IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 105

Civil Appeal No 178 of 2019

Between

(1) BTN
(2) BTO

… *Appellants*

And

(1) BTP
(2) BTQ

… *Respondents*

In the matter of Originating Summons No 683 of 2018

Between

(1) BTN
(2) BTO

… *Plaintiffs*

And

(1) BTP
(2) BTQ

… *Defendants*

JUDGMENT

[Arbitration] — [Arbitral Tribunal] — [Jurisdiction]
[Arbitration] — [Award] — [Recourse against award] — [Setting aside]

BTN and another
v
BTP and another

[2020] SGCA 105

Court of Appeal — Civil Appeal No 178 of 2019
Sundaresh Menon CJ, Judith Prakash JA and Quentin Loh J
31 March, 21 April 2020

23 October 2020 Judgment reserved.

Judith Prakash JA (delivering the judgment of the court):

Introduction

1 This appeal concerns the scope of the "public policy" ground for the setting aside of an arbitration award. The appellants before us contend very strongly that an award made against them must be set aside on the public policy ground because it has deprived them of their fundamental and contractual right to defend themselves against the claims of the respondents and further, to make claims against the respondents in turn. In brief, the appellants are aggrieved because the arbitral tribunal before which they appeared held that they were prevented by the doctrine of *res judicata* from litigating on a vital component of their defence to the respondents' claim in the arbitration. They say there is nothing more repugnant to the most basic notions of justice than to deny it to one party. That may be so, but whether "denial of justice" is an appropriate way in which to label what happened in the arbitration proceedings is another matter.

Litigants affected adversely by the application of the *res judicata* doctrine, a long-established common law doctrine, often consider themselves to have been unfairly deprived of their right to a hearing.

2 The appellants, BTN and BTO, had in Originating Summons No 638 of 2018 ("OS 683") sought the following relief from the High Court:

> (a) a review of a partial arbitral award dated 30 April 2018 ("the Partial Award") pursuant to s 10(3)(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"); or
>
> (b) in the alternative, a setting aside of the Partial Award on the grounds contained in s 24(*b*) of the IAA and Art 34(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 ("Model Law") as set out in the First Schedule to the IAA.

3 The High Court judge ("the Judge") dismissed the appellants' application and held that the case did not call for an exercise of the court's power to review the Partial Award under s 10(3) of the IAA or to set it aside pursuant to s 24(*b*) of the IAA and Art 34(2) of the Model Law. The appellants are dissatisfied with this decision.

4 On their appeal, the appellants dropped the application for a review and pursued only the setting-aside application. In this regard they raised the same issues that they had canvassed below: that there had been a breach of natural justice which had prejudiced them; that it would be contrary to public policy to enforce the Partial Award, because it had deprived them of the right to put forward their defence to the respondents' claim and to make their own claims against the respondents; and that the tribunal in the arbitration failed to decide matters contemplated by and/or falling within the submission to arbitration.

Like the Judge, we find no merit in their contentions and accordingly dismiss the appeal. Our detailed reasons are set out below.

Facts

5 The respondents, BTP and BTQ, are individuals. The first appellant, BTN, is a company incorporated in Mauritius. It now owns the second appellant, BTO, a Malaysian company.

6 Formerly, the respondents were substantial shareholders in two holding companies of which BTO was one. In turn, BTO and the other holding company owned a group of online travel agency companies ("the Group"). BTO is an online travel agency and has its registered office in Malaysia. The dealings between the parties that ultimately led to the dispute before us commenced when the respondents agreed to divest their interests in the Group to the buyer, *ie*, BTN.

The SPA and PEAs

7 On 26 September 2012, the respondents and two other beneficial owners of the Group entered into a Share Purchase Agreement ("the SPA") with BTN.

8 The SPA provided that:

(a) BTN would acquire 100% ownership and control of the Group on both the shareholder and board level from the respondents and the other beneficial owners.

(b) The consideration for BTN's acquisition of the Group comprised two elements:

(i) the "Guaranteed Minimum Consideration" of US$25m, which was paid upon completion of the acquisition; and

(ii) the "Earn Out Consideration" (or "Earn Outs"), which was capped at US$35m, was payable in tranches over three years immediately following the acquisition. The Earn Outs were not guaranteed and depended on the financial performance of the Group in financial years 2013, 2014 and 2015, and were calibrated according to the different levels of "Earn Out Targets" for each financial year as specified in the SPA.

(c) The respondents were to be employed by BTO. The employment of the respondents was to be governed by contracts referred to as Promoter Employment Agreements ("PEAs"), unsigned drafts of which were annexed to the SPA.

9 The SPA contained an arbitration clause requiring arbitration under the rules of the Singapore International Arbitration Centre ("SIAC rules") and an exclusive jurisdiction clause in favour of the Mauritian courts. The jurisdiction clause was expressly stated to be "subject to" the arbitration clause. The SPA was governed by the law of Mauritius.

10 In connection with the SPA, BTO entered into separate PEAs with each of the respondents in November 2012, by which BTP and BTQ were employed, respectively, as the Chief Executive Officer and Chief Technology Officer of BTO for three years. Each PEA was signed by the relevant respondent on the one hand and, on the other, by BTO as the employer and BTN as the confirming party. The PEAs were governed by the law of Malaysia.

11 The PEAs contained arbitration clauses that required disputes to be resolved by arbitration under the SIAC rules and exclusive jurisdiction clauses in favour of the Malaysian courts. As in the SPA, the jurisdiction clause in each PEA was expressly stated to be "subject to" the arbitration clause.

12 The SPA and PEAs contained materially identical provisions in relation to the termination of the respondents' employment with BTO. Clause 12.9 of the SPA was entitled "Termination of Employment Without Cause and Impact on Earn Out Consideration Tranche". It referred to and defined two types of termination: "With Cause" termination and "Without Cause" termination. "With Cause" termination was defined in materially identical terms in cl 12.9.1 of the SPA and cl 15.2.1 of the PEAs, by reference to specified justifications for a With Cause termination. "Without Cause" termination referred to termination for reasons other than those justifying a "With Cause" termination. Clause 15.1.2 of the PEAs stipulated the consequences of a "Without Cause" termination as follows:

> If [BTO] terminates the Employment without cause (that is at will for reasons other than as specified in Clause 14.2 below [*sic*]) … the Employee shall, only be entitled to receive (1) Remuneration which has accrued but has not been paid up to the date of termination … (2) severance pay … and (3) such payments as may be expressly specified as payable upon 'Without Cause' termination under Clause 12.9.[2] of the [SPA].
>
> …
>
> [emphasis added]

13 The effect of cl 12.9.2 of the SPA, as referred to in cl 15.1.2 of the PEAs set out above, read with cl 12.10.1(a) of the SPA, was that:

> (a) if the dismissals of the respondents were Without Cause, then they would be entitled to a maximum of US$35m in Earn Outs; and

(b) if the dismissals of the respondents were With Cause, then they would not be entitled to any Earn Outs.

14 Upon completion of the sale of the Group, the respondents ceased to be directors of BTO. In their place, three senior executives of BTN were appointed as directors, one Mr K being one of the three. Mr K was also the Group Chief Financial Officer and a director of BTN. It is important to remember that at all times Mr K was a director of both BTO and BTN.

15 On 8 January 2014, BTO gave notices to the respondents, dismissing them from their posts "pursuant to Clause 15.2.1 of the [PEA] and Clause 12.9.1 of the [SPA]", citing various grounds of With Cause termination.

The Malaysian Industrial Court proceedings

16 The respondents took the view that they had been wrongfully dismissed and decided to take action against BTO in this regard by invoking the remedies that Malaysian law makes available to disgruntled employees. On 13 February 2014, the respondents made representations to the Director General of Industrial Relations, Malaysia (the "Director General"), pursuant to the procedure under s 20 of the Industrial Relations Act 1967 (Act 177) (Malaysia) ("IRA"). Under the s 20 IRA procedure, where a workman considers that he has been dismissed without just cause or excuse by his employer, he may make representations to the Director General, who may in turn notify the Malaysian Minister for Industrial Relations. Under s 20(3) of the IRA, the Minister may, if he thinks fit, refer the matter to the Malaysian Industrial Court ("MIC") to consider and if thought fit make an award.

17 The Director General then sent letters dated 7 March 2014 to BTO (at its registered address in Malaysia) and the respondents, requesting them to attend

a conciliation meeting. An e-mail was sent on the same day to BTO's manager, one Mr C, and two other BTO employees, inviting them to the conciliation meeting. According to the appellants, Mr C was then the only employee at BTO's office in Malaysia. All its other employees were based in, and operated out of, Thailand and India. Correspondence to BTO was sent to its registered address and collected from this address by Mr C. He was responsible for keeping BTO's senior management apprised of this correspondence as well as keeping them aware of all developments in Malaysia.

18 The conciliation meeting was attended by the respondents and representatives of BTO. Representing BTO were Mr C and Mr K. While Mr K was wearing his BTO hat at that meeting, he still occupied his position on the BTN board. No settlement was reached, and the cases were referred to the MIC on 8 August 2014. The respondents and BTO were copied in these referral letters. From October 2014 to January 2015, the MIC fixed and then adjourned the hearings of the cases multiple times due to the non-attendance of BTO. In the process, numerous notices of the proceedings and various related documents were sent to BTO via registered post to its registered office. In the end, the hearings in respect of the respondents' cases proceeded, in BTO's absence, in March and May 2015.

19 Awards against BTO were issued by the MIC on 6 April 2015 and 29 July 2015 in favour of the respondents ("the MIC Awards"). The MIC found that their dismissals had been "without just cause or excuse" under s 20 of the IRA, and accordingly awarded them compensatory remedies based on their monthly salaries. In the MIC Awards, the reasoning was essentially that the burden of proof was on BTO to justify the respondents' dismissal. Given that BTO elected not to appear, the evidence of the respondents on the wrongfulness

of their dismissals remained unrebutted and their dismissals were held to be unjustified.

20 Subsequent to the MIC Awards, repeated letters from the respondents to BTO demanding payment of the compensation awarded were ignored.

21 On 19 November 2015, the respondents commenced non-compliance proceedings under the IRA against BTO. Both sets of non-compliance proceedings were fixed for mention on 30 December 2015. Notice of the same was sent to BTO. BTO did not attend either mention. The hearing of the non-compliance applications was fixed on 17 February 2016. Notice of the same was served on BTO on the same date.

22 According to BTO, it was only on 16 February 2016, a day before the non-compliance hearing, that Mr C notified the relevant BTO senior personnel of the hearing notices. Up till then, although he had collected the same from the registered office, he had kept all the correspondence away from BTN's senior management. On 17 February 2016, BTO appeared at the hearing through its counsel. In these proceedings, both before the Judge and this court, BTO has not disputed that all the notices mentioned above were validly served on it at BTO's registered address.

23 By two awards dated 1 March 2016, the MIC ordered BTO to pay the sums ordered under the MIC Awards within 30 days to the respondents. Therein, it was also stated that at the 17 February 2016 hearing, BTO's counsel had initially requested an adjournment of the hearing. After hearing the respondents' grounds for objecting to the adjournment, namely, that the time to file judicial review applications against the MIC Awards had long lapsed,

BTO's counsel agreed that there was no point in having the adjournment and conceded that any adjournment would further delay proceedings.

24 On 21 April 2016, BTO wrote to the President of the MIC (copying the respondents' solicitors) to inform the MIC that BTO had complied with the MIC Awards and effected full payment as required. BTO also conveyed its apologies for its absence at the MIC proceedings and explained that "the fact of the said proceedings have [*sic*] been inexplicably withheld from [BTO], [which was] an internal/domestic issue which [BTO was] currently addressing".

The arbitration proceedings

25 On 31 May 2016, the respondents' solicitors wrote to both BTO and BTN demanding payment of the sums due as Earn Out Consideration, in the total amount of US$35m. No payment was made. On 12 July 2016, the respondents commenced arbitration proceedings against both the appellants under the SPA, claiming that they were dismissed Without Cause and were therefore entitled to receive their Earn Outs in the sum of US$35m. A three-member tribunal ("the Tribunal") was constituted to conduct the arbitration.

Hearing to consider legal issues

26 In the arbitration proceedings, the appellants took the position that the dismissals were With Cause and put forward various bases in support of this. Apart from defending the claim, the appellants also filed a counterclaim against the respondents. The respondents responded that issues dealing with cause of termination were *res judicata* by virtue of the MIC Awards ("the *Res Judicata* Issue") and that as a matter of construction of the SPA and the PEAs, a determination under the PEAs by the MIC that the dismissals were without cause was binding for the purposes of the SPA ("the Construction Issue").

27 In a procedural order issued on 13 March 2017, the Tribunal set out the timetable for the arbitration, which included timelines for the filing of pleadings and the production of documents. It also fixed the hearing dates of the arbitration as being from 6 December 2017 to 8 December 2017. In early November 2017, certain events occurred as a result of which the respondents applied for an adjournment of the hearing. On 27 November 2017, the Tribunal informed the parties that it was inclined to adjourn the hearing on evidentiary issues but was willing to proceed with a hearing on legal issues alone if the parties were agreeable. The evidentiary hearing was formally adjourned on 28 November. Thereafter, parties were able to agree on the legal issues, and on 29 November 2017, the Tribunal issued Procedural Order No 5 setting out the agreed list of legal issues as follows:

> **A. What, if anything, is the effect of the judgments of the [MIC]?**
>
> 1. What are the issues before the Tribunal in this arbitration that are said to be the *subject of res judicata*?
>
> 2. What did the [MIC] decide?
>
> 3. What law governs the question of res judicata?
>
> 4. Are the findings of the [MIC] binding on the Tribunal?
>
> Question A.4 will include: (a) the question of *whether the decisions of the [MIC] are binding as a matter of contract on a proper interpretation of the SPA and PEAs* [*ie,* the Construction Issue], in addition to the *questions of res judicata under the general law* [*ie*, the *Res Judicata* Issue]; and (b) *determination of all issues necessary to resolve* whether the findings of the [MIC] are binding on both [appellants], including (i) all questions of Mauritian law (if that is the applicable law) and (ii) *whether any preclusive effect extends to [BTN]* as well as [BTO] (whether by way of privity, the doctrine of co-interested parties or otherwise).
>
> **B. Issues relating to the interpretation of Clause 12.9.1(viii) of the SPA**

> 1. Can [BTN and BTO] rely on clause 12.9.1(viii) in circumstances where no "Audited Accounts" (as defined in the SPA) had been prepared and/or adopted at the time of the dismissal?
>
> 2. Is strict compliance with the definition of "Audited Accounts" (as defined by the SPA) essential for a valid dismissal under clause 12.9.1(viii) of the SPA?

[emphasis added in italics]

28 The Tribunal further explained in its Partial Award that the hearing was meant to "hear discrete issues on points of law insofar that they could be entirely divorced from factual matters", and it had become apparent that "there were potentially determinative points of law capable of resolution in this way, that the parties were aware of those points of law and were fully prepared to argue them".

29 The Tribunal duly conducted the hearing on legal issues on 6 and 7 December 2017. Counsel for all the parties appeared at the hearing. They made submissions in two rounds and in response to Tribunal questions. Further, expert evidence on Mauritian law was presented and each party's expert was cross-examined by counsel. At the close of the hearing, all counsel agreed that there should be no post-hearing memorials.

The Partial Award

30 The Tribunal released the Partial Award on 30 April 2018. A brief summary of the Partial Award follows.

31 The Tribunal held that the dispute resolution clause stipulating arbitration in the PEAs was mandatory in nature but was conditional on one party actually invoking it. Where the clause was not invoked, a party could have recourse to the Malaysian courts under the exclusive jurisdiction clause of the

PEAs, subject to an application by the other party for a stay of proceedings or for an anti-suit injunction. In the present case, neither BTN nor BTO had sought to stay or restrain the proceedings or to commence arbitration. Nor were proceedings for judicial review commenced against the MIC Awards.

32 On the Construction Issue, the Tribunal considered the characteristics of the SPA and the PEAs, and concluded that "the PEAs and the SPA … [were] closely interconnected parts of the same transaction". The Tribunal further decided that termination Without Cause under the PEAs meant the same thing as termination Without Cause under the SPA, and *vice versa*.

33 On the *Res Judicata* Issue, the Tribunal held that both the appellants were prevented from arguing that the respondents were terminated With Cause under the SPA and PEAs by the doctrine of issue estoppel under Singapore law, as the question of whether this had occurred was essentially the same as the issue that the MIC had already determined.

34 The effect of the Partial Award was that the appellants would not be able to adduce evidence in the arbitration proceedings to make out their assertion that the respondents were terminated With Cause. The appellants therefore filed OS 683 on 1 June 2018, seeking the following:

(a) a declaration, pursuant to s 10(3)(*b*) of the IAA, that the Tribunal had jurisdiction to determine whether the respondents were terminated "Without Cause" for the purposes of the SPA;

(b) in the alternative, a setting aside of the Partial Award with respect to both the appellants pursuant to:

(i) section 24(*b*) of the IAA, Art 34(2)(*a*)(ii), Art 34(2)(*a*)(iii) and/or Art 34(2)(*a*)(iv) of the Model Law, on the basis that the Tribunal made findings on disputed facts despite the parties' agreement to reserve the resolution of disputed facts to subsequent hearings; and/or

(ii) section 24(*b*) of the IAA and/or Art 34(2)(*a*)(ii) of the Model Law, on the basis that the Tribunal:

(A) decided on an issue that was not pleaded or argued, by drawing a purported distinction between "subject matter identity" and "issue identity" in its decision on issue estoppel;

(B) failed to consider an argument submitted by the appellants against giving the MIC Awards *res judicata* effect under Singapore law; and/or

(iii) section 24(*b*) of the IAA, Art 34(2)(*a*)(ii), and/or Art 34(2)(*a*)(iii) of the Model Law, on the basis that the Tribunal failed to decide on the merits of the substantive dispute between the parties because it regarded itself bound by the MIC's determinations; and/or

(iv) Art 34(2)(*b*)(ii) of the Model Law, on the basis that the Partial Award was in conflict with the public policy of Singapore;

(c) in the further alternative, a setting aside of the Partial Award with respect to BTN only.

Decision below

35 By a judgment released on 16 September 2019, *BTN and another v BTP and another* [2019] SGHC 212 ("the Judgment"), the Judge dismissed the appellants' application in full.

36 In brief, the Judge held that the Partial Award was not a ruling on jurisdiction, because neither the Construction Issue nor the *Res Judicata* Issue was a jurisdictional issue (Judgment at [45], [52], [78] and [79]). The Judge held that there was no breach of natural justice, nor did the Tribunal breach the parties' agreed arbitral procedure, nor did it exceed its jurisdiction (Judgment at [92]–[99]). All that occurred was that there was a disagreement before the Tribunal between the parties as to the ambit of the requirement of identity of subject matter, and the Tribunal had preferred the respondents' position on issue estoppel (Judgment at [101]–[102]). The Tribunal was tasked with determining whether the findings of the MIC were contractually binding and had *res judicata* effect, and the Tribunal decided the very matters submitted to it – the Construction Issue and the *Res Judicata* Issue (Judgment at [108]). The Judge held that the Partial Award was not contrary to the public policy of Singapore, as the appellants were not prevented from having their case heard and there was no wrongdoing on the part of the respondents in commencing proceedings in the MIC (Judgment at [116] and [117]). The argument that the Partial Award should be set aside with respect to BTN was also rejected (Judgment at [119]).

Parties' cases on appeal

37 In this appeal, the appellants argue that the Judge erred in dismissing their application to set aside the Partial Award. The appellants contend that:

(a) the Tribunal committed a breach of natural justice in making the Partial Award;

(b) the Partial Award is contrary to the public policy of Singapore; and

(c) the Tribunal's decision on the *Res Judicata* Issue meant that it had failed to decide matters contemplated by and/or falling within the submission to arbitration.

In the alternative, the appellants argue that the Partial Award should be set aside only against BTN, given that BTN was not a party to the MIC proceedings. The appellants are aggrieved because the MIC proceedings were determined in the absence of BTO, and BTN was never a party to those proceedings. They feel shut out and disregarded. While one may sympathise with such reactions, the issues have to be determined as a matter of law alone. Further, as we will see, it was not the case that the appellants had no opportunity at all at the time when the MIC proceedings were afoot to put a spoke in the respondents' wheel and hold them to their contractual obligations.

38 On the other hand, the respondents argue that the appeal is effectively an attempt to reverse the Tribunal's findings on the substantive legal merits of the case under the guise of public policy, breach of natural justice or *infra petita* arguments.

Applicable legal principles

39 Article 34(2) of the Model Law, which is given the force of law in Singapore by s 3(1) of the IAA, provides exhaustive grounds for setting aside arbitration awards. The relevant provisions are as follows:

> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> > (a) the party making the application furnishes proof that:
> >
> > …
> >
> > (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
> >
> > (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
> >
> > …
>
> (b) the court finds that:
>
> …
>
> (ii) the award is in conflict with the public policy of this State.

40 The grounds provided by Art 34(2) of the Model Law are augmented by s 24 of the IAA. Section 24(*b*) reads:

> **Court may set aside award**
>
> **24.** Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —
>
> …
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

41 It is not open to the court to set aside an arbitral award on the freestanding ground that the Tribunal's substantive decision on the merits was

outrageous or irrational: *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [15]–[21].

42 As a preliminary matter, the appellants challenge the Partial Award on the basis that the Tribunal's decision on the *Res Judicata* Issue is simply wrong in law. This challenge is effectively directed to the merits of the Tribunal's decision, a category of challenge which is impermissible under Art 34(2) of the Model Law and s 24 of the IAA. The setting-aside procedure does not operate as an appeal and the court has no power to review the merits of an arbitral decision.

Our decision

Whether a breach of natural justice occurred in the making of the Partial Award

43 We turn to the appellants' allegation that the Tribunal permitted a breach of natural justice to occur. Under s 24(*b*) of the IAA, an arbitration award may be set aside if a breach of the rules of natural justice occurred in connection with the making of the award, by which the rights of any party were prejudiced. The inquiry is a four-stage one, as established by this court in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee"*) at [29]. The party who challenges the award on this ground must: (a) identify the rule of natural justice which was breached; (b) establish how the rule was breached; (c) establish the way the breach was connected to the making of the award; and (d) show that the breach prejudiced the rights of the party.

Whether the Tribunal based its decision on factual matters in dispute

44 On appeal, the appellants first argue that there was a breach of natural justice because the Tribunal based its decision regarding both the Construction

Issue and the *Res Judicata* Issue on factual matters, even though both parties had agreed that disputed matters of fact would not be taken into account by the Tribunal and that the arbitration was to be a "non-evidentiary hearing".

45 In our judgment, the Judge did nor err in holding that the Tribunal did not base its decision on facts in dispute, and there was accordingly no breach of any rule of natural justice in this regard. The parties had agreed to the arbitration hearing being a "non-evidentiary hearing" to resolve only legal issues, but had simultaneously tasked the Tribunal to determine "*all issues necessary* to resolve whether the findings of the [MIC] are binding on both [appellants]" [emphasis added] (see [27] above).

46 The Tribunal's decision is clearly within the scope of the parties' agreement. In relation to the *Res Judicata* Issue, the agreed list of questions had expressly included the issue of "whether any preclusive effect extends to [BTN] as well as [BTO] (whether by way of privity, the doctrine of co-interested parties or otherwise)". The Tribunal had answered this precise question in the affirmative. The appellants complain that one of the key reasons for the Tribunal's conclusion was a factual matter – that the appellants "purposefully and objectively shared the key benefits and risks" under the SPA and the PEAs, as evinced by the relevant provisions of these contracts – but this was simply the outcome of the Tribunal's application of the necessary legal tests required to determine the issue submitted to it. Likewise, in relation to the Construction Issue, the Tribunal's decision that the MIC's findings were contractually binding is based wholly on the construction of the SPA and the PEAs. The appellants argue on appeal that the Tribunal should have examined the evidence of witnesses and other documents showing the context and background to the SPA and PEAs. This suggestion is wholly contrary to the parties' agreement

evidenced by Procedural Order No 5 that the issues could be decided without touching on the evidentiary disputes.

Whether the Tribunal premised its decision on the Res Judicata Issue on matters not in issue

47 The appellants' second argument is that there was a breach of natural justice because the Tribunal had drawn a distinction between "subject matter identity" and "issue identity" in deciding the *Res Judicata* Issue, even though that distinction was not in issue, pleaded or argued by any of the parties.

48 For context, the Tribunal had held that Singapore law applied to the question of *res judicata* in the arbitration, and the applicable four-part test included the requirement that there be identity of subject matter. The respondents had argued that this requirement was fulfilled because the issue of Without Cause termination under the PEAs and SPA was necessarily determined in the MIC proceedings, as the very question before the MIC under s 20 of the IRA was whether the respondents had been dismissed without just cause. The appellants argued that the requirement was not met, because the issues must be identical. There was no identity of issue because the MIC's decision was based on a provision in the IRA, which was distinct from the termination clauses under the PEAs and the SPA. In its decision, the Tribunal considered that the concept of "issue identity" to be too narrow and "preferred to follow the Singapore High Court in *BNX v BOE* [*and another matter* [2017] SGHC 289] in using 'subject matter identity'". On this basis, the Tribunal concluded that the subject matter in both sets of proceedings was in essence the same.

49 We agree with the Judge that there was no breach of natural justice in this regard. While it might be that the parties were agreed that the test for issue

estoppel required an identity of issues, there was disagreement as to the degree of identity required under the test. The Tribunal's terminology of "issue identity" and "subject matter identity" was simply used to explain the difference in the degrees of identity required in the positions taken by the parties. As for the issue of the difference itself, it *was* a matter argued by the parties. In the premises, the Tribunal did not adopt a new approach that was outside of the parties' expectations, and there was no breach of natural justice.

Whether BTO did not have the opportunity to present its case

50 Lastly, the appellants argue that there was a breach of natural justice because BTO did not have an opportunity to present its case before the MIC and the Tribunal, and both the appellants were unable to defend themselves against the respondents' claims for the Earn Outs. We do not agree.

51 In the present case, it cannot be said that BTO "could not reasonably have known" that it should make submissions at the MIC proceedings on the reasons for the respondents' termination, given the valid service of the various notices. What went wrong in regard to the MIC proceedings was an internal matter for BTO – procedurally the opportunity was afforded by the MIC but not utilised by BTO. Even if there had been a breach of natural justice at the level of the MIC proceedings, which we do not accept, such breach would not constitute ground for setting aside the Partial Award. Section 24(*b*) of the IAA requires there to have been a breach of natural justice "in connection with the *making of the award*" [emphasis added]. That means that the breach must have been in relation to the arbitration proceedings before the Tribunal, not the MIC proceedings. An alleged breach of natural justice at the MIC proceedings and its effect on the *Res Judicata* Issue, if any, could and should have been brought up before the Tribunal. It has no place here.

52 We are only concerned with an allegation of breach of natural justice that may have occurred in the arbitral proceedings. We see no basis on which to hold that such a breach took place in this case. Indeed, the Tribunal was at pains to ensure it did not. We have explained at [26]–[29] above what occurred in the lead-up to and at the hearing before the Tribunal in December 2017. At those proceedings, the Construction and *Res Judicata* Issues were submitted by the parties to the Tribunal for determination, and both BTO and BTN were given the opportunity to make submissions accordingly. And, in actual fact, they availed themselves of that opportunity in full through their appointed counsel who were well equipped to handle all legal arguments on behalf of their clients.

53 The appellants also attempt to align the present case with that of *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW Joint Operation*"). In our view, that case is distinguishable from the present. To briefly summarise the facts of *CRW Joint Operation*, it involved a dispute that arose out of a contract that was governed by the 1999 FIDIC Conditions of Contract for Construction (1st Ed, 1999) ("FIDIC Conditions"). Clause 20.6 of the FIDIC Conditions provided that "[u]nless settled amicably, *any dispute in respect of which the [board]'s decision (if any) has not become final and binding shall be finally settled by international arbitration*" [emphasis added]. The dispute was referred to a dispute adjudication board in accordance with the FIDIC Conditions. The board decided that the defendant owed the sum of US$17m to the claimant. The defendant filed a notice of dissatisfaction, and parties were not able to comply with the board decision. The claimant commenced arbitration for the purpose of enforcing the board decision. The tribunal held that the claimant was entitled to immediate payment, and that the defendant was not entitled to request that the tribunal reverse the board's decision. The defendant thereafter sought to set aside the award in the Singapore

courts. The award was set aside by the High Court, and this court dismissed the appeal.

54 Crucial to this court's decision in *CRW Joint Operation* was the operation of sub-clause 20.6 of the FIDIC Conditions in the relevant contract. That provision provided that where a notice of dissatisfaction had been validly served and either or both of the parties failed to comply with the binding but non-final board decision, a single arbitration was contemplated at which all the existing differences between the parties arising from the board decision concerned would be resolved (at [67]). By issuing a final award which upheld the board's decision without going into the substantive merits of the parties' dispute, the tribunal ignored the clear wording of sub-cl 20.6 of the FIDIC Conditions and fundamentally altered the terrain of the entire proceedings as well as the arbitral award which would have been issued if they had reviewed the merits of the board decision (regardless of what the final outcome might have been) (at [82]–[85]). There was a breach of natural justice as the defendant was not provided with a real opportunity to present its case on what was owing to the claimant. The arbitral hearing was meant to be a preliminary one, and the defendant did not envisage having to present evidence at that stage on how much it believed it owed to the claimants during the arbitral hearing (at [89]–[90], [93]–[96]). These facts are clearly distinguishable from those of the present case and *CRW Joint Operation* does not assist the appellants.

55 In sum, the appellants failed to establish that the proceedings before the Tribunal constituted a breach of natural justice. We go on to explain why upholding the Partial Award would not be contrary to public policy.

Whether the Partial Award is contrary to public policy

56 The public policy ground for setting aside provided by Art 34(2) of the Model Law is a narrow one. This court has held that the ground should only succeed in cases where upholding or enforcing the arbitral award would "shock the conscience", or be "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public", or violate "the forum's most basic notion of morality and justice": *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") at [59]. In this respect, we reiterate that the doctrine of *res judicata* has long been part of the law of Singapore and its invocation in cases brought in the Singapore courts is not unusual. Accordingly, a decision based on *res judicata* principles can never in itself be described as shocking the conscience or wholly offensive to informed members of the public. Recognising this, the appellants aim their attack at *erroneous* applications of the doctrine. Importantly, however, the general principle is that even if an arbitral tribunal's findings of law and/or fact are wrong, such errors would not *per se* engage the public policy of Singapore: *AJU v AJT* [2011] 4 SLR 739 at [66]; *PT Asuransi* at [57].

57 On appeal, the appellants argue that the Partial Award is contrary to public policy for two reasons:

(a) First, because the appellants were not aware of the MIC proceedings, the effect of the Tribunal's decision that the MIC awards have preclusive effect is that the appellants have been deprived of their right to defend themselves and/or make claims in respect of whether the respondents' termination was "With Cause" under the SPA.

(b) Second, the appellants claim that because the respondents were in breach of the arbitration agreements in the PEAs in seeking recourse from the MIC, upholding the Partial Award would mean that the respondents would be allowed to take advantage of their breach and this would be contrary to public policy.

We address these arguments in turn.

The effect of the Tribunal's holding on the Res Judicata Issue

58 At the outset, we note again that the various notices of the MIC proceedings were validly served on BTO at its registered address and were received by Mr C. Indeed, the appellants do not dispute this. Instead, the appellants' argument is that BTO's directors and senior management were unaware of these notices because Mr C had failed to relay the messages to them until it was too late. It was only on 16 February 2016 that Mr C informed BTO's senior management about the MIC notices, letters of demand and the notices of non-compliance proceedings. According to the appellants, Mr C had concealed the notices from BTO's senior management. The appellants had placed evidence before the Tribunal that Mr C's failure to bring these notices to BTO's senior management resulted in his employment being terminated following an internal inquiry into his misconduct, and the respondents had not challenged the truth of such evidence. As a result of Mr C's misconduct and the Tribunal's decision on the *Res Judicata* Issue, the appellants argue that they were effectively deprived of the right to defend themselves against the respondents' claim by showing that their termination was "With Cause" under the SPA.

59 In our view, the appellants' allegation that they "did not know" of the MIC proceedings is irrelevant. As the respondents point out, no fewer than eight

notices relating to the MIC proceedings were properly served on BTO, and the proceedings were repeatedly adjourned to ensure that BTO had the opportunity to attend the hearings. BTO's failure to present its defence at the MIC proceedings was a direct result of its own internal arrangements, and therefore could not be a ground for challenging the validity of the MIC Awards. In fact, the appellants did *not* challenge the validity of the MIC Awards in the arbitration proceedings before the Tribunal. On this footing, the substance of the MIC Awards was examined by the Tribunal. The Tribunal examined the facts and concluded that the MIC Awards were decisions on the merits. As per the agreed list of issues, the Tribunal further decided that the MIC's findings were binding, both as a matter of contractual interpretation and of *res judicata*, in respect of both the appellants. There is no allegation that the appellants were prevented from presenting their respective cases on the Construction and *Res Judicata* Issues before the Tribunal. The merits of a tribunal's decision are ordinarily irrelevant to whether its award should be set aside. The appellants cannot now refuse to accept the legal outcome of the Tribunal's determination.

60 At the hearing of this appeal, the appellants further argued that there was "sufficient material before the Tribunal" that "cr[ied] out for an inquiry" into the circumstances behind BTO's non-appearance at the MIC proceedings. According to the appellants, the Tribunal's failure to conduct such an inquiry before it decided the *Res Judicata* Issue meant that the appellants were deprived of their right to defend themselves, because the result of the inquiry would have had a bearing on Tribunal's decision on the *Res Judicata* Issue. The appellants argued that to enforce the Tribunal's award, which flowed from this series of events, would be contrary to public policy.

61 In our view, if the circumstances indeed "cried out" for a factual inquiry, then surely the onus was on the appellants to make the argument before the

Tribunal that the *Res Judicata* Issue could not be determined until that inquiry had been conducted. The appellants, however, did not do so. Instead, they agreed that the hearing to determine the issues as agreed in Procedural Order No 5 would be a non-evidentiary hearing. The Tribunal had done precisely what was intended by disposing of the agreed issues without taking further evidence. There is therefore no basis on which the appellants can complain about the Tribunal's failure to conduct a factual inquiry into the circumstances behind BTO's non-appearance at the MIC proceedings.

The respondents' alleged breach of the arbitration agreements in the PEAs

62 We turn to the appellants' next argument. It relates to the respondents' conduct in seeking recourse against them by way of the MIC proceedings. The appellants submit that this was in breach of the arbitration agreements in the PEAs. Therefore, upholding the Partial Award would be contrary to public policy because it would allow the respondents to take advantage of their breach of contract. The appellants argued that Mr K's unchallenged evidence was that when he attended the conciliation meeting, he had taken the position that any disputes relating to the SPA should be subject to arbitration. According to the appellants, Mr K had also offered, at the conciliation meeting and in an e-mail on 9 April 2014, to make severance payments to settle the dispute. Since there was no response to Mr K's assertion or offer, the appellants were entitled to assume that the respondents had decided not to pursue their complaints.

63 In our judgment, this argument is unmeritorious. As we pointed out to the appellants' counsel during the hearing of the appeal, there was, in April 2014, recognition on the appellants' part that the MIC proceedings may have been initiated to foreclose the relevant issues being challenged in arbitration.

After Mr K participated in the conciliation process on BTO's behalf (see [18] above), he sent an e-mail to the conciliator dated 9 April 2014 stating that:

> … [The respondents were] trying to use this employment conciliation forum to indirectly get a decision on disputed issues under the [SPA] or on business-related issues that have nothing to do with employment issues under Malaysian law. … All disputes under the SPA are subject to arbitration … [The respondents] have raised the "with or without cause" termination issues in this forum in an improper attempt to derive benefits under the SPA, which is clearly subject to arbitration. …

The possibility of the respondents getting an MIC Award in their favour, which would thereafter be foisted upon a subsequent arbitration, was therefore clearly on the appellants' minds. It was open to the appellants, at that stage, to have invoked the arbitration process. They did not do so. They neither commenced arbitration proceedings themselves nor sought to restrain the further conduct of the MIC proceedings, a course which was open to BTO. As the Tribunal held, the mandatory nature of the relevant arbitration clause was conditional on one party actually invoking it. Since the arbitration clauses were not invoked by either of the appellants, the respondents' actions in bringing proceedings under the IRA in Malaysia could not thereafter be impugned. The appellants therefore cannot complain that there was something suspicious or improper about the bringing of the MIC proceedings. In this connection, it is worth reiterating that at all material times, Mr K was on the board of BTN. Although his letter to the conciliator was sent on behalf of BTO, there is no reason to believe that the BTN board was unaware of the respondents' alleged breach of the arbitration clauses. Both BTN and BTO were fully capable of putting in train action to ensure that the disputes were diverted to resolution by arbitration instead of in the MIC.

64 In so far as the appellants make various arguments that the Tribunal erred in law in its decision on the *Res Judicata* Issue, such arguments must be rejected for the reason given at [42] above. These arguments include the appellants' arguments that the Tribunal had erroneously ascribed the MIC Awards *res judicata* effect because the claims before the MIC involved different claims, issues, reliefs and applicable laws as compared to those before the Tribunal, and that the Tribunal erroneously ascribed the MIC Awards *res judicata* effect in respect of the claims against BTN, even though BTN was not a party to the MIC proceedings.

Whether there is an exception for awards which rest on errors of law by reason of which the tribunal was unable to exercise its mandate

65 At the hearing, the appellants made the argument that as a matter of law, a party may seek to challenge an award on the ground that the award is contrary to public policy, if that award rests on an error of law by reason of which error the tribunal considered that it was not able to exercise its mandate and determine the merits of either party's position. In the context of this appeal, a tenet of the appellants' argument is that erroneous applications of the *res judicata* doctrine by arbitral tribunals are such errors of law.

66 The starting point is this court's decision in *PT Asuransi* ([56] *supra*), where the court held that errors of law or fact made in an arbitral decision, *per se*, are final and binding on the parties and may not be appealed against or set aside by a court except in situations prescribed under s 24 of the IAA and Art 34 of the Model Law (at [57]). The contrary approach taken by the Supreme Court of India in *Oil & Natural Gas Corporation Ltd v SAW Pipes Ltd* AIR 2003 SC 2629 cannot be applied in the context of the legal framework in Singapore under the IAA. As this court observed in *PT Asuransi* at [57]:

> … the [IAA] will be internally inconsistent if the public policy provision in Art 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact. For consistency, such errors may be set aside only if they are outside the scope of the submission to arbitration. In the present context, errors of law or fact, *per se*, do not engage the public policy of Singapore under Art 34(2)(*b*)(ii) of the Model Law when they cannot be set aside under Art 34(2)(*a*)(iii) of the Model Law.

In contrast to a tribunal's decisions of law and fact which are not ordinarily open for review, a tribunal's decision on jurisdiction is subject to *de novo* independent review by the courts.

67 In this respect, the appellants seek to align decisions by a tribunal which result in the tribunal considering that it is unable to exercise its mandate and determine the merits of either party's position with decisions on jurisdiction. The appellants argue that where a tribunal wrongly declines to exercise its mandate, a party which has agreed to arbitrate a dispute finds itself shut out and is denied substantive assessment of its claim. Such an award is, according to the appellants, contrary to the public policy of Singapore, and may thus be set aside pursuant to Art 34(2)(*b*)(ii) of the Model Law. The appellants argue that refusing to recognise such an award would be consistent with the pro-arbitration public policy of Singapore, by ensuring that tribunals honour their mandate to arbitrate on the whole dispute submitted to them. The appellants further submit that an arbitral tribunal may not delegate or reserve matters submitted to it to another to decide, relying on *Shanghai Tunnel Engineering Co Ltd v Econ-NCC Joint Venture* [2011] 1 SLR 217 at [37].

68 In our judgment, a tribunal's decision on the *res judicata* effect of a prior decision is not a decision on jurisdiction. This court in *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2019] 1 SLR 263 ("*Swissbourgh*") at [207] distinguished between the concepts of jurisdiction and

admissibility – jurisdiction refers to "the power of the tribunal to hear a case", whereas admissibility refers to "whether it is appropriate for the tribunal to hear it". The significance of the distinction between jurisdiction and admissibility is that a decision of the tribunal in respect of jurisdiction can be reviewed *de novo* by the supervisory courts at the seat of the arbitration, but a decision of the tribunal, having jurisdiction, on admissibility cannot: *BBA and others v BAZ and another appeal* [2020] 2 SLR 453 ("*BBA v BAZ*") at [73].

69 As this court explained in *BBA v BAZ* at [76], the "tribunal versus claim" test applies for the purpose of distinguishing whether an issue goes towards jurisdiction or admissibility. This court elaborated as follows (at [77]–[79]):

> 77 The "tribunal versus claim" test asks whether the objection is targeted at the tribunal (in the sense that the claim *should not be arbitrated* due to a defect in or omission to consent to arbitration), or at the claim (in that the claim itself is defective and *should not be raised at all*). Jan Paulsson explains the test in these terms … :
>
> > …
> >
> > To understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds:
> >
> > - If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.
> >
> > - If the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility and the tribunal's decision is final.
>
> 78 Consent serves as the touchstone of whether an objection is jurisdictional … arguments as to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional, as are questions of the claimant's standing to bring a claim or the possibility of binding non-signatory respondents …
>
> 79 Conversely, admissibility relates to the "nature of the claim, or to particular circumstances connected with it" … It

> asks whether a tribunal may decline to render a decision on the merits for reasons other than a lack of jurisdiction, and is determined by the tribunal on the basis of their discretion guided by, amongst others, principles of due administration of justice and any applicable external rules …
>
> [emphasis in original]

70 Jan Paulsson further states (Jan Paulsson, "Jurisdiction and Admissibility" (2005) in *Global Reflections on International Law, Commerce and Dispute Resolution*, Liber Amicorum in honour of Robert Briner (Gerald Aksen et al, eds) (ICC Publishing, 2005) at p 616) that, following the lodestar of this distinction as set out in the preceding paragraph, tribunals' decisions on objections regarding preconditions to arbitration, like time limits, the fulfilment of conditions precedent such as conciliation provisions before arbitration may be pursued, mootness, and ripeness are matters of admissibility, not jurisdiction.

71 In our judgment, determinations of *res judicata* issues should likewise be treated as decisions on matters of admissibility, not jurisdiction. In *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104, in explaining the concepts of *res judicata* and jurisdiction, this court stated as follows (at [115]):

> … *Res judicata* operates against the litigants, and not against the court: it bars the litigants from raising an issue or advancing a contention, and if a party persuades the court that a matter is caught by the doctrine, the court would grant an order giving effect to this; but, the doctrine does not have any effect on the court's authority to hear the dispute before it and, having heard it, to determine whether or not to uphold the argument that the matter is foreclosed by *res judicata*. Of course, the court might be mistaken in its assessment of that argument, but that does not convert what might well be an erroneous decision into one which was made without jurisdiction. …

We agree with the Judge below that this statement of principle is applicable to decisions made by arbitral tribunals on issues of *res judicata* as well, as the nature of a *res judicata* challenge is the same in both court proceedings and in arbitral proceedings. Furthermore, as explained by Gretta Walters in "Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?" (2012) 29(6) Journal of International Arbitration 651 ("*Walters*") at 672 and 675, as a matter of logic, where a party alleges that a dispute has already been resolved and should not be reheard, the party is not attempting to get the dispute resolved in a different forum; rather the party does not want the claim (or part thereof) to be resolved in any forum. In sum, a decision on the issue of *res judicata* is one of admissibility, and the courts cannot review it on its merits.

72 Further, in our judgment, there is no basis on which to challenge an award involving an erroneous ruling in respect of an admissibility issue (such as a *res judicata* issue) that would result in the tribunal considering that it is not able to determine the merits of either party's position on that issue, on the basis of it being contrary to public policy. Setting such an award aside would undermine the policy of minimal curial intervention, which is a "mainstay of the Model Law and the IAA" (*AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 at [37]). Well-established considerations underlying this policy include the finality of the arbitral process and the interest in preventing indefinite litigation, which ensure that arbitration's advantage as an efficient alternative dispute resolution process is not undermined: *Soh Beng Tee* ([43] *supra*) at [65(c)].

73 Accordingly, there is no good reason why erroneous decisions to ascribe *res* judicata effect to a prior decision should be treated any differently from other errors of law. Enforcement of such awards does not reach the high threshold set

out in *PT Asuransi* at [59] (see above at [56]). Parties are simply being held to the decision of the tribunal they chose for the resolution of disputes between them. In the present case, the *Res Judicata* Issue was even explicitly and specifically set out in a list of agreed issues for the tribunal's determination in Procedural Order No 5. In holding that the MIC Awards had *res judicata* effect, the tribunal was not "delegat[ing] or reserve[ing] matters submitted to it to another to decide", contrary to the appellants' assertion, but was deciding the very issue it had been tasked to adjudicate on.

74 We note that there are several foreign cases, which the appellants rely on in their arguments, which appear to have diverged from this approach. The first case relied on is the decision of BGH, Beschluss vom 11. Oktober 2018 – I ZB 9/18 – OLG Köln ("I ZB 9/18"); In brief, I ZB 9/18 concerned two consecutive arbitration proceedings. In the first set of arbitration proceedings, the tribunal had stated in its award that the claimant had no commission claims against the defendant for January 2011 until 10 July 2013. The claimant had, however, actually withdrawn part of its claim in relation to the period of 1 January to 10 July 2013 prior to the award being issued. At the second arbitration filed by the claimant against the defendant, the claimant sought approval of the audit for business transactions from 1 January 2012 onwards. The second tribunal's award granted the claim from 11 July 2013 until the award was rendered, but held that since the commission payment claims for 1 January to 10 July 2013 had been dismissed by the first tribunal, then a claim for an audit (directed at establishing the amount of the claim) would no longer be considered. The claimant sought a setting aside of the second tribunal's award, in so far as it rejected the application for an audit for the period from 1 January to 10 July 2013, as it was wrong to have disregarded the claimant's withdrawal of the claims in respect of 1 January to 10 July 2013 and to hold that the claims

for that period had been determined by the first tribunal. The court, in holding that the second tribunal had erred in ascribing *res judicata* effect to the first tribunal's award, stated at [15]:

> (2) The principle that the clear disregard of the legal validity of another decision by an arbitral tribunal violates public policy, is not only given when it wrongly fails to take into account the binding effect of a final judgment or a final arbitral award within the limits of § 1055 of the German Code of Civil Procedure, but also in the opposite case here, where an arbitral tribunal, in disregard of the effects of *res judicata*, wrongly considers itself bound by an earlier award. Only in this way can it be prevented that a party bound to an arbitration agreement is denied access to effective protection by the law by denying the party the substantive assessment of an arbitration claim with the erroneous view that this claim has already otherwise been finally decided.

75 We also note the Swiss case of 4A_633/2014, as cited by the appellants. In that case, the Swiss Federal Tribunal examined the merits of the second arbitral tribunal's decision not to accord the first tribunal's award *res judicata* effect. It held that the second tribunal's award did not involve any error of judgment. In doing so, the Swiss Federal Tribunal stated at para 3.2.1 that "[t]he arbitral tribunal violates procedural public policy when it disregards the res judicata effect of a previous judgment in its decision". The Swiss Federal Tribunal considered the converse situation in which a second tribunal erroneously ascribes *res judicata* effect to a first tribunal's award, and stated as follows at para 3.2.6:

> … [the second arbitral tribunal] would have violated public policy if, in the assessment of the claim, it [erroneously] held itself bound by the interpretation of the contract in the first arbitral award and renounced the corresponding review although a different claim was decided in the first award.

76 As noted in Bernhard Berger, "No Force of Res Judicata for an Award's Underlying Reasoning. Note on 4A_633/2014 of 29 May 2015" (2015) 33(3) ASA Bulletin 642 ("Berger") at 656, this conclusion is "remarkable" as no

justification at all is given as to why this opposite scenario would (also) be incompatible with public policy. Berger, however, goes on to propose the following justifications (at 657):

> … [I]f a tribunal wrongly attributes res judicata to an earlier decision and thus decides to reject a claim or declare it inadmissible, its decision results in a denial of the right of access to justice and, as such, in a violation of the right to a fair trial. In fact, if there were no remedy at all against a wrongful attribution of res judicata, this would result in a situation where the respective claim would never be considered. However, the law of civilised jurisdictions provides that each individual for its claims has a fundamental right to a fair trial before a court established by law. This fundamental principle falls within the scope of procedural public policy within the meaning of Article 190(2)(e) [of the Swiss Private International Law Statute].

77 Respectfully, we disagree with the reasoning in these two cases and in Berger. They stand for a position which we do not accept in Singapore. Reviewing an award based on the substantive merits of the tribunal's decision on a legal issue goes against the weight of the relevant principles in Singapore, as explained above.

78 In sum, the Partial Award is not contrary to public policy and should not be set aside on this basis.

Whether the Tribunal failed to decide matters

79 Finally, the appellants argue on appeal that in holding that the MIC Awards precluded the appellants from raising the issue of With Cause termination in the arbitration, the Tribunal abdicated its duty to decide that issue.

80 Given the observations we have made above, this ground of appeal is moot. The Tribunal was specifically tasked with determining whether the

findings of the MIC were contractually binding and had *res judicata* effect. The Tribunal determined these issues, according to the parties' agreement. There can be no complaint by the appellants at this stage.

Conclusion

81 We are therefore satisfied that the grounds for setting aside of the Partial Award are not met. The appeal is dismissed.

82 The parties shall submit written submissions on costs, limited to five pages each within ten days of the date of this judgment.

Sundaresh Menon	Judith Prakash	Quentin Loh
Chief Justice	Judge of Appeal	Judge

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