amenable to the jurisdiction of the Colombo High Court. They are a Singapore company without any presence in Sri Lanka. Clause 19 of the MRA specified English law as the

governing law with arbitration to be conducted in Singapore under the SIAC Rules. They had not taken any action that may be construed as having voluntarily submitted to the jurisdiction of the Colombo High Court. The Plaintiffs point out that the following were the steps that they had taken in the Second Action:

> (i) Filed a notice of motion to object to the Colombo High Court exercising jurisdiction under s 5 of the Sri Lankan Arbitration Act No 11 of 1995;

(ii) Attended before the Colombo High Court to argue that it had no jurisdiction over the subject matter of the dispute;

> (iii) Filed written submissions without prejudice to their position that the Defendants were precluded under the anti-suit injunction from proceeding in the Second Action; and

(iv) Applied for leave to appeal against the order of the Colombo High Court on the question of jurisdiction.

The Plaintiffs emphasise that their participation in the Second Action was limited to their objection to the exercise of jurisdiction by the Colombo High Court. They point out that they had taken no steps to defend the merits of the Second Action and even allowed default judgement to be entered against them.

35 The Defendants submit that by participating in the Second Action the Plaintiffs had submitted to the jurisdiction of the Colombo High Court. They pointed out that the Plaintiffs challenge was based on s 5 of the Sri Lankan Arbitration Act No. 11 of 1995, which reads as follows:

> Where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the Court shall have no jurisdiction to hear and determine such matter if the other party objects to the Court exercising jurisdiction in respect of such matter.

The Defendants argue that this provision does not operate automatically to deprive the Colombo High Court of jurisdiction. It is only when an objection is raised to the Courts taking jurisdiction that the issue of the applicability of s 5 comes into play. Therefore the Plaintiffs must, at the outset, have accepted that the Colombo High Court had jurisdiction under its own law to hear and determine the Second Action. Accordingly the Plaintiffs are bound by the determination made by the Colombo High Court on this question, i.e. that Clause 19 is not an arbitration agreement for the purpose of s 5 of the Sri Lankan Arbitration Act and therefore it had jurisdiction to hear the action commenced by the Defendants. The Defendants rely on *Williams & Glyns Bank plc v Astro Dinamica Compania Naviera S.A.* [1984] 1 WLR 438 in which the House of Lords held that there were two different and distinct jurisdictions: (a) jurisdiction over the merits of the claim; and (b) jurisdiction to determine whether the court has jurisdiction over the merits. The Defendants contend that the Colombo High Court had exercised the latter jurisdiction in deciding that Clause 19 was not an arbitration agreement. The Plaintiffs, by participating in the hearing on that issue, had voluntarily submitted to that jurisdiction of the Colombo High Court.

36 In the *Williams & Glyns Bank case*, the plaintiffs lent money to a Greek company under a loan agreement. This loan was secured by *inter alia* two guarantees, one from each of the defendant companies. Each guarantee was backed by a mortgage of a ship belonging to the company and provided for English law to be the governing law and the English courts to have exclusive jurisdiction. When the Greek company defaulted on the loan repayment, the plaintiffs sued the defendants in England on the guarantees. The defendants claimed that these guarantees were procured fraudulently and the signatories had no authority

from the companies to execute them. Therefore the guarantees were null and void and there was no agreement on the part of the defendants to submit to the jurisdiction of the English courts. The defendants commenced proceedings in the Greek court for declarations that the guarantees were void and of no effect. The defendants also took out an application in England under O 12 r 8(1) of the English Rules of Supreme Court for *inter alia* an order to set aside the writ or service of the writ and a stay of the action on the ground of *forum non conveniens* and *lis alibi pendens*. There were therefore two questions before the court: (i) whether it had jurisdiction over the defendants who assert that the guarantees were null and void; and (ii) whether to grant a stay. Logically, the court should first decide whether it has jurisdiction over the matter before it can go on to consider any other application in the matter and Bingham J ordered that the issues as to jurisdiction be heard and determined as a preliminary issue. But that would involve a determination of whether the guarantees were valid or not, which was at the heart of the dispute and would take a considerable time. Lord Fraser, with whom the other judges agreed, held that the court had power to stay the proceedings, even before it had decided on the question of its jurisdiction, because under s 43(9) of the Supreme Court Act 1981 it had a wide power to stay any proceedings before it.

37 The holding by the House of Lords that there are two different and distinct jurisdictions involved was made in a different context from the present case. The plaintiffs in the *Williams & Glyns Bank case* had contended that in applying for a stay, the defendants had waived any objection to the jurisdiction of the English courts. The House held that there was no waiver because in entertaining the stay application the court was acting under its power to decide whether it had jurisdiction over the merits without assuming that it had such jurisdiction. Lord Fraser reasoned as follows (at p 442):

> It was further contended on behalf of the appellants that the respondents either had waived any objection to the jurisdiction because they had taken a step in the action by applying for a stay, or that they would waive any objection if they persisted with their application in priority to disputing the jurisdiction. My Lords, it would surely be quite unrealistic to say that the respondents had waived their objection to the jurisdiction by applying for a stay as an alternative in the very summons in which they applied for an order giving effect to their objection to the jurisdiction. That summons makes it abundantly clear that they are objecting, and the fact that they ask for a decision upon their objection to be postponed until the outcome of the Greek proceedings is known is not in any way inconsistent with maintaining their objection. I can see no reason in principle or common sense why the respondents should not be entitled to say: "We object to the jurisdiction of the English courts, but we ask for the proceedings necessary to decide that and the other issues to be stayed pending the decision of the proceedings in Greece."
>
> The argument to the contrary which was accepted by Bingham J. was that, if the court were to entertain the application for a stay, it would be assuming that it had jurisdiction to entertain the action. With the greatest respect to the learned judge, I agree with Robert Goff L.J. in the Court of Appeal that that view is mistaken. The fallacy is in confusing two different kinds of jurisdiction; the first is jurisdiction to decide the action on its merits, and the second is jurisdiction to decide whether the court has jurisdiction of the former kind. The distinction was explained in *Wilkinson v. Barking Corporation* [1948] 1 K.B. 721, 725 by Asquith L.J. who said:
>
> > "The argument we are here rejecting seems to be based on a confusion between two distinct kinds of jurisdiction: the Supreme Court may, by statute, lack jurisdiction to deal with a particular matter - in this case matters including superannuation claims under section 8 - but it has jurisdiction

> to decide whether or not it has jurisdiction to deal with such matters. By entering an unconditional appearance, a litigant submits to the second of these jurisdictions (which exists), but not to the first (which does not)."

By entertaining the application for a stay in this case, the court would be assuming (rightly) that it has jurisdiction to decide whether or not it has jurisdiction to deal with the merits, but would not be making any assumption about its jurisdiction to deal with the merits.

38 In the present action, the Plaintiffs had filed an application in the Colombo High Court objecting to the exercise of jurisdiction by that court on the ground that it had no jurisdiction by virtue of the arbitration agreement. There was no other application by the Plaintiffs and in particular there was no application for a stay. The Defendants contention that in filing the objection application the Plaintiffs had submitted to the Colombo High Courts jurisdiction to decide its own jurisdiction, while certainly attractive, is therefore not directly supported by the *Williams & Glyns Bank case* which involves an application for a stay. Furthermore, in my respectful view Lord Fraser had applied this dual jurisdiction concept in order to avoid a situation where the defendants, in applying in the English courts for a stay, would be taken to have submitted to the jurisdiction. It would be ironical if the *ratio* in the *William & Glyns Bank case* is to be held to apply in the circumstances of the present case.

39 The Defendants also rely on *Harris v Taylor* [1915] 2 KB 580 and *Henry v Geoprosco International Ltd* [1976] 1 QB 726. In *Harris v Taylor,* the English Court of Appeal held that a defendant who had entered a conditional appearance in the Isle of Man court in order to set aside the proceedings on jurisdictional grounds had submitted to the jurisdiction of the Manx Court, even though he took no further part in the proceedings after his application to set aside was unsuccessful. The defendant was an Englishman who was not resident nor owned any property in the Isle of Man. The plaintiff obtained leave from the Manx court to serve the writ out of jurisdiction and it was duly served on the defendant in England. The defendant unsuccessfully applied to set aside enforcement proceedings in the England based on the Manx judgment. The matter turned on whether the defendant had submitted to the jurisdiction of the Manx court. The defendants counsel had entered a conditional appearance to set aside the writ and leave was granted to file a motion for this purpose. In his motion, the defendant applied to set aside the writ and the order for service out of jurisdiction on three grounds: (i) that the Manx rules of court do not contemplate or authorise service out of the jurisdiction; (ii) that no cause of action arose within the jurisdiction; and (iii) that the defendant was domiciled in England. The Manx procedure is explained by Pickford LJ at p 590:

> The procedure in an action in the Isle of Man is this. A document called a statement of claim is filed, and the case is called on in Court. The defendant may or may not be present. If he is, no difficulty arises; he has to put in a defence. If he is not present, certain process follows, and if the defendant is not resident in the Isle of Man it is necessary for the plaintiff to obtain an order for service of a writ out of the jurisdiction. That is what was done in this case, and the defendant's advocate subsequently applied to the Court to have the service of the writ out of the jurisdiction set aside on various grounds. That application was heard by the Court and was dismissed. Then the plaintiff signed an interlocutory judgment, and obtained a writ of inquiry for the assessment of the damages by a jury. I am inclined to think, though I am not sure, that the Court treated the defendant's appearance on his motion as in the nature of a conditional appearance, but the point is not in my view of any importance because the evidence shows that if the appearance was only intended as a conditional appearance the Court had power in its discretion to treat it as an appearance to the action; and if a defendant applies to a Court to set aside

> the service of a writ under which judgment could be obtained against him, and the Court is one which has power to treat that application as constituting an appearance to the action, that in my opinion amounts to such a submission on the part of the defendant to the jurisdiction of the Court as renders him liable to obey the judgment of the Court. In my opinion the defendant did submit to the jurisdiction of the Isle of Man Court, and, therefore, the judgment of that Court is enforceable against him in the Courts of this country.

40 Buckley LJ reasoned that as the defendant was not subject to that jurisdiction, if he had done nothing, any judgment given by the Manx court could not have been enforced against him unless he had some property there. By entering conditional appearance and contending to the Manx court that it had no jurisdiction he had done something that he was not obliged to do. Buckley LJ said as follows at p 587:

> The question which we have to decide on this appeal depends, as I have said, on whether the defendant submitted to the jurisdiction of the Isle of Man Court, and in order to decide that question it is necessary to consider what it was that the defendant did on March 17, when as the record states he appeared conditionally to set aside the writ. When the defendant was served with the process he had the alternative of doing nothing. He was not subject to the jurisdiction of the Court, and if he had done nothing, although the Court might have given judgment against him, the judgment could not have been enforced against him unless he had some property within the jurisdiction of the Court. But the defendant was not content to do nothing; he did something which he was not obliged to do, but which, I take it, he thought it was in his interest to do. He went to the Court and contended that the Court had no jurisdiction over him. The Court, however, decided against this contention and held that the defendant was amenable to its jurisdiction. In my opinion there was a voluntary appearance by the defendant in the Isle of Man Court and a submission by him to the jurisdiction of that Court. If the decision of the Court on that occasion had been in his favour he would have taken advantage of it; as the decision was against him, he was bound by it and it became his duty to appear in the action, and as he chose not to appear and to defend the action he must abide by the consequences which follow from his not having done so. The course adopted by the defendant's advocate on March 17 was either a qualified appearance or an unqualified appearance. If it can be regarded as a qualified appearance, it was an appearance for the purpose of getting a decision of the Court on the question whether the defendant was bound by the jurisdiction of the Court. The decision was against him, and thereafter it was not open to the defendant to say that he was not bound. The doctrine applicable to these cases is that if the defendant has placed himself in such a position that it has become his duty to obey the judgment of the foreign Court, then the judgment is enforceable against him in this country: see *Schibsby v. Westenholz* L.R. 6 Q.B. 155. I think that in this case the defendant did submit himself to the jurisdiction of the Court of the Isle of Man, and, therefore, it was his duty to obey the judgment.

41 Bankes LJ was of the view that as the defendant had appealed to the Manx court to relieve him from a liability which the plaintiff sought to place upon him, this imposed an obligation on him to comply with the decision of that court even if it should go against him. He said this at p 591:

> the principle underlying the case of a person resident in the foreign country or of a person who has agreed to submit to the jurisdiction of its Courts applies equally to the case of a person who appeals at a preliminary stage to the foreign Court to relieve him from an obligation which the plaintiff by means of the

action seeks to put upon him. In *Carrick v. Hancock* (1895) 12 Times L.R. 59 it was held that the fact that the residence of the defendant in the foreign country was merely temporary was not sufficient to oust the jurisdiction of the Courts of that country over him. Mr. Arthur Cohen in arguing that case said that "as a man would be protected from being robbed while passing through a foreign country so also h e was liable to the jurisdiction of its Courts," and Lord Russell of Killowen C.J. in giving judgment said that in his opinion the "duty of allegiance was correlative to the protection given by a State to any person within its territory. This relationship and its inherent rights depended upon the fact of the person being within its territory. It seemed to him that the question of the time the person was actually on the territory was wholly immaterial." It seems to me that if the duty of allegiance exists in a case like that where a mere temporary protection of the law of the foreign Court is enjoyed, the case is far stronger when a defendant actually appeals to a foreign Court to relieve him from a liability which the plaintiff by his action seeks to place upon him. The fact that the defendant has sought the protection of the Court imposes upon him an obligation to obey the judgment of the Court if it should happen that it is given against him. It is in my opinion an entire misconception of the principle applicable to these cases to say that there is a voluntary submission to the jurisdiction of a foreign Court only when the defendant by appearing in the action in the technical sense has consented to the jurisdiction.

42 Bankes LJ said that *"[t]he precise point in this case does not seem to have arisen for decision previously"* (at p 590). And Pickford LJ commented on the difficulty of the issue before them, saying at p 589:

> I do not think the case is an easy one to decide.

4 3 *Harris v Taylor* was considered by a later Court of Appeal in *Henry v Geoprosco*, which involved a Canadian plaintiff resident in Alberta. The defendant company was incorporated in Jersey and had its head office in London, but had no branch or assets in Canada. The plaintiff entered into a service agreement with the defendants in Canada that was governed by English law and had an arbitration clause. When the defendant dismissed the plaintiff summarily the latter commenced an action in the Supreme Court of Alberta for wrongful dismissal. The plaintiff obtained leave to serve the statement of claim on the defendants outside the jurisdiction and this was effected in Jersey. The defendants applied by motion to the Alberta court to: (a) set aside the service of the statement of claim; and (b) alternatively, stay the action by reason of the existence of the arbitration clause. The defendants forwarded three grounds for setting aside the statement of claim: (i) the first ground was one that eventually became irrelevant; (ii) the second ground was that the plaintiffs affidavit seeking leave of court to serve out of the jurisdiction was defective; and (iii) the third was that the Alberta court was not the *forum conveniens*. The defendants motion was refused and their subsequent appeal dismissed. Thereafter the defendants took no further part in the Alberta proceedings. Roskill LJ, who delivered the judgment of the Court, noted the following features of the case (at p 732):

> > It is to be observed that at no time was it argued for the defendants that the Supreme Court of Alberta had no jurisdiction to entertain the action. It seems plain that such an argument would have failed, having regard to the clear terms of rule 30 of the Rules of the Supreme Court of Alberta to which we have referred. This was no doubt the reason why no such argument was advanced. Grounds 2 and 3 above referred to in effect invited the Supreme Court to exercise its discretion not to allow service to stand. The application for a stay because of the arbitration clause was expanded in the notice of appeal to the Court of Appeal of Alberta to allege that the clause was a *Scott v. Avery* clause. As a matter of English law this last submission was plainly untenable upon the true construction of that clause.

44 Roskill LJ observed that the decision in *Harris v Taylor* had been much criticised, in particular by the editors of *Dicey & Morris, The Conflict of Laws*, 9th ed. (1973) and embarked on a detailed consideration of

that judgment "*in order to ascertain precisely what that case decided*" (at p 736). After setting out the facts of that action, including an examination of the first instance decision of Bray J, and the judgments of the members of the Court of Appeal, Roskill LJ pointed out five salient points of the case:

> It seems to us of crucial importance, when considering the *ratio decidendi* of *Harris v. Taylor* to observe, first, that the Isle of Man High Court had by its own local law jurisdiction over the defendant; secondly, that that court had a discretion whether or not to exercise that jurisdiction over the defendant; thirdly, that that court having heard a plea by the defendant that it could not and should not do so decided both that it could and should exercise that jurisdiction; fourthly, that it was not argued in the English action that that decision was in any way wrong by the local law, and, fifthly, that the defendant, having voluntarily invited the Isle of Man High Court, by the appearance which he made, to adjudicate upon his submission that that jurisdiction of that court could not and should not be exercised over him and having lost, had voluntarily submitted to the jurisdiction of that court so that thereafter the defendant could not be heard to say that that court did not have jurisdiction to adjudicate upon the entirety of the dispute between him and the plaintiff.

45 Roskill LJ then examined the line of authorities leading up to *Harris v Taylor* and concluded that they justify three propositions (at p 746, emphasis added):

> (1) The English courts will not enforce the judgment of a foreign court against a defendant who does not reside within the jurisdiction of that court, has no assets within that jurisdiction and does not appear before that court, even though that court by its own local law has jurisdiction over him. (2) English courts will not enforce the judgment of a foreign court against a defendant who, although he does not reside within the jurisdiction of that court, has assets within that jurisdiction and appears before that court solely to preserve those assets which have been seized by that court. (3) The English courts will enforce the judgment of a foreign court against a defendant over whom that court has jurisdiction by its own local law (even though it does not possess such jurisdiction according to the English rules of conflict of laws) if that defendant voluntarily appears before that foreign court <u>to invite that court in its discretion not to exercise the jurisdiction which it has under its own local law</u>.

46 Roskill LJ pointed out that there was no decision that specifically held that an appearance in a foreign court solely to protest against its jurisdiction was a voluntary submission. He pointed out that in *Harris v Taylor*, (at p 747):

> the defendant went much further than protesting against the jurisdiction. It is plain that he was also inviting the Isle of Man High Court not to exercise the discretionary jurisdiction which it undoubtedly possessed under its own local law to allow the order for service out of the jurisdiction to stand - a submission which by implication accepted that there was jurisdiction in that court which it was entitled to exercise if it thought fit to do so.

47 Roskill LJ concluded that *Harris v Taylor* did not stand for the proposition that an appearance solely to protest against the jurisdiction of a foreign court is a voluntary submission to that court. He pointed out that there was authority that an appearance before an arbitrator solely to protest his jurisdiction was not a submission to it. The judge said that the cases in fact go further than that and a party can participate in the entire arbitration subject to the protest as to jurisdiction. However the distinction could lie in the fact that arbitration was consensual compared to the compulsory jurisdiction of a court. Roskill LJ said as follows (at

p 748):

> *Harris v. Taylor* must, we think, therefore be taken as deciding that, whatever the position may be in relation to submission to the jurisdiction in arbitrations, that position has no direct application to the question of voluntary submission to the jurisdiction of a foreign court. It is not open to this court now to hold otherwise. The distinction may lie in the fact that whereas an arbitrator's jurisdiction is always wholly consensual, in the foreign judgment cases such as *Harris v. Taylor* the foreign court had "compulsory" jurisdiction by its own local law and it was within the discretion of that court whether or not to exercise that jurisdiction. If, therefore, a defendant enters a conditional appearance or takes some other comparable step, he is thereby conditionally agreeing to submit to that jurisdiction. If his application to set aside service then fails, that condition is fulfilled. But in the arbitration cases there is no such conditional submission.

48 As the case before the Court in *Henry v Geoprosco* was not one where the defendants had appeared in the Alberta courts solely to protest the jurisdiction, Roskill LJ said that the Court of Appeal was "*not deciding that an appearance solely to protest against the jurisdiction is, without more, a voluntary submission.*" But (at p 748):

> .. we do think that the authorities compel this court to say that if such a protest takes the form of or is coupled with what in England would be a conditional appearance and an application to set aside an order for service out of the jurisdiction and that application then fails, the entry of that conditional appearance (which then becomes unconditional) is a voluntary submission to the jurisdiction of the foreign court.

49 As alluded to by Roskill LJ, the decisions in *Harris v Taylor* and *Henry v Geoprosco* have been severely criticised by academic writers. Denning LJ had commented as follows in *Re Dulles Settlement (No 2)* [1951] Ch 842 (at p 850):

> I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all. I quite agree, of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable. But when he only appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction

50 Indeed the English position has since been changed by legislation. But there is no similar legislation in Singapore and the parties agree that the common law position applies. The Plaintiffs submit that the rule in *Henry v Geoprosco* has not been adopted in any decision of the Singapore Courts and that I should not adopt it because it is based on an application of the rule in *Harris v Taylor,* a decision that the English Courts themselves have refused to apply in two subsequent decisions, i.e *Re Dulles Settlement (No 2)* and *Daarnhouwer & Co NV v Boulous* [1968] 2 Lloyds Rep 259. However, the Plaintiffs submit that even if this rule is adopted, on the facts of the present case the Plaintiffs had not asked the Colombo High Court to exercise

any jurisdiction but had only raised the issue of its lack of jurisdiction in view of the existence of the arbitration clause. On the view that I take in relation to this question, I find that it is not necessary for me to enter into a consideration as to whether the rule in *Henry v Geoprosco* should or should not be adopted in Singapore. I will proceed on the basis that it is the law.

51 In *Henry v Geoprosco*, Roskill LJ said that in determining whether a defendant had voluntarily submitted to the jurisdiction (at p 748):

> it must depend in each case upon what it was that the defendant did or refrained from doing in relation to the jurisdiction of the foreign court.

On that note, I note that what the Plaintiffs did in the proceedings in the Colombo High Court was to take out a motion to raise the Plaintiffs objection to it exercising jurisdiction in the Second Action. The motion is on the following terms:

> the Defendant wishes to bring to the notice of Your Honours Court that the Defendant objects to Your Honours Court exercising jurisdiction over this matter in terms of Section 5 of the Arbitration Act No.11 of 1995.

This is in accordance with the scheme under s 5 of the Sri Lankan Arbitration Act which provides as follows:

> Where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the Court shall have no jurisdiction to hear and determine such matter if the other party objects to the Court exercising jurisdiction in respect of such matter.

52 This provision does not operate by giving the court a power to stay proceedings in favour of arbitration. Instead it provides that the court shall have no jurisdiction over the proceedings if the other party objects to the Court exercising jurisdiction. Hence once an objection is made, by operation of s 5 the Colombo High Court would have no jurisdiction over the matter. It is essential to note that if the Plaintiffs do not make this objection then it would appear that the Colombo High Court would have jurisdiction; at the very least the Plaintiffs could be taken to have waived their right to object. Only by making an objection to the Court exercising jurisdiction in respect of the proceedings can the Plaintiffs deprive it of jurisdiction. Furthermore, although the Plaintiffs have no presence or assets in Sri Lanka, they were faced with a purported termination by the Defendants of the MRA, the subject matter of which were, *inter alia*, broadcasting rights to Test matches played by the Sri Lankan cricket team. In the circumstances they had an interest to ensure that the Colombo High Court did not assume jurisdiction, which is in the nature of having assets within the jurisdiction.

53 These circumstances are therefore quite removed from those in *Harris v Taylor*, where by Manx law, if the defendant there had done nothing, the plaintiff could not have enforced the judgment against him in the Isle of Man because he had no assets there nor in England because the jurisdiction of the Manx court would not have been recognised. The Plaintiffs had not participated in the proceedings apart from making the objection and submitting that this objection was valid. The Defendants argue that by such participation, the Plaintiffs had submitted to the jurisdiction of the Colombo High Court to determine its jurisdiction. The House of Lords had in the *Williams & Glyns Bank case* pronounced the existence of such jurisdiction. However as explained above, that case involved an application for a stay in which the court would have to exercise its discretion, whereas the present case involves the making of an objection which would operate to deprive the Colombo High Court of its jurisdiction if an arbitration agreement existed.

54 As I have said above, the Defendants argument based on the dual jurisdiction concept is attractive, certainly from a conceptual point of view. However it is possible to take an overly theoretical approach to this question and as a consequence lose sight of the woods for the trees. In my view that is the danger with the Defendants approach. This Court has to bear in mind that cases of this nature involve real people making business decisions in their endeavour to create wealth for themselves and their employers. For my part I would prefer the common-sense approach of Denning LJ in *In Re Dulles Settlement (No. 2)* and hold that the true question is whether, in raising the objection before the Colombo High Court that it had no jurisdiction over the matter by virtue of s 5 of the Sri Lankan Arbitration Act, the Plaintiffs had taken a step in the proceedings which necessarily involved waiving their objection to the jurisdiction. When posed in that manner, the answer is obviously in the negative and I so hold.

(b) Issues not the same

55 The Plaintiffs submit that the questions decided by the Colombo High Court are not similar to the issues that this Court has to decide. The Colombo High Court had decided that Clause 19 of the MRA is not an arbitration agreement within the meaning of s 5 of the Sri Lankan Arbitration Act. But before me, they submit, the question is whether Clause 19 is an arbitration agreement within the meaning of s 2 of the Act which adopts the definition in Article 7 of the Model Law.

56 However I note that the definition of that term in s 50(1) of the Sri Lanka Arbitration Act is on similar terms as follows:

> "Arbitration Agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not;

This is not surprising as the Sri Lankan Act was enacted in 1995 *inter alia* to give effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") as its long title states.

57 The Plaintiffs submit that the Colombo High Court would apply Sri Lankan law in deciding the issue whereas this Court would apply Singapore law. This is certainly an interesting argument. However, this submission was made virtually at the last minute of the last day of submissions, and there was not only no opportunity for counsel for the Defendants to respond to this, the Plaintiffs counsel did not have time to develop the argument. Ordinarily I would have given the parties an opportunity to make full submissions. However a decision is required rather urgently because the arbitrators have fixed the matter for hearing in late May 2002. In the circumstances, and in view of the position I have taken on the remaining issues, I need not make a finding on this point.

(c) Public policy

58 The Plaintiffs submit that, even if they are deemed to have submitted to the jurisdiction, the order of the Colombo High Court should not be recognised in Singapore on two grounds:

(i) the Defendants had proceeded with the action in the Colombo High Court with notice and in breach of the anti-suit injunction; and

(ii) the order of the Colombo High Court was made without regard to the treaty obligations of Sri Lanka under the New York Convention.

59 The Plaintiffs point out that following the grant of the anti-suit injunction on 29 October 2001, at the

adjourned hearing of the Plaintiffs objection motion in the Colombo High Court, the Plaintiffs drew the courts attention to those injunctions. The learned judge there had stated that it was for the Defendants to decide if they would continue with the Second Action in view of the injunction. Notwithstanding this, the Defendants elected to proceed. The Plaintiffs submit that, the Defendants having proceeded with the Second Action in breach of an injunction of this Court which they had notice of, it would be contrary to public policy to recognise any order made under the Second Action.

60 The Plaintiffs refer to these passages in the following texts:

(i) *Cheshire & North, Private International Law,* 13th Edn, at p 446:

No action is sustainable on a foreign judgment which is contrary to the English principles of public policy.

(ii) *Halsburys Laws of England, 4th Edition Reissue*, Vol 8(1), 1009:

1009. Judgment contrary to public policy.

A foreign judgment will not be recognised or enforced in England if its recognition or enforcement, would be contrary to public policy.

(iii) *Dicey & Morris, The Conflict of Laws, 13th Edition*, Vol 1, at 14-145*:*

> It will be contrary to public policy to recognise or enforce a judgment which has been obtained in disobedience of an injunction not to proceed with the action in a foreign court.

61 The Plaintiffs also cite *Philip Alexander Securities & Futures Ltd v Bamberger & Ors* CA (Civil Division) Transcript, 12 July 1996. The respondents there had commenced proceedings in German courts against the appellants despite the existence of arbitration clauses in the contracts providing for arbitration in London. In each case the appellants contested the proceedings on the basis that there was a binding arbitration agreement. On the appellants application, the English court granted interim anti-suit injunctions against the respondents. The respondents continued to prosecute their claims despite having notice of the injunctions and obtained judgments from the German courts. The English Court of Appeal approved the following statement of the judge at first instance:

> It would seem to me *prima facie* that if someone proceeds in breach of, and with notice of, an injunction granted by the English Court to obtain judgments abroad, those judgments should not, as a matter of public policy, be recognised in the United Kingdom.

62 In the present case the Defendants submit that the Plaintiffs themselves had commenced the present action in breach of the order of the Colombo High Court obtained by the Defendants on 16 October 2001 enjoining the Plaintiffs from preventing the Defendants from, or interfering with the Defendants, negotiating with or entering into contracts with any party in respect of matters covered by the MRA. Therefore the injunctions obtained in these proceedings are similarly tainted. On the Plaintiffs own argument, the Sri Lankan Court, when it heard the Plaintiffs own application seeking the Sri Lankan Courts determination of its own jurisdiction, was bound not to recognise the injunctions issued by this Court as the Plaintiffs had obtained it in breach of an order of the Sri Lankan Court. The Defendants say that this distinction is in itself sufficient to take the present case out of the authority of *Philip Alexander Securities & Futures Ltd v Bamberger & Others*. They point out that the anti-suit injunctions in *Philip Alexander Securities & Futures Ltd v*

Bamberger & Ors were not obtained in breach of an injunction of the foreign court.

63 The Defendants also point out that *Philip Alexander Securities & Futures Ltd v Bamberger & Others* is of limited authority because although the court had stated this principle, it had refused to grant the declarations sought by the plaintiff that certain German judgments obtained against it in breach of English anti-suit injunctions were not to be recognised or enforced as a matter of English law. The Court of Appeal held that it was open to the judge at first instance to decline to make the matter *res judicata* but leave it open to the German plaintiffs to seek to enforce their judgment in England.

64 However the Plaintiffs point out that the present injunctions were obtained on 29 October and the Defendants notified immediately but they had only taken out this summons on 22 January 2002. They point out that the proper course of action on the part of the Defendants would have been to apply to adjourn the Second Action and take out this application to obtain a discharge before resuming it. Instead they had chosen to ignore it, taken out judgment, and then come to this court almost three months later.

65 In my view I cannot ignore the actions of the Defendants. They were aware of the anti-suit injunction and chose to ignore it. By virtue of the MRA they had agreed to submit disputes to arbitration in Singapore upon election by any party and the Plaintiffs have so elected. In the circumstances it would be manifestly against public policy to give recognition to the foreign judgment at the behest of the Defendants who have procured it in breach of an order emanating from this Court.

Urgency

66 The Plaintiffs application was made pursuant to s 12(6) of the Act. Such an application is governed by O 69A r 3(1)(c) of the Rules of Court which provides that it is to be made to a Judge in Chambers or the Registrar. The Defendants initially challenge the procedure by which the Plaintiffs took out this application but have since abandoned it. However the application was made *ex parte* under O 69A r 3(3) which provides as follows:

> (3) Where the case is one of urgency such application may be made ex parte on such terms as the Court thinks fit.

The Defendants submit that the Plaintiffs have not shown that the application was urgent and therefore they were not entitled to make the application *ex parte*.

67 The Defendants submission is as follows. The Second Action was commenced on 16 October 2001 and the Plaintiffs were aware from 17 October that fresh tenders were invited which would close on 25 October. The Plaintiffs were also aware of the Second Action at the very latest on 19 October 2001, when they appointed solicitors and took objection to the exercise of jurisdiction by the Colombo High Court. On that day, the Plaintiffs issued the Notice of Arbitration. On and from 19 to 24 October, the Plaintiffs did nothing in Singapore to restrain the Defendants:

> (a) from continuing with the Second Action. In fact the Plaintiffs had actively participated in the Second Action by asking the Colombo High Court to decide on its own jurisdiction and participating fully in the hearings on that issue;
>
> (b) from entering into a fresh contract covering the same subject-matter as the MRA.

68 On 24 October the deadline for the tenders was extended to 29 October. Between 24 and 29 October the Plaintiffs again did nothing in Singapore to restrain the Defendants from proceeding with Second Action or to prevent the Defendants from entering into a fresh contract. It was only on 29 October that the

Plaintiffs finally took out this action. However, that resort was not had on the basis that the Colombo High Court was proceeding against the will of the Plaintiffs to determine the question of its own jurisdiction. The Defendants submitted that from the first affidavit of David Mallinson filed in support of the Plaintiffs action, the Plaintiffs had resorted to the Singapore Court on 29 October 2001 for the purpose of maintaining the status quo until the Colombo High Court had had an opportunity to rule on the issue of its own jurisdiction. It was clear, say the Defendants, that the urgency on 29 October 2001 arose from the fact that the Plaintiffs realised that they would not be able to get a decision from the Colombo High Court on the issue of the Courts own jurisdiction before noon on 29 October 2001. But this was entirely of the Plaintiffs own making because they had ample time since 19 October to take the steps which they belatedly took "as a matter of urgency" before this Court on 29 October 2001. The Defendants argue that this urgency was entirely manufactured and insufficient to bring the Plaintiffs application within O 69A, r 3(3).

69 Mallinson had stated the following as the reasons for the urgency (at 34-36 of his first affidavit):

> 34. Given that no ruling on WSG Nimbus Application can be obtained by 12 noon, 29 October 2001, and prior to the closing of BCCSLs tender exercise, WSG Nimbus wrote to BCCSL on 26 October 2001 on the following terms:
>
> > *"It has been and remains our position that the Sri Lankan Court does not have jurisdiction to hear any dispute between the parties relating to the Master Rights Agreement and/or the Terms of Settlement and further, that you have brought the proceedings in HC(Civil) Case No 246/2001 in Sri Lanka in breach of Clause 19 of the Master Rights Agreement.*
> >
> > *Unless we receive confirmation from you by 12.00 noon, 27 October 2001 that you will not enter into any contract(s) or commitment(s) with any third party/parties in any way dealing with the rights forming the subject matter of the Master Rights Agreement, we will have no other option but to institute such proceedings in Singapore as may be necessary so as to protect our rights in aid of the pending arbitration proceedings. Please let us know within the next twenty-four (24) hours hereof, whether you wish to be heard in any such proceedings and if so, the name(s) and contact details of your representative(s) in Singapore."*
>
> 35. By a letter dated 27 October 2001 to WSG Nimbus, BCCSL responded thus:
>
> > *"We re-iterate that the Master Rights Agreement has ceased to operate and that*

the courts in Singapore and the proposed Arbitral Tribunal;(not yet constituted) has no jurisdiction to issue any order against us and we will not be bound by any such order. We still have time to reply to your letter of reference to Arbitration dated 19th October 2001.

As you are no doubt aware we have no representative whatsoever in Singapore.

We will refer this matter on Monday to our Lawyers for necessary action, inclusive of whether you could be charged for Contempt of Court."

It bears mention that BCCSL failed and/or refused to confirm (as requested by WSG Nimbus) that it would not enter into any contract(s) or commitment(s) with any third party/parties in respect of the Commercial Rights.

36. In light of the oppressive and vexatious manner with which BCCSL has conducted itself in instituting both the First Action and the Second Action, as well as in the procurement of both the First Enjoining Order and the Second Enjoining Order, there is a real risk that if the application herein was made inter partes or with notice to BCCSL, BCCSL would procure an injunction from the Colombo High Court restraining WSG Nimbus from instituting any legal proceeding to enforce the arbitration agreement and or in aid of the Arbitration. This would frustrate the very purpose and intent behind the arbitration agreement that BCCSL had consensually entered into.

70 It is clear from Mallinsons affidavit that the reason for the urgency was because the Defendants had refused to confirm that they would not deal with the rights the subject of the MRA. The extended deadline for submission of tenders was 29 October, on which date there was the possibility of a new contract being awarded. Further, in his fourth affidavit, Mallinson had explained that up until 26 October the parties were engaged in negotiations to resolve the dispute. He was constrained not to disclose this fact as they were conducted without prejudice. However since the Defendants had made reference to it in the affidavits filed on their behalf, he felt he had to set the record straight.

71 From the matters disclosed in the affidavits I am satisfied that the Plaintiffs application was sufficiently urgent and fell within the ambit of O 69A r 3(3).

The anti-suit injunction

72 As I have determined that Clause 19 is an arbitration agreement, the Defendants become subject to the jurisdiction of this Court. The Defendants submit that even so, the anti-suit injunction should not be granted on the ground that it does not fall within s 12(6) of the Act read with s 12(1)(g). These provisions state as follows:

12. (1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for

(a) security for costs;

(b) discovery of documents and interrogatories;

(c) giving of evidence by affidavit;

(d) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;

(da) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;

(db) the preservation and interim custody of any evidence for the purposes of the proceedings;

(e) securing the amount in dispute;

(f) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

(g) an interim injunction or any other interim measure.

(6) The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this Part applies, the same power of making orders in respect of any of the matters set out in subsection (1) as it has for the purpose of and in relation to an action or matter in the court.

73 In *Sokana v Freyre & Co* [1994] 2 Lloyds Rep 57, Colman J considered a similar provision in the English Arbitration Act 1950, which he summarised in his judgment in this manner (at p 64):

> By reason of s. 12(6) of the Arbitration Act 1950 the High Court has:
>
> > . . . for the purpose of and in relation to a reference, the same power of making orders in respect of . . . (h) interim injunctions . . . as it has for the purpose of and in relation to an action or matter in the High Court . .

The parties make their submissions on the basis that this is *in pari materia* with s 12(6) read with s 12(1)(g) of the Act. Colman J held that the English provision gives power to the court to make interlocutory orders but only in respect of an existing or pending reference to arbitration. He said as follows (at p 64):

> The purpose of s. 12(6) of the Arbitration Act 1950 is to provide a power to the Courts to make interlocutory orders in relation to and for the purpose of a reference, in the same way as they have power to make interlocutory orders in relation to an action or other proceeding. The powers are all related to the matters in issue in, or the conduct of, the reference - security for costs, evidence by affidavit, the taking of oral evidence in England and abroad, the detention, preservation or inspection of property or anything else which is the subject of or related to the reference. The words "for the purpose of and in relation to a reference" clearly comprehend a reference to arbitration that has already been made or which the applicant is about to make. Thus the words of s. 12(6)(f) and (h) were held by Mr. Justice Brandon in *The Rena K*, [1978] 1 Lloyd's Rep. 545; [1979] 1 Q.B. 377 to be wide enough to give jurisdiction to grant *Mareva* injunctions.
>
> Thus *Mareva* injunctions can be granted in aid of execution of an award under the existing reference or under a reference to be commenced analogously with such an injunction ordered in aid of execution of a judgment that may be given in a pending action or in an action which the applicant undertakes to commence. The relief in the latter case would thus be parasitic, as was recognized in *The Siskina,* [1978] 1 Lloyd's Rep. 1; [1979] A.C. 210, since it had nothing to sustain it except the claim in the pre-existing or anticipated proceedings. The same would be true of each one of the categories of relief listed in s. 12(6) of the Arbitration Act. They are essentially remedies whose function is to assist in the just and proper conduct of the reference or preservation of property the subject of the reference.

74 The plaintiffs application in *Sokana v Freyre & Co* was made pursuant to s 12(6) of the English Act, but they had asked for a permanent injunction and damages on account of the defendants alleged breach of an agreement to arbitrate by commencing proceedings in the Florida courts for a declaration that there had been a settlement between the parties and for its enforcement. Colman J held that as it was not an interim measure in aid of an existing arbitration but a substantive claim, jurisdiction could not be founded on s 12(6) of the English Act. Colman J also held that it would not have made a difference were the plaintiffs to convert the originating summons into a claim for an interim injunction. This was because there was no reference to arbitration in respect of the plaintiffs claim that the defendants had breached the arbitration agreement by commencing the proceedings in Florida.

75 In the present case the Defendants submit that there is no reference to arbitration on the question of their entitlement to commence the Second Action. In the Plaintiffs Notice of Arbitration, they refer to three matters in dispute, i.e. (i) the purported termination by the Defendants of the MRA and the Terms of Settlement on grounds that the Plaintiffs had breached paragraph 1(a), (b), (d) of the Terms of Settlement; (ii) the commencement of negotiations by the Defendants with third parties on the commercial rights the subject matter of the MRA; and (iii) interference with the rights of the Plaintiffs under its team sponsorship agreement with Ceylon Tea Services Ltd by instructing the latter to withhold payment of certain sums owed to the Plaintiffs. The Defendants contend the Plaintiffs did not refer to arbitration the question of their breach of the arbitration agreement by taking out the Second Action in the Colombo High Court. Therefore, as with the situation in *Sokana v Freyre & Co*, the anti-suit injunction cannot be an interim measure to maintain the status quo in relation to a dispute referred to the arbitral tribunal until it has had an opportunity to adjudicate upon it.

76 In my view there is a crucial difference between the present action and the circumstances in *Sokana v Freyre & Co.* In that case the parties had, after the arbitrators were appointed, engaged in negotiations to settle the dispute. The defendants had alleged that the parties had reached a binding agreement to settle

the matter. When the plaintiffs disputed this, the parties attempted to place this issue before the arbitrators. But because of a dispute with the arbitrators over payment of a deposit for fees, the arbitrators refused to accept the reference on the question of whether a settlement agreement had been reached. The defendants then commenced the Florida proceedings for the declaration and to enforce the settlement. As Colman J explained it (at p 61):

> So the position on Apr. 26 was that: (i) there was a stalled arbitration in London between the plaintiffs and the defendants in relation to which the arbitrators were declining to accept jurisdiction in respect of the settlement agreement disputes and (ii) there were proceedings in the State Court in Florida in which the defendants claimed to enforce the settlement agreement, failing which they claimed the same relief as that claimed in the main part of arbitration

77 In *Sokana v Freyre & Co* the defendants cause of action in the Florida courts was a separate settlement agreement which was not the subject of an arbitration agreement. The plaintiffs therefore had no basis to make the application under s 12(6) of the English Act. Colman J said at p 65:

> The originating summons, in its original form, claims relief by way of a permanent injunction and damages. The underlying cause of action is breach of the arbitration agreement. The injunction was for the purpose of restraining that breach and the damages claimed were in respect of loss allegedly caused by that breach. The allegation that the defendants are in breach of the arbitration agreement finds no expression in the existing reference to arbitration. Nor is that issue one which is to be raised in any reference to arbitration contemplated or foreshadowed by the plaintiffs. Thus the claim in this originating summons for a final injunction, as distinct from an interim injunction, cannot be the subject of an order under s. 12(6), firstly because it is not seeking an interim injunction, and secondly because it is not a claim for relief for the purpose of or in relation to the existing reference, or of or to any contemplated reference within the meaning of the Act. The relief sought would not be for the purpose of facilitating the just and proper conduct of the arbitration, but for the purpose of restraining an alleged breach of contract which had not been referred to any arbitrator and was not anticipated to be so referred. The Court would be required to determine an issue which fell within the arbitration clause and which the parties had never agreed to submit to the determination of the English Courts. In these circumstances, no order could properly be made under O. 73, r. 7, giving leave to issue and serve that originating summons on the defendants.
>
> Would the result be any different if the relief sought by the originating summons were converted into a claim for an interim injunction? In my judgment it would not. Such an interim injunction would not be a parasitic injunction sustained by the issue in the existing or anticipated reference. It would instead

> be a claim for relief to preserve the status quo until an award had been made in a reference which had nothing whatever to do with the alleged breach of the arbitration agreement. If that matter were referred to arbitration, there would have to be a fresh reference.
>
> If one substitutes for the arbitration an action in Court, in which those defendants had advanced their claims and had subsequently sought to commence foreign proceedings in breach of an exclusive English jurisdiction clause, had the plaintiffs wished to restrain those proceedings, they would have had to counterclaim an injunction based on breach and apply for an interim injunction to preserve the status quo pending determination of their counterclaim. No similar procedure was available here. There would have had to be a fresh reference through the London Chamber of Commerce in respect of the alleged breach of the arbitration agreement.
>
> It follows that the claim for relief advanced by the originating summons, whether in its original or modified form, did not fall within s. 12(6) of the 1950 Act, and there was accordingly no jurisdiction to make an order under O. 73, r. 7 for leave to issue and serve it outside the jurisdiction of the English Court.

78 In the present case the facts are at a simpler level. There is an arbitration clause in the MRA in which the parties agree to submit to arbitration in Singapore upon the election of any one of them. The Defendants purport to terminate the contract and the Plaintiffs dispute that they are entitled to do so. The Defendants then commence proceedings in the Colombo High Court *inter alia* for damages for breach of the MRA (the Second Action). The Plaintiffs elect to refer these disputes to arbitration. There is therefore a reference to arbitration in respect of the disputes between the parties and the Plaintiffs have sought in this originating summons an anti-suit injunction to prevent the Defendants from proceeding with the Second Action in the Colombo High Court. The Second Action before the Colombo High Court is not based on a settlement agreement where there is no reference to arbitration but based on the underlying contract, i.e. the MRA and the Terms of Settlement, where there is a reference to arbitration.

79 The Defendants next submit that, even if there is jurisdiction under s 12(6), the Court ought not to have exercised its discretion to grant the anti-suit injunction. They rely on *Sokana v Freyre & Co* in which Colman J said that such discretion should be exercised sparingly (at p 66):

> There is no doubt that the English Courts can, in appropriate cases, restrain by injunction the conduct of proceedings in a foreign Court: see *The Tropaioforos (No 2)*, [1962] 1 Lloyd's Rep. 410. Where a contract contained an arbitration clause referring all relevant disputes to arbitration in England, and the claimant had started an arbitration in England and then commences proceedings in a foreign Court making the same claim as had been advanced in the arbitration, the invocation of the foreign Court's jurisdiction would be a breach of the arbitration agreement in English law: see *Mantovani v. Carapelli S.p.A.*; [1980] 1 Lloyd's Rep. 375. However, the fact that the pursuit of such proceedings would amount to a breach of contract would not automatically entitle the other party to an injunction in the English Courts. The Court has a discretion whether to grant such an order: see *Pena Copper Mines Ltd. v. Rio*

Tinto Co. Ltd., [1912] 105 L.T. 846. Such a direction should be exercised in favour of an injunction only with caution: see *Apple Corps. Ltd. v. Apple Computer Inc.*, [1992] R.P.C. 70 per Mr. Justice Hoffmann at p. 77. The English Courts will not lightly interfere with the conduct of proceedings in a foreign court, even if that conduct is in breach of a contract to arbitrate.

In the present case, there are already on foot in the Florida proceedings steps taken by the plaintiffs to challenge the jurisdiction of those Courts. If those steps are successful, the action will not proceed and the defendants will have to pursue their claims in the arbitration. Having regard to the fact that this arbitration agreement falls within art. 1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which both the United States and Britain are parties, it would be extremely surprising if the United States had not given effect to that convention by enabling both the Federal Court and State Courts mandatorily to stay actions in breach of agreements for foreign arbitration. Accordingly, on the face of it, the plaintiffs should be able to obtain a mandatory stay of the Florida action. In view of there already being before those Courts applications challenging their jurisdiction, I am firmly of the view that, at least at this stage, the English Courts should not interfere with those proceedings by granting an injunction. The United States Courts must in such circumstances be left in control over their own proceedings. In my view, the appropriate course is that adopted by Mr. Justice Lloyd in *The Golden Anne*, [1984] 2 Lloyd's Rep. 489.

80 I should add that immediately after those passages, Colman J made the following remarks:

Apart from the New York Convention, there are strong arguments for declining to exercise the jurisdiction to grant an injunction in this case. They are that it is appropriate that the Florida Courts should be seized of disputes under a contract governed by the law of Florida and, further, that the joinder of Den Norske Bank as a co-defendant in the Florida proceedings means that, at least theoretically, the enjoining of the defendants from pursuing such proceedings against the plaintiffs will lead to multiplicity of litigation on the same issues with different parties involved: see *Aratra Potato Co. v. Egyptian Navigation Co*., [1981] 2 Lloyd's Rep. 119. Finally, the issues in the arbitration and the evidence in the case appear to be located in or near to Florida and not in England.

81 The Defendants next refer to *World Pride Shipping Ltd v Daiichi Chuo Kisen Kaisha ("The Golden Anne")* [1984] 2 Lloyds Rep 489 in which Lloyd J had to decide whether to grant an injunction restraining the defendants from continuing with an application for summary judgment on a cross-claim against the plaintiff pending before a Florida Court in circumstances where the plaintiff also had a pending motion for the Florida equivalent of a stay on grounds of an English law arbitration clause. Lloyd J said that the English Court of Appeal in *Tracomin SA v Sudan Oil Seeds Co Ltd* [1983] 2 Lloyds Rep 384 had re-affirmed the jurisdiction of the Court to grant an anti-suit injunction. But the judge concluded that he should not grant the injunction in the case before him, and said as follows (at p 498):

The crucial difference between the present case and *Tracomin* is that in *Tracomin*, the Swiss Court had already refused a stay pursuant to the arbitration clause. Accordingly, there was no way in which the English Court could seek to compel the buyers to honour the arbitration agreement except by granting an injunction. In the present case, by contrast, the American Court has not yet ruled on the joint motion for continuance. The matter is still open. It seems to me in those

> circumstances it would be much better that the District Court should itself rule on the motion for continuance and, if it thinks fit, stay all further proceedings on [the plaintiffs] cross-claim, in the light of the judgment I have given . . . . rather than I should seek to pre-empt, and perhaps even seem to dictate, the decision of a foreign court. It may be said that having answered the first four questions in favour of [the plaintiff], consistency and logic require me to go one step further and answer the fifth question also in their favour. But consistency must yield to caution and logic to the requirements of judicial comity, by which I mean only the mutual respect due between those who, as Sir John Donaldson MR has said, "labour in adjoining judicial vineyards". I recognise that the District Court may refuse a stay; in which case the unfortunate result will follow that if [the defendants] motion for summary judgment is rejected, there will be concurrent proceedings on both sides of the Atlantic. Obviously I hope that will not happen. But to my mind, it is better to run that risk, rather than grant an injunction which will, in effect, operate as a stay of the Florida proceedings. That is a function which belongs properly to the District Court, and may still, I hope, be exercised by that Court. This Court should not appear to usurp that function except as a last resort.

82 The Plaintiffs submit that *The Golden Anne* and *Sokana v Freyre & Co* are no longer the representative of the position in English jurisprudence. In 1994, some ten years after those decisions, the English Court of Appeal took a very different tack in *Aggeliki Charis Compania Maritima SA v Pagnan SpA ("The Angelic Grace")* [1995] 1 Lloyds Rep 87. Leggatt LJ said that *The Golden Anne* was *"not to be regarded as authority for the proposition that it is wrong in principle to grant an injunction before the foreign Court has decided whether to assume jurisdiction or reject it in favour of arbitration"*. Millet LJ said that the decision in that case should be regarded as having been decided on its own special facts.

83 In the *The Angelic Grace*, the owners of the vessel was in dispute with her charterers in respect of the damage she suffered during discharging operations in Italian waters. The charter-party contained a clause that called for arbitration in London. Rix J granted an anti-suit injunction against the charterers commencing court proceedings in Venice and the charterers appealed. In response to the submission by the charterers counsel to "robustly restrain" itself, Leggatt LJ said (at p 94):

> The present case is the paradigm case for the prompt issue of an injunction. The charter here is governed by English law. According to English law, the arbitration clause extends to claims in tort. Proceedings in a foreign Court are in breach of contract, so an injunction can issue to restrain them. If no injunction issues, a foreign Court will either decline or accept jurisdiction. If, as we are entitled to assume it would, the Italian Court were to decline jurisdiction, those proceedings would have constituted a waste of time and money. If, on the other hand, the Italian Court were to accept jurisdiction, any injunction then issued would directly conflict with the deliberate assumption of jurisdiction by the foreign Court. The owners would also be set at risk of being held to have submitted to the jurisdiction of the foreign Court. In the absence of submission, the undesirable process would then occur envisaged by this Court in *Tracomin S.A. v. Sudan Oil Seeds Co. Ltd.*, [1983] 2 Lloyd's Rep. 624; [1983] 1 W.L.R. 1026 and the arbitrator's award would have to be for any damage held by them to have been suffered by the owners, in excess of any sum found due from them by the Italian Court. But if there were held to have been a submission, there would follow two parallel sets of proceedings where the arbitration clause had been contractually designed to ensure that there was only one. If the charterers are not restrained from pursuing the Italian proceedings and the Italian Court exercised jurisdiction, then the question would arise, referred to by the Judge, whether a

judgment by the Italian Court on the merits of the charterers' claim would be recognized or enforced in England.

84 In respect of the presumed sensitivities of the Italian court, Leggatt LJ said (at p 95):

> For my part, I do not contemplate that an Italian Judge would regard it as an interference with comity if the English Courts, having ruled on the scope of the English arbitration clause, then seek to enforce it by restraining the charterers by injunction from trying their luck in duplicated proceedings in the Italian Court. I can think of nothing more patronising than for the English Court to adopt the attitude that if the Italian Court declines jurisdiction, that would meet with the approval of the English Court, whereas if the Italian Court assumed jurisdiction, the English Court would then consider whether at that stage to intervene by injunction. That would be not only invidious but the reverse of comity.

85 Millett LJ agreed with Leggatt LJ. In his judgment, Millett was less restrained, saying at p 96 (emphasis added):

> In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. In the former case, great care may be needed to avoid casting doubt on the fairness or adequacy of the procedures of the foreign Court. In the latter case, the question whether proceedings are vexatious or oppressive is primarily a matter for the Court before which they are pending. <u>But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them</u>.
>
> The Courts in countries like Italy, which is a party to the Brussels and Lugano Conventions as well as the New York Convention, are accustomed to the concept that they may be under a duty to decline jurisdiction in a particular case because of the existence of an exclusive jurisdiction or arbitration clause. I cannot accept the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline.
>
> We were pressed to leave it to the Italian Court to determine the limits of its own jurisdiction, even though that jurisdiction depended upon a question of construction of a contract governed by English law.
>
> We should, it was submitted, be careful not to usurp the function of the Italian Court except as a last resort, by which was meant, presumably, except in the event that the Italian Court mistakenly accepted jurisdiction, and possibly not even then. That submission involves the proposition that the defendant should be allowed, not only to break its contract by bringing proceedings in Italy, but to break it still further by opposing the plaintiff's application to the Italian Court to stay those proceedings,

> and all on the ground that it can safely be left to the Italian Court to grant the plaintiff's application. I find that proposition unattractive. It is also somewhat lacking in logic, for if an injunction is granted, it is not granted for fear that the foreign Court may wrongly assume jurisdiction despite the plaintiffs, but on the surer ground that the defendant promised not to put the plaintiff to the expense and trouble of applying to that Court at all. Moreover, if there should be any reluctance to grant an injunction out of sensitivity to the feelings of a foreign Court, far less offence is likely to be caused if an injunction is granted before that Court has assumed jurisdiction than afterwards, while to refrain from granting it at any stage would deprive the plaintiff of its contractual rights altogether.
>
> In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in *Continental Bank N.A. v. Aeakos Compania Naviera S.A.*, [1994] 1 W.L.R. 588. The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case.

86 In the present case, with the greatest of respect, it would appear to me that if Clause 19 is an arbitration agreement, continuation of the proceedings in the Colombo High Court would constitute a breach by Sri Lanka of her obligations under the New York Convention, of which Article II provides as follows:

> 1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.
>
> 2.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

87 The submission in Clause 19 is to arbitration under the SIAC Rules. Rule 26.1 provides as follows:

> 26.1 The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, termination or validity of the arbitration agreement. For that purpose, an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration agreement.

Therefore the parties would be deemed to have agreed that any dispute as to the jurisdiction of the arbitral tribunal be determined by that tribunal.

88 As the Plaintiffs application was made under the Arbitration Act, it would be instructive to consider the parliamentary materials to divine the legislative intention. The International Arbitration Bill which was passed by Parliament on 31 October 1994 and its long title states as follows:

> An Act to make provision for the conduct of international commercial arbitrations based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law and conciliation proceedings and to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and for matters connected therewith.

89 The following are excerpts from the speech of the Parliamentary Secretary to the Minister for Law when he moved the Bill a second time (emphasis added):

> the Ministry and the Attorney-General's Chambers would review our legislation to ensure adequate legal support for Singapore's regionalisation drive. In this regard, the adoption of international conventions and model laws which harmonise and facilitate international trade and dispute settlements would be considered. This Bill will provide a legal framework to resolve international commercial disputes by arbitration The Bill will mainly implement the UNCITRAL Model Law on International Commercial Arbitration on an "opt-out" basis. It is crafted in such a way as to be acceptable to lawyers from both of the world's major legal systems, ie, the common law and civil law systems. Sir, the Model Law accords full liberty to parties in non-domestic arbitrations to choose laws and arbitrators to resolve their disputes with minimal intervention from domestic courts. Since the Model Law's adoption by the UN General Assembly in 1985, it has gained widespread acceptance. The 1985 Economic Committee recommended that to develop into a centre for legal services, we should speed up the settlement of commercial disputes and set up an international commercial arbitration centre. The SIAC commenced operations in 1991. This Bill will facilitate the settlement of commercial disputes in Singapore. As Singapore businessmen expand overseas, there will be greater contacts with foreign parties. Currently, foreign businessmen are uncomfortable with unfamiliar arbitration laws and excessive intervention from local courts if they select Singapore as the venue for arbitration. They will therefore welcome the application of the Model Law in Singapore. Sir, international arbitration is a highly competitive business. Businessmen are able to choose from a variety of attractive international centres including Hong Kong, Hawaii, Kuala Lumpur, Melbourne and Vancouver. Currently, a glaring disadvantage of the SIAC is the non-applicability of the Model Law in Singapore. The Law Reform Commissions and Legislatures of Commonwealth countries which have adopted the Model Law have stated that the Law would assist the development of their respective international arbitration centres. The Hong Kong experience suggests that the adoption of the Model Law will sharpen the competitive edge of the SIAC. Since 1990, when the Model Law was introduced in Hong Kong, a significantly higher number of cases have been referred to the Hong Kong International Arbitration Centre. From the initial nine cases in 1985, this number increased incrementally from 20 in 1986 to 45 in 1989. Thereafter, the number of cases increased significantly from 54 in 1990, ie, when the Model Law was introduced, to 185 in 1992. Part II also contains the modifications and clarifications we have made to clarify and improve the Model Law. This was done after studying the experiences of other countries and

> consulting the UNCITRAL Secretariat. The reason for this approach is to let foreign businessmen and lawyers know at the outset the changes that have been made to the Model Law. This will facilitate their choice of Singapore as a venue for their cases. Apart from implementing the Model Law, Part II will introduce additional provisions which will facilitate arbitrations. These provide for the confidentiality of court proceedings arising from arbitrations, conciliation proceedings prior to arbitration, immunity of arbitrators for negligence and mistakes, invoking the assistance of the courts in enforcing interim orders or directions, allowing the arbitrators to adopt "inquisitorial processes" in the Civil Law tradition, awarding of interest and taxation of arbitration costs by the Registrar of the SIAC. . the reasons why Singapore should adopt the Model Law are as follows: Firstly, the Model Law provides a sound and internationally accepted framework for international commercial arbitrations. Secondly, the general approach of the Model Law will appeal to international businessmen and lawyers, especially those from Continental Europe, China, Indonesia, Japan and Vietnam who may be unfamiliar with English concepts of arbitration. This will work to Singapore's advantage as our businessmen expand overseas. Thirdly, it will promote Singapore's role as a growing centre for international legal services and international arbitrations.

90 It can be seen that one major purpose of the Bill is to promote Singapore as an international centre for arbitration by facilitating arbitrations that are held here. That Bill was the result of a review of our legislation to ensure adequate legal support for Singapores regionalisation drive. There are many formidable competitors in this area and the Act was enacted to enhance Singapores position as a centre for international legal services and international arbitrations. The intention of the Bill is to promote the growth of Singapore as a venue for international arbitrations and the Courts must do their part by taking a robust approach when faced with applications under s 12(6).

91 This is also the attitude of the English courts as manifested by their Court of Appeal in *The Angelic Grace*. I should add that this is entirely consistent with the principle that parties be made to abide by their agreement to arbitrate. Furthermore, the New York Convention obliges state parties to uphold arbitration agreements and awards. Such an agreement is often contravened by a party commencing an action in its home courts. Once this Court is satisfied that there is an arbitration agreement, it has a duty to uphold that agreement and prevent any breach of it. Accordingly, I am of the opinion that the anti-suit injunction should be continued until further order. Therefore the Defendants application to set aside the anti-suit injunction is dismissed.

The prohibitive injunction

92 I turn to the prohibitive injunction, under which the Defendants are restrained from dealing with the commercial rights which form the subject matter of the MRA until further order. The Defendants submit that the Plaintiffs have not made out a case for the Court to exercise its discretion to grant the prohibitive injunction. In particular the Plaintiffs have not established that:

(a) they have a good arguable case for their claim against the Defendants;

(b) damages will not be an adequate remedy for the Plaintiffs; and

(c) damages will be an adequate remedy for the Defendants.

Good arguable case

93 In respect of the first ground, this is the Defendants submission. Clause 1 of the Terms of Settlement provides that:

The parties hereby agree that upon the breach of any of the terms 1(a), (b), (c) or (d) referred to above on the due dates, the agreement shall cease to operate as and from the said date.

The Defendants point out that the Plaintiffs had admitted that the Clause 1(a) payment was made after the scheduled payment date in the MRA although they maintain that there was an agreement between the parties that, pending the Defendants payment to the Plaintiffs of sums in respect of access feeds provided by the Plaintiffs to local broadcasters and revenues from local sponsorship sales, the Plaintiffs would not be required to effect the Clause 1(a) Payment. The Plaintiffs alternative submission is that the Defendants had waived any breach by the Plaintiffs in respect of the Clause 1(a) payment and had continued to affirm the MRA until the time that the Clause 1(a) payment and the Clause 1(b) payment had been effected. The Defendants say that Clause 20 of the MRA provides that no variations of the MRA shall be effective unless agreed in writing and signed by the duly authorised representatives of the Defendants and the Plaintiffs. The Defendants submit that, accordingly, the Plaintiffs do not have a good arguable case for the injunction sought.

94 The Plaintiffs response is as follows. By their conduct between 1 October 2001 to 16 October 2001, the Defendants had waived the requirement that the Plaintiffs effect payment of the Clause 1(a) Payment by 30 September 2001. The Defendants were notified by their bankers on 15 October 2001 that the Clause 1(a) payment had been received for the credit of the Defendants. But despite having been notified of the receipt of the Clause 1(a) payment the day before, the Defendants (on 16 October 2001) sent a letter to the Plaintiffs alleging that the Clause 1(a) payment had not been made and furthermore, instituted the Second Action alleging that the MRA ceased to operate by reason of an alleged failure to make the Clause 1(a) payment and claimed US$50,000.00 in relation to that payment. Prior to their receipt of the Defendants notification of 16 October 2001, the Plaintiffs had not only given instructions to their bankers to meet the Plaintiffs obligations under the Clause 1(a) payment, the Clause 1(b) payment and the Clause 1(d) Guarantee but had also informed the Defendants of their having done so. Having waived their right to require payment of the Clause 1(a) payment by 30 September 2001, the Defendants are precluded from enforcing the said right or relying on the automatic cessation clause without first giving to the Plaintiffs reasonable notice of their intention to do so.

95 In respect of the Defendants contention that Clause 20 of the MRA forbids variations unless duly signed in writing, the Plaintiffs point out that Clauses 8 and 10 of the Terms of Settlement provide as follows:

(a) Clause 8 stipulates that "the parties agree that upon the terms of settlement now entered herein the aforesaid [MRA] will continue to operate and subsists as amended by these terms of settlement and these terms will be treated as part and parcel of the said agreement"; and

(b) Clause 10 stipulates that "[t]he parties will be free to amend and/or vary these terms and the said agreement by mutual agreement without further reference to the Court".

96 The Plaintiffs submit that there is therefore a good arguable case or at least a serious question to be tried as to whether there is a dispute between the Defendants and the Plaintiffs on whether:

(i) There was an agreement to defer the Clause 1(a) payment;

(ii) Clause 20 of the MRA (read with Clauses 8 and 10 of the Terms of Settlement) require any agreement for variation to be agreed in writing and signed by the duly authorised representatives of the Defendants and the Plaintiffs; and

(iii) There had been a waiver by the Defendants, on the basis of the Defendants conduct up to the time that the Plaintiffs obligations under the Clause 1(a) payment, Clause 1(b) payment and the Clause 1(d) Guarantee had been satisfied, for the making of the Clause 1(a) payment by 30 September 2001.

97 I agree with the Plaintiffs on this point and hold that there is a serious question to be tried and so hold.

Whether damages adequate remedy for the Plaintiffs

98 On the question of whether damages would be an adequate remedy for the Plaintiffs, they contend as follows:

(i) Irreparable damage will be caused to their credibility, commercial reputation and standing (particularly *vis-a-vis* other sports governing bodies and other sub-licensees with whom they deal) if the Plaintiffs are not able to preserve the status quo when a dispute arises with their licensor.

(ii) One of the remedies prayed for by the Plaintiffs in the arbitration is specific performance by the Defendants of their obligations under the MRA. If the prohibitive injunction, which has a countervailing effect to the Sri Lanka default judgement, were discharged the Defendants would, pending adjudication in the arbitration, be able to enforce the default judgement in jurisdictions outside Sri Lanka. Irreparable damage would be caused to the Plaintiffs as the Defendants ability to deal freely with the commercial rights pending adjudication by the tribunal would tantamount prejudging against the Plaintiffs of the merits of their claim for specific performance.

99 In response to the first point, the Defendants point out that under Clause 16.3 of the MRA the Plaintiffs cannot recover damages for injury to their reputation or loss of credibility. Clause 16 is entitled "LIMITATION OF LIABILITY/INDEMNITY" and it sets out five circumstances in which the liability of the respective parties are either limited or not limited. Clause 16.3 states as follows:

> Under no circumstances shall either party be liable to the other under this Agreement for any actual or alleged indirect loss or consequential loss howsoever arising suffered by the other, including, but not limited to, loss of profits, anticipated profits, savings, business or opportunity or loss of publicity or loss of reputation or opportunity to enhance reputation or any other sort of economic loss.

The Defendants submit that in view of this provision, the Plaintiffs are not entitled to any damages caused to their credibility, commercial reputation and standing which would fall within the words underlined. Therefore the issue of adequacy or otherwise of damages for such losses is irrelevant in considering whether or not to grant an interim injunction.

100 The Plaintiffs disagreed with this and submitted that where damages are nominal or insubstantial, it is all the more appropriate to grant specific relief rather than damages since damages would clearly not be an adequate remedy. They cite the decision of the House of Lords in *Beswick v Beswick* [1967] 2 All ER 1197 and the High Court in *Chua Kwok Fun Kevin & Anor v Etons Management Consultants Pte Ltd* [2000] 3 SLR 337. I must confess I fail to see the relevance of those authorities which concern matters in which damages are clearly inadequate. In *Beswick v Beswick*, the appellant had contracted to pay an annuity to the respondent for the remainder of her life and the court ordered specific performance of that term. In *Chua Kwok Funs case* the High Court ordered specific performance of a term in the settlement agreement that stipulated that the defendant should provide a bank guarantee to secure payment of a certain sum due at a later date. In my view, the Plaintiffs had agreed in the MRA that they would not be entitled to damages for loss of reputation. So there is nothing to preserve. Furthermore, the test must be whether it would make a material difference if the injunction is continued or is discharged. If the Plaintiffs succeed in the

arbitration their position is vindicated in the eyes of the world. I cannot see how such vindication would be any less effective if there is no interim injunction.

101 As regards specific performance, the Defendants agree that it is true that if they were to be allowed to enter into fresh contracts covering the subject-matter of the rights of the MRA, that would result in an alteration of the status quo which would be difficult if not impossible to reverse if the Defendants were ultimately held to be entitled to specific performance. However, in order to justify the grant of an interim injunction, it is not enough for the applicant simply to show that not granting the injunction will result in the alteration of the status quo. The applicant must show that damages would not be an adequate remedy. The Defendants also point out that the Plaintiffs are a business. Their purpose, as stated in Mallinsons affidavit, is to produce and distribute live coverage of and market cricket events world-wide and other sports events in South Asia. As a business, the Plaintiffs purpose is to earn a profit and not to hold contracts for the sake of holding contracts. The subject-matter of the MRA is not like real property or a work of art which have utility or aesthetic value in and of itself that warrants the intervention of the Court to preserve it pending the resolution of a dispute. The subject-matter of the MRA is merely the means to an end, that end being the making of profits. The Defendants submit that a contract entered into to earn a profit is the quintessential contract for which damages will be an adequate remedy, if breach be proved.

102 On this issue, I agree with the Defendants submissions and hold that damages are an adequate remedy for the Plaintiffs.

Whether damages adequate remedy for the Defendants

103 As to whether damages would be an adequate remedy for the Defendants, they first of all point out that the Plaintiffs are a two-dollar company. They fear that if an award of damages is made against the Plaintiffs, they would be unable to pay it. In response to this point on their ability to pay, the Plaintiffs point out that at the time of the purported termination of the MRA, the Plaintiffs had been up to-date with all their payment of rights fees. The Plaintiffs have so far paid an amount in excess of US$10 million in rights fees to the Defendants under the MRA and there is presently a sum of US$700,000 that the Defendants have retained to account. In my view this is a matter of obtaining fortification from the Plaintiffs shareholders if an injunction is otherwise warranted and I need not take this point any further.

104 The principal point of the Defendants is that, being the statutory body charged with being the guardian of Sri Lankan Cricket, they have a duty to ensure promotion of the sport in the country. Prompt payments by purchasers of broadcast rights is their lifeblood. The broadcasting revenue stream is principally what enables the Defendants to meet the outgoings associated with organising and staging cricket matches. The effect of enjoining the Defendants from making alternative arrangements to sell broadcast and other rights upon the termination of the MRA is akin to depriving a person of the ability to earn a living. With the sanction of the Sri Lankan Order of Court dated 16 October 2001 and 7 November 2001, which remain in full force, and in the performance of their duties as a Sports Body, the Defendants have made arrangements to televise Sri Lankan cricket matches and to exploit the commercial rights associated therewith in the interests of the Sri Lanka.

105 The Plaintiffs have not made any response that deals squarely with this point. I would also add that the subject matter of the MRA is a perishable commodity in that the live broadcasts of the Test matches cannot await the resolution of the dispute in the arbitration. The matches will be played and if the Defendants are unable to deal with the commercial rights, then their value will be irretrievably lost. I would agree with the Defendants that damages would not be an adequate remedy for them.

Balance of convenience

106 I hold that because damages would be an adequate remedy for the Plaintiffs but not for the Defendants, the balance tilts in the Defendants favour. Therefore the prohibitive injunction ought to be discharged and I order accordingly.

Other matters

107 I will hear counsel on the question of costs and other consequential orders.

Sgd:

LEE SEIU KIN

JUDICIAL COMMISSIONER

SUPREME COURT