IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 65

Civil Appeal No 113 of 2018

Between

(1) ST Group Co Ltd
(2) Sithat Xaysoulivong
(3) ST Vegas Co Ltd

... Appellants

And

Sanum Investments Limited

… Respondent

Civil Appeal No 114 of 2018

Between

Sanum Investments Limited

... Appellant

And

ST Vegas Enterprise Ltd

… Respondent

In the matter of
Originating Summons No 890 of 2016

In the matter of
Section 19 of the International Arbitration Act (Cap 143A)

And

In the matter of
Order 69A, Rule 6 of the Rules of Court (Cap 322, Rule 5)

And

In the matter of
a Final Award dated 22 August 2016
made in SIAC Arbitration No 184 of 2015
between Sanum Investments Limited as Claimant and
(1) ST Group Co Ltd (2) Sithat Xaysoulivong (3) ST Vegas Co Ltd
(4) ST Vegas Enterprise Ltd (5) Xaya Construction Co Ltd
(6) Xaysana Xaysoulivong as Respondents

Between

Sanum Investments Limited

… *Plaintiff*

And

(1) ST Group Co Ltd
(2) Sithat Xaysoulivong
(3) ST Vegas Co Ltd
(4) ST Vegas Enterprise Ltd

… *Defendants*

JUDGMENT

[Arbitration] — [Enforcement] — [Action]
[Arbitration] — [Agreement] — [Scope]
[Arbitration] — [Conflict of laws] — [Seat of the arbitration]

TABLE OF CONTENTS

ST Group Co Ltd and others
v
Sanum Investments Limited and another appeal

[2019] SGCA 65

Court of Appeal – Civil Appeals Nos 113 and 114 of 2018
Sundaresh Menon CJ, Judith Prakash JA and Quentin Loh J
10 May; 7 June 2019

18 November 2019 Judgment reserved.

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

Introduction

1 We have before us two related but cross appeals arising, in the first instance, out of a court order made by an Assistant Registrar granting leave for the enforcement of an arbitration award against the award debtors ("the Leave Order"). The award debtors mounted a challenge against the Leave Order and this eventually came before a High Court judge ("the Judge"). The Judge affirmed the Leave Order in respect of three of the award debtors but allowed the application to set aside that order in respect of one of them. Neither side was completely happy with the decision, hence the appeals to this Court seeking to reverse the Judge's decision on both points.

2 The parties to the arbitration proceedings were as follows. The claimant was Sanum Investments Limited ("Sanum"), a company incorporated in Macau and carrying on business in the gaming industry. Sanum obtained an arbitration award in its favour and subsequently obtained leave to enforce the same in Singapore. It is the appellant in Civil Appeal No 114 of 2018 ("CA 114") and seeks to overturn the Judge's order reversing the Leave Order in respect of ST Vegas Enterprise Ltd ("STV Enterprise").

3 STV Enterprise is a company incorporated in Laos. It was a respondent to the arbitration proceedings brought by Sanum together with two other associated Laotian companies and an individual. The companies were ST Group Co, Ltd ("ST Group") and ST Vegas Co, Ltd ("ST Vegas") while the individual was Mr Sithat Xaysoulivong ("Mr Sithat"), a Laotian citizen who was the moving spirit behind all the Laotian companies involved in the dealings with Sanum that led to the arbitration. ST Group, ST Vegas and Mr Sithat are the appellants in Civil Appeal No 113 of 2018 ("CA 113") and they are appealing against the Judge's decision to affirm the Leave Order in respect of the enforcement of the award against them.

4 For convenience, we shall sometimes hereafter refer to the Lao companies and individual involved in the two appeals as, collectively, the "Lao Parties".

The parties

5 ST Group owns business interests in various industries in Laos, including the gaming and entertainment industry. Mr Sithat is the President of ST Group. One of his sons, Mr Xaya Xaysoulivong ("Mr Xaya") is the Vice President of ST Group and ST Vegas. Another of his sons, Mr Xaysana

Xaysoulivong ("Mr Xaysana"), manages ST Vegas and STV Enterprise which are affiliated with ST Group.

6 ST Vegas and STV Enterprise own gaming licenses to operate certain clubs in Laos. In particular, ST Vegas holds the gaming licence to operate a slot machine club located at the Vientiane Friendship Bridge. The parties referred to this club as the "Thanaleng Slot Club". The dispute between the parties that was eventually submitted to arbitration ("the Dispute") arose out of arrangements involving the Thanaleng Slot Club.

Background to the Dispute – the agreements

7 Mr John Baldwin ("Mr Baldwin") is Chairman of Sanum's Board of Directors. In 2007, Mr Baldwin was exploring opportunities for investing in Laos. He met Mr Sithat and Mr Xaya on 26 May 2007 to discuss potential business collaboration between Sanum and Mr Sithat's group. Mr Sithat and Mr Xaya possessed valuable concessions for hotel and casino projects and owned several slot machine clubs, but lacked the necessary funds and expertise to develop those assets. Sanum, with its expertise and experience in the gaming industry, appeared to be a good fit.

8 The parties thus negotiated and entered into a joint venture arrangement under which Sanum would eventually come to hold 60% of all present and future gaming businesses of the joint venture. Pursuant to this, a Master Agreement was executed on 30 May 2007. There is no dispute that ST Group and Sanum were parties to the Master Agreement, but there is a dispute over whether STV Enterprise, ST Vegas and Mr Sithat were parties to the Master Agreement. The Master Agreement contained a dispute resolution clause, cl 2(10), which reads:

> 10) If any dispute shall arise, the Parties agree to conduct an amicable negotiation. If such dispute cannot be settled by mediation, the Parties may submit such disputes to the Resolution of Economic Dispute Organization or Courts of the Lao PDR according to the provision and law of Lao PDR in accordance with this Agreement. All proceedings of the arbitration shall be conducted in Lao and English Languages.
>
> Before settlement by the arbitrator under the rules of the Resolution of Economic Dispute Organization, the Parties shall use all efforts to assist the dispute resolution in accordance with the laws of Lao PDR.
>
> If one of the Parties is unsatisfied with the results of the above procedure, the Parties shall mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration company in Macau, SAR PRC.

9 The proper interpretation and scope of cl 2(10) of the Master Agreement is in dispute.

10 Clause 1(3) of the Master Agreement states that the joint venture between the parties would include various joint ventures in the gaming and entertainment industry. Of particular relevance to the present case is a "Slot Club Joint Venture", which would involve two slot clubs. Clause 1(3) also stated that the Slot Club Joint Venture was not limited to the aforesaid clubs. Specific mention was made of the Thanaleng Slot Club in cl 1(3)(d) of the Master Agreement. The Thanaleng Slot Club would not, however, immediately form part of the Slot Club Joint Venture because of the then existing involvement of third party machine owners in that club. The last of the contracts with these third party machine owners was set to expire on 11 October 2011. The Master Agreement states, therefore, that Sanum was to take over the Thanaleng Slot Club upon the termination of the third party machine owners' contracts. The parties referred to this event as the "turnover" of the Thanaleng Slot Club and referred to 11 October 2011 as the "turnover date".

11 Clause 1(5) of the Master Agreement envisages that there would be separate "sub-agreements corresponding to the details of each Joint Venture". On 6 August 2007, Sanum entered into one such sub-agreement with STV Enterprise: the Participation Agreement. The Participation Agreement referred to two slot clubs run by STV Enterprise (which were identified as the "Lao Bao" and "Ferry Terminal" slot clubs) and stated that STV Enterprise desired to engage Sanum as a business partner in those slot clubs. The Participation Agreement contained a dispute resolution clause, cl 19, which reads:

> **19. Applicable Law and Dispute Resolution**
>
> (a) …
>
> (b) Any dispute, controversy or claim arising out of or relating to this Agreement, including any question regarding its existence, validity or termination, the parties agree to conduct an amicable negotiation. In the event such dispute cannot be settled by mediation, the unsettled dispute shall be referred to and resolved by, unless the parties otherwise agree, Resolution of Economic Dispute Organization or Courts of the Lao PDR according to the provision and law of Lao PDR.
>
> (c) If one of the parties is unsatisfied with the results of the decision or judgment of the above procedure, the Parties shall mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration at the Singapore International Arbitration Centre (SIAC), Singapore and the rules of SIAC shall be applied.
>
> (d) The tribunal shall consist of three arbitrators. Each of the parties to this Agreement (as a group) shall each be entitled to appoint one arbitrator and the third shall be nominated by the chairman of the arbitration in Singapore, but must be an arbitrator of a different nationality from that of the others. All proceeding of mediation or arbitration shall be conducted in English language.

12 On 4 October 2008, Sanum and ST Vegas entered into the first of three sub-agreements relating to the Thanaleng Slot Club ("the Temporary Thanaleng Participation Agreement"). The Temporary Thanaleng Participation Agreement

allowed Sanum to supply slot machines to the Thanaleng Slot Club, and set a 40/60 split in the revenue generated from these machines in favour of ST Vegas. This agreement was concluded because one of the third party machine owners had left the Thanaleng Slot Club and Sanum was willing to provide additional machines to fill the gap left by that party. The Temporary Thanaleng Participation Agreement stated that it would terminate on 11 October 2011.

13 On 23 February 2010, Sanum entered into an agreement with ST Group in relation to the expansion of the Thanaleng Slot Club to adjacent premises owned by ST Group ("the First Expansion Agreement"). On 16 November 2010, Sanum, ST Vegas and ST Group entered into an agreement for the construction of an additional building to further expand the Thanaleng Slot Club ("the Second Expansion Agreement"). We shall refer to the Temporary Thanaleng Participation Agreement, the First Expansion Agreement and the Second Expansion Agreement as the "Thanaleng Agreements". None of the Thanaleng Agreements contained a dispute resolution clause.

14 For convenience, the Master Agreement, the Participation Agreement and the Thanaleng Agreements are sometimes hereafter collectively called "the Five Agreements".

The Dispute arises and proceedings are taken

Proceedings in Laos

15 According to Mr Baldwin, over the three years following October 2008, Sanum invested heavily into the Thanaleng Slot Club, and the slot club had tripled its profits by 2011. However, less than two months before the 11 October 2011 turnover date, Sanum received an e-mail from ST Group claiming that the

date on which the final contract with the third party machine owners was to expire was 12 April 2012 instead of 11 October 2011. This meant that the turnover of the slot club would be delayed. Sanum considered this a breach of contract but tried to negotiate with ST Group to find a way forward. The negotiations failed. Accordingly, the substance of the Dispute was the alleged failure of the ST Group and their related parties to hand over the Thanaleng Slot Club to Sanum on 11 October 2011.

16 On 1 March 2012, Sanum initiated arbitral proceedings against ST Group and ST Vegas before the Organisation of Economic Dispute Resolution ("OEDR") (referred to in the Master Agreement as the Resolution of Economic Dispute Organization), a Lao dispute resolution centre, in relation to the alleged failure to turn over the Thanaleng Slot Club. While OEDR proceedings were afoot, ST Group and all its affiliated companies declared on 11 April 2012 that they considered all agreements between the parties relating to the Thanaleng Slot Club to be terminated and demanded that Sanum immediately remove its machines from the slot club. On 12 April 2012, ST Vegas locked the doors of the Thanaleng Slot Club and refused to admit any of Sanum's personnel to the premises. The OEDR proceedings concluded on 21 May 2012, with the OEDR dismissing the claim filed by Sanum.

17 On 11 June 2012, ST Vegas commenced proceedings against Sanum in the Vientiane People's Court, seeking, *inter alia*, a declaration that the Temporary Thanaleng Participation Agreement had been validly terminated. Sanum filed a defence and counterclaim which named ST Vegas, ST Group, Mr Sithat and a company named Xaya Construction Co Ltd as defendants in the counterclaim. On 26 July 2012, the Vientiane People's Court issued a judgment in favour of ST Vegas and dismissed the counterclaim, finding that the

Temporary Thanaleng Participation Agreement had been validly terminated on 4 October 2011 and observing that the provisions in the Master Agreement had "no effect" on the provisions of the Temporary Thanaleng Participation Agreement. The decision of the Vientiane People's Court was affirmed on Sanum's appeal to the People's Court of Appeal. Sanum appealed again to the People's Supreme Court and on 4 April 2014 the People's Supreme Court delivered a judgment which affirmed the decision of the Vientiane People's Court. Mr Baldwin claims that there were "egregious procedural infractions" that "obliterated" Sanum's right to be heard over the course of the Lao court proceedings.

18 Due to its dissatisfaction with the results of the OEDR and Lao court proceedings, on 10 July 2015, Sanum filed a request for mediation with the Singapore International Mediation Centre ("SIMC"). The request named the Lao Parties, as well as three other related parties as parties to the mediation. The Lao Parties and the related parties refused to participate in the mediation. SIMC proceedings were thus terminated.

The SIAC arbitration

19 On 23 September 2015, Sanum commenced arbitration proceedings under the rules of the Singapore International Arbitration Centre ("SIAC") seeking damages suffered for breaches of the various agreements. All the Lao Parties were named as respondents in the arbitration.

20 In its amended Notice of Arbitration dated 22 September 2015, Sanum made various assertions. In paragraphs 5 and 6, it stated that:

> ***Rules, Seat and Language of the Arbitration***
>
> 5. Combining and reconciling the Master Agreement and the Sub-Agreements:
>
> (a) The arbitration shall be conducted in accordance with the SIAC Rules (5th Edition, 1 April 2013) with three arbitrators;
>
> (b) The seat of the arbitration is Macau; and
>
> (c) The language of the arbitration is English.
>
> ***Governing Law***
>
> 6. The Governing Law is that of the Lao P.D.R.

From paragraphs 8 to 30 of the Notice of Arbitration under the heading "Nature and Circumstances of Dispute", Sanum described the matters leading up to the issue of the Notice of Arbitration. In the court below, Sanum's counsel confirmed that under the Notice of Arbitration, the claim that Sanum was making was in respect of the breach of the obligation to turn over the Thanaleng Slot Club after 11 October 2011.

21 The Lao Parties objected to the SIAC arbitration. In a letter signed by Mr Xaysana and Mr Xaya dated 15 October 2015, they stated that "[Mr Xaya] and [Mr Xaysana] have never agreed … to the arbitration proposed by [Sanum]" and the "unilateral proposal" for an arbitration was not in conformity with the Master Agreement and other sub-agreements and was invalid. They also highlighted that the "joint Business Agreements" clearly stipulated that any dispute should be settled by OEDR or the Vientiane People's Court and that judicial proceedings were still ongoing in the Vientiane People's Court. Additionally, they highlighted that according to the Master Agreement, "the Parties shall arbitrate their dispute using an internationally recognized mediation arbitration Company in Macau, SAR. PRC". Mr Xaysana attested that the letter was sent on behalf of all the respondents to the SIAC arbitration.

He highlighted that the reference to ongoing proceedings in the Vientiane People's Court was an inadvertent mistake due to confusion between the proceedings relating to the Thanaleng Slot Club and another set of disputes between Sanum, ST Group and Xaya Construction Co Ltd.

22 The SIAC noted these objections and informed the parties on 24 November 2015 that it was *prima facie* satisfied that a valid arbitration under the SIAC Rules existed. After this, the Lao Parties did not participate further in the SIAC arbitration.

23 Relying on cl 19 of the Participation Agreement, the SIAC proceeded on the basis that the parties had agreed to a three-member tribunal. The Lao Parties did not nominate an arbitrator as requested. So, on 20 January 2016, pursuant to rule 9.1 of the SIAC Rules 2013, the SIAC appointed all three tribunal members ("the Tribunal"). The Tribunal rendered its final award on 22 August 2016 ("the Award").

24 In the Award, the Tribunal ruled that it had jurisdiction to determine the claims made by Sanum against ST Group, Mr Sithat, ST Vegas and STV Enterprise because they were signatories to the Master Agreement or the Participation Agreement. In the Tribunal's view, the Participation Agreement "amplifie[d] and supplement[ed] the dispute resolution procedure set out in the Master Agreement". Clause 19 of the Participation Agreement specifically provides for arbitration at SIAC in Singapore and for the application of the rules of the SIAC. Thus the Tribunal was satisfied that Singapore should be the seat of arbitration. At this juncture it should be noted that Sanum had in the amended notice of arbitration (dated 22 September 2015) and in the statement of claim for the arbitration (dated 21 April 2016) initially taken the position that the seat

of arbitration was Macau. During the SIAC arbitration hearing, the Tribunal queried Sanum's counsel on the relevance of the fact that, arguably, the dispute resolution clause in the Master Agreement stated the seat of arbitration to be Macau, while that of the Participation Agreement stated the seat to be Singapore. Sanum's counsel replied that Sanum did not have any objection if the panel found that the seat was Singapore and added that "the weight of evidence suggests that [the seat] is indeed Singapore".

25 In relation to the merits of the claim, the Tribunal found that all the Five Agreements had to be read together in order to determine the intentions and agreement of the parties in relation to the Thanaleng Slot Club. It concluded that the Lao Parties had breached the Five Agreements in so far as they concerned the Thanaleng Slot Club. The Tribunal awarded Sanum damages amounting to US$200m for breach of contract, as well as further sums for legal expenses and the costs of the arbitration. The Tribunal also awarded interest on the sums awarded to Sanum.

The proceedings in Singapore

26 Shortly after the Award was issued, on 7 September 2016, Sanum obtained leave of court to enforce the Award in Singapore. In response, between 13 January 2017 and 26 October 2017, the Lao Parties filed four applications challenging the Leave Order. The parties subsequently agreed, however, to adjourn all the applications except Summons No 4933 of 2017 ("SUM 4933"). SUM 4933 was an application for the refusal of enforcement of the Award pursuant to Art 36(1) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"). The summons went before the Assistant Registrar and then on appeal to the Judge.

Summary of Arguments Below

27 Before the Judge, the Lao Parties made three broad submissions premised on various limbs of Art 36(1) of the Model Law:

(a) The Award was made pursuant to an arbitration agreement (or agreements) to which not all the Lao Parties were party and thus should not be enforced pursuant to Art 36(1)(*a*)(i).

(b) The Award dealt with a dispute not contemplated by or falling within the scope of the submission to arbitration and thus should not be enforced pursuant to Art 36(1)(*a*)(iii).

(c) The composition of the tribunal and the seat of the arbitration were not in accordance with the agreement of the parties and thus the Award should not be enforced pursuant to Art 36(1)(*a*)(iv).

28 The parties agreed (and continue to agree) that in construing the Five Agreements, the relevant law is Lao law.

29 In relation to the first and second submissions, the Lao Parties argued that the Tribunal was wrong to have relied on the Master Agreement and the Participation Agreement to find that it had jurisdiction. This was because the Dispute concerned the Thanaleng Slot Club and must therefore have arisen out of the Thanaleng Agreements. As stated earlier, none of the Thanaleng Agreements contain an arbitration clause. On this basis, there was no relevant arbitration agreement that applied to the Dispute. Even if cl 2(10) of the Master Agreement was relevant to the Dispute, the Lao Parties argued that only Sanum and ST Group (and none of the other Lao Parties) were party to the Master

Agreement. The Lao Parties also argued that Sanum did not comply with the pre-requisites for the commencement of arbitration.

30 For its part, Sanum argued that the Dispute concerned the failure to turn over the Thanaleng Slot Club, and it arose out of the Master Agreement and the Participation Agreement. On this basis the Tribunal was right to find that both cl 2(10) of the Master Agreement and cl 19 of the Participation Agreement were engaged. In response to the Lao Parties' argument on the parties to the Master Agreement, Sanum highlighted that Mr Sithat and ST Vegas were expressly named as parties in the Master Agreement. As for STV Enterprise, it was a party to the Master Agreement even though it was not expressly named due to the fact that the Master Agreement contained a reference to the "affiliates, subsidiaries, principles [*sic*] or assigns" of ST Group and there was express acknowledgement in the Recital of the Participation Agreement that STV Enterprise was a party to the Master Agreement.

31 In relation to the third submission, the Lao Parties' primary position was that there was no arbitration agreement at all. As an alternative, the Lao Parties highlighted that if only cl 2(10) of the Master Agreement (and not cl 19 of the Participation Agreement) applied to the Dispute, the relevant arbitration agreement required an arbitration conducted by an internationally recognised arbitration company located in Macau. The arbitration that took place was not seated in Macau and SIAC had no presence in Macau. The refusal of enforcement of an award would be immediate if an arbitration were incorrectly seated. The Lao Parties also highlighted that cl 2(10) of the Master Agreement did not provide for a three-member tribunal and hence the default rule pursuant to rule 6.1 of the SIAC Rules 2013 ought to have applied, in which case, a single member tribunal ought to have been appointed.

32 Sanum argued that cl 2(10) of the Master Agreement must be read alongside cl 19 of the Participation Agreement. Alternatively, it contended that cl 19 of the Participation Agreement varied or clarified cl 2(10) of the Master Agreement such that, properly interpreted, the parties had agreed to Singapore as the seat of arbitration, and the appointment of a three-person tribunal. In any event, prejudice was required for the court to refuse enforcement on the grounds in Art 36(1)(*a*)(iv) of the Model Law and there was no evidence of prejudice.

Decision Below

33 In her decision in *Sanum Investments Limited v ST Group Co, Ltd and others* [2018] SGHC 141 ("*Sanum HC*"), the Judge made the following findings:

(a) The Dispute involved a breach of cl 1(3)(d) of the Master Agreement and arose solely under the Master Agreement, not the rest of the Five Agreements (see *Sanum HC* at [46]–[62]). Clause 2(10) of the Master Agreement was thus the only relevant arbitration agreement to be construed (see *Sanum HC* at [84]).

(b) Sanum, ST Group, ST Vegas and Mr Sithat were parties to the Master Agreement, but STV Enterprise was not (see *Sanum HC* at [63]–[83]).

(c) Sanum complied with the pre-requisites for the commencement of arbitration vis-à-vis ST Group, ST Vegas and Mr Sithat, but not vis-à-vis STV Enterprise (see *Sanum HC* at [91]).

(d) On the proper construction of cl 2(10) of the Master Agreement, the seat of arbitration should have been Macau (see *Sanum HC* at [106]).

(e) Since there was no express stipulation as to the number of arbitrators in cl 2(10) of the Master Agreement, the default position under rule 6.1 of the SIAC Rules 2013 should have applied. The SIAC wrongly appointed a three-member tribunal on the basis that there was an agreement for a three-member tribunal between the parties found in cl 19 of the Participation Agreement (see *Sanum HC* at [110]).

(f) Despite the "procedural irregularities" noted at (d) and (e) above, the Lao Parties needed to demonstrate prejudice before Art 36(1)(*a*)(iv) could be invoked to justify non-recognition of the award, and the Lao Parties had failed to demonstrate prejudice (see *Sanum HC* at [111] to [118]).

34 On this basis, the Judge set aside the Leave Order in respect of STV Enterprise, but affirmed the Leave Order for the rest of the Lao Parties.

The Appeals

35 The Lao Parties (save for STV Enterprise) appeal the decision to affirm the Leave Order, whereas Sanum appeals the decision to set aside the Leave Order against STV Enterprise.

36 The parties' respective cases broadly track their arguments in the court below, save for certain key changes that will be highlighted below. Greater elaboration on the parties' respective arguments will be provided as needed in the analysis of the respective issues.

37 First, the Lao Parties have adopted the Judge's finding that the Dispute arose solely under the Master Agreement and hence cl 2(10) is the relevant

arbitration agreement to be construed. This is in contrast to their primary position in the court below that only the Thanaleng Agreements were relevant to the Dispute.

38 Second, the Lao Parties no longer appear to be contesting the point that even if ST Vegas and Mr Sithat were parties to the Master Agreement, Sanum nevertheless did not comply with the pre-requisites for arbitration vis-à-vis ST Vegas and Mr Sithat. They continue to contest this point vis-à-vis STV Enterprise.

39 Third, the Lao Parties raise a new argument that highlights that the Tribunal found that the Lao Parties had breached all the Five Agreements, and contends that this finding (which relied on agreements other than the Master Agreement) was beyond the Tribunal's remit. Sanum contests this argument on its substantive merits and also on the basis that the Lao Parties should not be allowed to raise this new argument on appeal.

40 Fourth, Sanum raises a new argument that the Lao Parties had waived their right to, or are estopped from, raising objections to the seat and/or tribunal composition.

41 Finally, the Lao Parties highlight that since the Judge found that the correct seat of the arbitration was Macau and not Singapore, pursuant to s 27(1) of the International Arbitration Act (Cap 143, 2002 Rev Ed) ("IAA"), the Award should now be characterised as a "foreign international award", to which Part III of the IAA would apply. In the circumstances, the proper grounds for refusing enforcement, should the Judge's finding on the seat be affirmed, would be found in s 31(2) of the IAA instead of Art 36(1)(*a*) of the Model Law. It is common

ground, however, that the standards and principles to be applied are the same regardless of whether s 31(2) or Art 36(1)(*a*) applies.

Issues before this Court

42 The parties raised five main issues before us. In addition, we raised an issue for the parties' consideration.

43 Four issues involve determining the parties to the relevant dispute resolution clauses, the scope of the clauses and whether the Dispute falls within any of the clauses. They are as follows:

(a) Issue 1: Who were the parties to the relevant dispute resolution clauses?

(b) Issue 2: Did the Dispute fall within the scope of any of the relevant dispute resolution clauses or to put it another way which agreement gave rise to the Dispute?

(c) Issue 3: Were the pre-requisites for the commencement of arbitration complied with? (But this issue falls away if we uphold the finding that STV Enterprise was not a party to the arbitration agreement.)

(d) Issue 4: Did the Tribunal, in finding that the Lao Parties had breached all the Five Agreements, rule on matters beyond the scope of the submission to arbitration?

44 The fifth issue raised by the parties pertains to the Lao Parties' challenge to the enforcement of the Award premised on the seat of the arbitration and the composition of the Tribunal. This issue can be further divided into sub-issues:

(a) Issue 5(a): Was the proper seat of the arbitration Macau as the Judge found or Singapore?

(b) Issue 5(b): Did the Judge err in finding that the composition of the Tribunal was wrong?

(c) Issue 5(c): Did the Lao Parties waive their right to object to the choice of the seat and the composition of the tribunal or are they estopped from objecting to the same?

(d) Issue 5(d): If the seat was Macau and/or the composition of the Tribunal was wrong, whether the existence of prejudice is a relevant factor and, if so, whether there was prejudice.

45 The issue that we raised for the parties' consideration relates to cl 2(10) of the Master Agreement and whether, properly construed, that clause would qualify as an arbitration clause at all. The exact wording of the question that we posed to counsel ("the Question") was:

> As a matter of the proper construction of the arbitration clause, if you are dealing with a clause that seems to contemplate that it could leave the parties with a decision of the Supreme Court of Laos and then the parties can go to arbitration after that, is that even an arbitration clause to begin with?

46 On the view that we have come to in regard to these appeals, it is unnecessary to deal with all of the issues mentioned above. For reasons that will

become clear in the course of this judgment, in our view the issues that must be considered and which determine the outcome are the following:

(a) Under which agreement did the Dispute arise?

(b) Who were the parties to the relevant agreement?

(c) Was the dispute resolution clause in the relevant agreement a valid arbitration clause to begin with?

(d) Were the correct seat and composition of the Tribunal chosen?

(e) Did any waiver or estoppel arise in relation to issue (d) above? and

(f) If the Judge's findings on issue (d) are upheld, do the Lao Parties have to show actual prejudice before they can resist enforcement of the Award?

Under which agreement did the Dispute arise?

47 As stated earlier, the Judge found that the Dispute involved a breach of cl 1(3)(d) of the Master Agreement which contained what Sanum called the "Turnover Obligation", *ie* the obligation to hand the Thanaleng Slot Club over to Sanum upon the expiry of then existing agreements with third parties. She found that it arose solely under the Master Agreement. It did not arise under either the Participation Agreement (as Sanum had contended) or any other of the Five Agreements. Clause 2(10) of the Master Agreement was thus the only relevant arbitration agreement to be construed.

48 On its appeal in CA 114, Sanum renewed the arguments it had made below that the Dispute had arisen under both the Master Agreement and the

Participation Agreement. Factually, it accepted that the Dispute arose out of the breach of the Turnover Obligation. It contended that the Judge should have found that the Dispute *also* arose under the Participation Agreement because she had found that the terms of the Master Agreement had been incorporated into the Participation Agreement pursuant to cl 16 of the latter. The Judge had, Sanum said, operated on two flawed premises: first, that unlike the Master Agreement, the Participation Agreement did not contain any obligation to turn over the Thanaleng Slot Club; and secondly, that the Participation Agreement was confined to the Lao Bao and Ferry Terminal slot clubs.

49 The first premise was wrong because cl 2 of the Participation Agreement made it clear that the Thanaleng Slot Club was eventually to be included in the scheme under the Participation Agreement "in accordance with the [Master Agreement]". Further, this premise contradicted the Judge's finding that the aforesaid reference to the Master Agreement "serve[d] to incorporate the terms of the Master Agreement into the Participation Agreement" as the incorporation of those terms must necessarily mean that the Turnover Obligation was also incorporated into the Participation Agreement. It followed that the second premise was also wrong – once the Turnover Obligation was incorporated into the Participation Agreement that latter agreement could not be said to be "confined to" the Lao Bao and Ferry Terminal slot clubs only.

50 We cannot accept the above argument. First, there is no express mention of the Thanaleng Slot Club in cl 2 of the Participation Agreement. Secondly, although that clause provides that "the participation fee for future slot club(s)" is to be paid in accordance with the Master Agreement, the term "future slot club(s)" was not apt to describe the Thanaleng Slot Club which was an existing club owned and managed by ST Vegas. The Lao Bao and Ferry Terminal slot

clubs which were the express subjects of the Participation Agreement were owned and operated by STV Enterprise, the counter party to the Participation Agreement, and thus "future slot club(s)" must mean new slot clubs to be owned and managed by STV Enterprise.

51 Thirdly, as STV Enterprise submits, the Judge's acceptance that terms of the Master Agreement were incorporated into the Participation Agreement did not mean that she held that all terms of the former were incorporated into the latter no matter how inapplicable they were to the subject matter of the latter. ST Vegas was not a party to the Participation Agreement so it would not make legal sense to incorporate its obligations to Sanum under the Master Agreement into the Participation Agreement nor would it make any sense for STV Enterprise to undertake those obligations of ST Vegas in such an oblique manner. If it was truly the parties' intention that STV Enterprise would also become obliged to meet the Turnover Obligation (even though it on its own had no power to hand over the Thanaleng Slot Club), they would have ensured that this was spelt out plainly in the Participation Agreement instead of relying on a vague phrase like "future slot club(s)". Further, the Participation Agreement is governed by Lao law (cl 19) and the Lao Parties adduced evidence that under Lao law the effect of the incorporation of the Master Agreement under cl 16 of the Participation Agreement was simply to incorporate the terms of the Master Agreement in so far as they pertained to the Participation Agreement.

52 As STV Enterprise also submits, at the time when the Dispute arose, Sanum did not assert that the Participation Agreement had been breached. Its contemporaneous correspondence and its petition to the OEDR referred to breaches of the Master Agreement and certain other agreements. The Participation Agreement was not mentioned. The Participation Agreement was

mentioned for the first time in the amended Notice of Arbitration in September 2015. The mention of the Participation Agreement in the context of arbitration indicates that Sanum was not relying on it so much for the Dispute as for the arbitration clause it contained which specified arbitration at the SIAC, Singapore in accordance with SIAC rules.

53 For the reasons given above we reject Sanum's submission and agree with the Judge that the Dispute arose from the alleged breach of obligations undertaken in the Master Agreement. It had nothing to do with the Participation Agreement.

Who were the parties to the Master Agreement?

54 The Judge held that among the Lao Parties the ones who were parties to the Master Agreement were ST Group, ST Vegas and Mr Sithat. She further held that STV Enterprise was not such a party. There are cross appeals on this issue: Sanum says STV Enterprise is a party while ST Vegas and Mr Sithat say that they are not. In our view, the holdings of the Judge are correct.

55 It is useful at this juncture to set out the first portion of the Master Agreement, which purports to set out the relevant parties to the Master Agreement:

> **AGREEMENT**
>
> Made and entered into by and between
>
> "**1st Party":**
>
> **SANUM INVESTMENTS, LTD**
>
> A Macau SAR, PRC Company,
>
> Represented by Mr. John K. Baldwin
>
> And its affiliates, subsidiaries, principles [*sic*] or assigns

> …
>
> (Hereinafter referred to as the said 1st Party) of the one part
>
> AND
>
> **"2nd Party":**
>
> **ST GROUP CO., LTD**
>
> Represented by Mr. Sithat Xaysoulivong
>
> And its affiliates, subsidiaries, principles [*sic*] or assigns
>
> …
>
> **Slots Clubs Vientiane Capital**
>
> S.T. Vegas CO. LTD.
>
> **Slots Club Savannakhet Province**
>
> S.T. Vegas CO. LTD.
>
> …
>
> (All of the above hereinafter referred to as the said 2nd Party)
>
> [emphasis in original]

56 The Master Agreement states that the agreement is "[m]ade and entered into" between the "1st Party" and the "2nd Party". The text and context of the Master Agreement suggests that it was intended for Mr Sithat to be a party to the agreement in his personal capacity. Mr Sithat is expressly listed under the definition of "2nd Party". Although the extracted portion of the Master Agreement may appear to support the suggestion that Mr Sithat is merely listed in a representative capacity on behalf of ST Group (due to the words "Represented by"), the final portion of the Master Agreement confirms that this is not the case. This portion contains the signatures of the parties to the Master Agreement. In this portion, Mr Sithat signs the agreement four times: once on behalf of ST Group, twice on behalf of ST Vegas and once under a section labelled "**Sithat Xaysoulivong,** as an individual" [emphasis in original]. If Mr Sithat were not intended to be a party to the Master Agreement, it is difficult

to understand why he would need to sign "as an individual" above and beyond the signatures he had already appended on behalf of ST Group and ST Vegas. The other representatives of the various other companies did not sign "as an individual" and only appended a single signature for each company they represented.

57 Furthermore, under cl 5(g) of the Master Agreement, it is stated that "2nd Party represents and warrants the below. … All entities *and individuals* included in the above definition of '2nd Party' are all entities *and individuals* that hold any interest in the Joint Ventures" [emphasis added]. The clause contemplates that there would be individuals who would fall within the definition of "2nd Party", and Mr Sithat is the only individual named in the first portion of the Master Agreement which defines the "2nd Party".

58 The Lao Parties claim that their Lao law expert had emphasised that "Art 16 of the Lao Law of Contract and Tort (in particular, the Lao text), requires ***all*** parties to a contract to be identified by its '*name, surname and address*'" [emphasis in original]. This claim is not supported by that report. Instead the report states as follows:

> The first sub-point which had been left out of the unofficial English translation provides that a "*main contents*" of a contract includes: the name, surname and address of the party. This is one factor that the Lao court may look at in determining if an individual/entity is party to a contract [emphasis in original].

As the report makes clear, the fact that the name, surname and address have been appended is only a factor in considering whether an individual/entity is a party to the contract, it is not a legal requirement.

59 The text and context of the Master Agreement also suggest that ST Vegas was intended to be a party to the agreement. ST Vegas was expressly listed in the section defining the "2nd Party". In the final portion of the Master Agreement, Mr Sithat also signed twice on behalf of ST Vegas. If ST Vegas was not intended to be a party to the agreement, and only ST Group was intended to be a party, there would be no reason for Mr Sithat to sign again on behalf of ST Vegas.

60 Unlike Mr Sithat and ST Vegas, STV Enterprise was not expressly listed in definition of the "2nd Party". Sanum relies on the fact that the definition of "2nd Party" includes the phrase "[ST Group] … and its affiliates, subsidiaries, principles [*sic*] or assigns" to argue that STV Enterprise was a party. It is not in dispute that STV Enterprise is an affiliate of ST Group. The difficulty is that under Lao law, as explained by Sanum's own Lao law expert, in order for a party to be bound to a contract, there must be some evidence of voluntary consent to be bound. This is not dissimilar from the concept of acceptance under Singapore contract law. In the present case, ST Group, ST Vegas and Mr Sithat have all demonstrated voluntary consent to be bound by appending the relevant signatures to the Master Agreement. There is no signature appended on behalf of STV Enterprise in the Master Agreement, however. The manner in which the Master Agreement was structured, with a definition section which expressly listed certain parties and a portion where all the relevant parties to the agreement would express their consent to be bound to the agreement by appending their signatures, strongly suggests that it was never intended for STV Enterprise to be a party to the contract.

61 Therefore, we must uphold the Judge's findings that ST Vegas and Mr Sithat were parties to the Master Agreement and that STV Enterprise was not. This holding disposes of CA 114 which must therefore be dismissed.

Is cl 2 (10) of the Master Agreement a valid arbitration clause?

62 Having upheld the Judge's finding that the Dispute arose solely under the Master Agreement and that therefore the relevant arbitration clause by which the parties were bound is that contained in cl 2(10) of that agreement, we now turn to consider the question we put to the parties on the validity of that clause. For clarity, we reproduce cl 2(10) again:

> 10) If any dispute shall arise, the Parties agree to conduct an amicable negotiation. If such dispute cannot be settled by mediation, the Parties may submit such disputes to the Resolution of Economic Dispute Organization or Courts of the Lao PDR according to the provision and law of Lao PDR in accordance with this Agreement. All proceedings of the arbitration shall be conducted in Lao and English Languages.
>
> Before settlement by the arbitrator under the rules of the Resolution of Economic Dispute Organization, the Parties shall use all efforts to assist the dispute resolution in accordance with the laws of Lao PDR.
>
> If one of the Parties is unsatisfied with the results of the above procedure, the Parties shall mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration company in Macau, SAR PRC.

63 For ease of reference we also repeat the Question we put to the parties:

> As a matter of the proper construction of the arbitration clause, if you are dealing with a clause that seems to contemplate that it could leave the parties with a decision of the Supreme Court of Laos and then the parties can go to arbitration after that, is that even an arbitration agreement to begin with?

64 It can be seen from the phraseology of the Question that we were concerned about the validity of a multi-tiered arbitration agreement that

apparently provided that even if a relevant dispute had been settled by a court in litigation proceedings, the party who was dissatisfied with the court's decision would then be able to refer the same dispute to arbitration. The implication would be that a national court's decision properly given after contested proceedings before it could be overridden or displaced by an arbitral tribunal appointed at the instance of one of the parties to the court proceedings. Since, obviously, the party who brought the dispute to arbitration would be the party who was unhappy with the court's decision, the arbitral tribunal would in effect be hearing an appeal against that decision.

65 The parties gave us written submissions on this issue after the hearing as it was not one that they had considered. We will summarise their arguments here.

66 Unsurprisingly, the Lao Parties submit that cl 2(10) is not a valid arbitration agreement. They say:

(a) A valid arbitration agreement is one where the parties intend that any dispute between them shall be finally be resolved by arbitration. A valid multi-tier arbitration clause cannot logically consist of one binding tier such as court proceedings, followed by another binding tier such as arbitration. Arbitration cannot be co-extensive with litigation.

(b) Such a multi-tier dispute resolution clause would also contravene the principle of *res judicata*.

(c) Alternatively, the phrase "the above procedure" which appears in the third paragraph of cl 2(10) could be interpreted to refer only to the OEDR proceedings. This interpretation would mean

that the parties were not allowed to contract out of a binding court decision and therefore would be an interpretation that gave effect to the clause rather than invalidating it.

(d) On the alternative interpretation, Sanum's notice of arbitration was not in order because it stated that Sanum was unsatisfied with the result and judgment issued by the Lao courts. Therefore, the arbitration proceedings were commenced on the wrong basis.

67 Sanum seeks to uphold cl 2(10). It submits:

(a) The clause means that the parties have agreed that if either side is dissatisfied with the OEDR or Lao court proceedings, both will forbear from enforcing their rights under such proceedings but instead go to international arbitration in accordance with the third para of cl 2(10) to resolve the dispute. The clause does not involve any appeal against concluded court proceedings and merely obliges parties not to insist on accrued rights pursuant to the court's decision.

(b) Based on the evidence on record, this was the construction which parties intended to apply to cl 2(10).

(c) The validity of cl 2(10) would have to be decided according to Lao law but the Lao Parties who dispute its validity have not adduced any relevant evidence on Lao law.

(d) Even assuming Lao law is similar to Singapore law, any objection on the basis of *res judicata* must be pleaded and proved by the Lao Parties who have not done so.

(e) Neither party has suggested that there is anything inherently repugnant about parties agreeing not to rely on and not to invoke on previous adjudication decisions.

(f) The argument that the phrase "the above procedure" refers only to the OEDR proceedings is not open to the Lao Parties because this was never their case before this appeal and the wording of cl 2(10) does not support such an interpretation.

(g) As a preliminary argument, the Question is moot because under Art 36(1)(*a*)(i) the question must be raised at the instance of the resisting party and the Lao Parties never did so.

68 Arising out of the aforesaid submissions, the essential issues would appear to be:

(a) On the basis that the arbitration clause is governed by Lao law, do we have sufficient evidence of Lao law to make a determination?

(b) If we cannot determine the validity of the arbitration clause under Lao law, should we apply Singapore law?

69 There is no dispute that the validity of any contract has to be decided in accordance with its governing law. In addition, in this case under Art 36(1)(*a*)(i) of the Model Law or Art V(1)(*a*) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38 (entered into force 7 June 1959, accession by Singapore 21 August 1986) (the "New York Convention"), recognition of an arbitration award can be refused when the "agreement is not valid under the law to which the parties have subjected it".

The Judge stated that both sides had agreed that the governing law of cl 2(10) is Lao law (*Sanum HC* at [31]). In these appeals no issue was taken with this statement.

70 The difficulty is that there is no expert opinion on Lao law in respect of the precise question before us. The experts whose opinions were adduced before the Judge largely dealt with other aspects of Lao law. The only legal opinion which may have a bearing was adduced by Sanum before the Tribunal. This is the opinion of Dr Gerard Ngo, a lawyer in France who is not a Laotian lawyer and says that his experience of Lao law has come from his involvement in matters relating to the case between Sanum and the Government of Laos. For what it is worth, Dr Ngo interprets the first paragraph of cl 2(10) to mean that if parties cannot settle their dispute by mediation, they have a choice to go either to arbitration by OEDR or to court. That choice is invoked by the first person who commences proceedings in either forum. He says that the clause is a bilateral option provision and is legal under Lao law. He does not, however, deal with the third paragraph of the clause. His opinion also is that the Lao court proceedings were invalid because six weeks prior to their commencement by the Lao Parties, Sanum had already started arbitration proceedings before OEDR and this action meant that the parties had to resolve their dispute by arbitration and not by litigation. He also says in terms that "the arbitration provisions are legal under Lao law and should be enforced".

71 We agree with Sanum that the Lao Parties bear the onus of proving that the clause is invalid under Lao law. They have not done so. Their argument on the invalidity of the clause is based on principles put forward by texts like Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) and local and English cases. These express

Singapore and/or common law arbitration principles and cannot be taken *ipso facto* to represent Lao law.

72 So can this Court assess the validity of the clause on the basis that since no or insufficient evidence of Lao law on the point has been adduced, we can assume it is the same as Singapore law? It is noteworthy that the Lao parties do not put forward such an argument expressly (although it is implicit in their use of Singapore principles). After all, since the burden is on them, they should have proved the law of Laos on the point and should not have asked this Court to make assumptions as to the foreign legal position.

73 Further, making such an assumption in this case may be difficult to justify as Sanum put Dr Ngo's report before the Tribunal as evidence of the validity of the clause under Lao law and the Lao parties, though putting forward reports from two experts on Lao law before the Judge, did not ask their experts to address this specific point. Indeed, they did not raise it before the Judge either and it was this Court that brought up the issue on the appeal. Additionally, in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491, this Court cautioned against the use of the presumption of similarity of foreign law where it may have the effect of depriving a party of the right to be heard on a decisive issue.

74 Overall, having considered the Question at length since we posed it, we take the view that we should not analyse cl 2(10) of the Master Agreement on the basis of Singapore arbitration law principles because this Court would then be changing the nature of the argument at too late a stage. Sanum's preliminary objection is a weighty one. The Lao Parties could have participated in the arbitration and objected to jurisdiction on this ground. They did not. They did

not raise it before the Judge either though they could have under Art 36 (1)(*a*)(i) of the Model Law or Art V of the New York Convention but both of those provisions state that the party resisting enforcement *must prove* the invalidity of the arbitration agreement. The Lao Parties did not so prove at any earlier stage of this long running battle. It would, in our view, be unsatisfactory to decide a case on the basis of an assumption as to content of a foreign law when doing so may mean deciding it in favour of the party with the burden of proof who knew or should have known what it had to prove and did not do so.

75 In addition, the Judge found that the expert evidence on Lao law put before her established that Lao principles of contractual interpretation apply to the interpretation of an arbitration agreement. Under Lao law, a contract must be interpreted in accordance with its express terms and wording. If there is ambiguity the court may have recourse to the intentions of the parties to resolve the same. Also, recourse may be had to the principle of effective interpretation to give effect to parties' intentions. In this case there is evidence that the clause was vigorously negotiated and both parties were represented and the form that it finally took (with the various stages of dispute resolution) was freely agreed to by them both. Additionally, it was replicated in later agreements between Sanum and various of the Lao Parties and even expanded to make clear that the option to go to international arbitration applied to dissatisfaction with both orders "or judgment" thus indicating that the dissatisfaction was not to be limited to the outcome of OEDR arbitration. So perhaps the right interpretation of the clause would be that given by Sanum as set out in [67(a)] above though even such an interpretation may not preserve the validity of the clause. Be that as it may, on the view that we have reached, we do not need to consider whether under Singapore law a multi-tiered arbitration clause providing for arbitration after court proceedings would be valid, whether this or any other interpretation

is given to it. It is sufficient for present purposes that the clause provided for arbitration in certain circumstances and those circumstances arose allowing Sanum to invoke its right to arbitration.

What was the seat of the arbitration and what should have been the composition of the Tribunal?

76 The next issue that we deal with, having found the arbitration clause to be valid, essentially involves consideration of whether the arbitration that took place was in accordance with the requirements of the clause. This does involve interpreting the clause to determine what would be the seat of any arbitration commenced under the clause. The relevant portion of the clause is the phrase in the last paragraph that reads "arbitrate such dispute using an internationally recognized … arbitration company in Macau, SAR PRC".

77 The Judge found that this phrase meant that the arbitration was seated in Macau. She also found that the default rule on tribunal composition applied and there should have been a one-person tribunal rather than a three-person one. The Lao Parties support this interpretation on appeal and say that the Judge should have gone further to find that the wrongful seating of the arbitration in Singapore and the wrongful composition of the tribunal meant that the Award should not be enforced here.

78 The Judge set out the three possible interpretations of the said phrase (at [94] of *Sanum HC*):

> (a) Parties shall arbitrate such dispute using an internationally recognised arbitration company geographically located in Macau ("Interpretation A").

(b) Parties shall arbitrate such dispute using an international arbitration company recognised in Macau ("Interpretation B").

(c) Parties shall arbitrate such dispute, using an internationally recognised arbitration company, in Macau ("Interpretation C").

79 It is common ground that the last paragraph of cl 2(10) is ambiguous. Interpretation A means that the institution of choice must be geographically located in Macau and must be one that is internationally recognised, as the Judge noted. The Judge also noted, and the parties do not dispute that Interpretation A is an interpretation that would give rise to "practical difficulties", in the sense that no "internationally recognised mediation/arbitration company" appears to have a geographical presence in Macau. To accept Interpretation A would thus contravene the principle of effective interpretation. In our view, the Judge was right to reject it.

80 This leaves Interpretations B and C. As it stands, Interpretation B requires the court to change the word "internationally" to "international" and move the word "recognised". As so re-worded, the clause means that the party shall choose an arbitration company offering international arbitration and which is a company that is "recognised" in Macau. Interpretation B does not in itself specify any seat for the arbitration. Thus, while Sanum supported Interpretation B, it had to find a way to show that Interpretation B led to Singapore as the choice of the seat. It therefore contended that since cl 2(10) is ambiguous, the court is entitled to have recourse to the intentions of the parties to resolve the ambiguity. Sanum makes the argument that cl 19 of the Participation Agreement and other sub-agreements entered into pursuant to the Master Agreement consistently provided for SIAC arbitration in Singapore, and

that this illuminated and clarified the parties' intentions with respect to cl 2(10). On this reading, Interpretation B would be consistent with the intentions of the parties, since they had no clear preference for a seat or a particular international arbitration company initially, but it was clarified later (in subsequent agreements) that the parties intended an SIAC arbitration with Singapore as the seat. As the Judge noted, this interpretation faces two difficulties.

81 The first is that Interpretation B as propagated by Sanum is strained in that it requires substantial adjustment to the words of cl 2(10), not only by changing "internationally" to "international" and moving the placing of "recognised", but also by including an explicit or implied reference to the Participation Agreement. In contrast, Interpretation C requires only a minor amendment of the said phrase, *viz*, the insertion of one comma after the word "dispute" and another comma after the word "company". It is one of the principles of interpretation that the interpretation that does least violence to the language of the clause is to be preferred.

82 The second is that there is evidence to suggest that Sanum's counsel in the arbitration proceedings had repeatedly expressed the view that the seat of the arbitration conducted by the SIAC was to be Macau. This was done on 22 September 2015 (in the amended notice of arbitration), 23 October 2015 (in a reply to the Lao Parties' objection to jurisdiction), on 21 April 2016 in the statement of claim for the arbitration and during the arbitration hearing itself on 15 June 2016 (see *Sanum HC* at [103]–[105]). In fact, during the arbitration hearing, Sanum's counsel gave an account of how the seat changed from Macau to Singapore in later agreements:

> Ms Deitsch-Perez [Sanum's counsel]: … Originally the claimant had selected Macau because it was from Macau. Later

> agreements the claimant and the respondent agreed to Singapore and we expected actually the respondent to come in and say no, it should be Singapore and we were prepared to agree to that, so we would have no objection if the panel found that the seat was Singapore.

83 The account provided by Sanum's counsel provides a compelling explanation for the phraseology of the last paragraph of cl 2(10), and indicates the actual intentions of the parties at the relevant time: Sanum intended Macau to be the seat of arbitration because that was where it was based and the Lao Parties did not object. This directly contradicts Sanum's suggestion that the parties had originally intended to leave the seat of arbitration open-ended in the Master Agreement.

84 We agree with the Judge that the proper interpretation of cl 2(10) is Interpretation C. Interpretation C is the most natural interpretation of the wording in the arbitration agreement and also accords with what the parties intended, as discussed above. Neither Singapore nor the SIAC are mentioned in cl 2(10). There is no connection at all between the Master Agreement and Singapore. If the Master Agreement is read on its own without reference to the Participation Agreement, the only geographical location mentioned is Macau and in an arbitration clause when the word "arbitration" is juxtaposed with the words "in [place name]", the natural interpretation is that the place so-named is to be the seat of the arbitration rather than simply a venue.

85 On this basis, the correct seat of arbitration is Macau and Art 36(1)(*a*)(iv) of the Model Law and s 31(2)(*e*) of the IAA are engaged.

86 We move next to the issue of composition of the tribunal. Art 36(1)(*a*)(iv) of the Model Law and s 31(2)(*e*) of the IAA state that

enforcement may be refused if the composition of the arbitral tribunal was not *in accordance with the agreement of the parties*.

87 Clause 2(10) of the Master Agreement is completely silent on the composition of the arbitral tribunal. In an arbitration to which the SIAC Rules 2013 applied (as this was, at least putatively, on the basis of Sanum's selection of the SIAC as the "internationally recognised arbitration company" to resolve the Dispute), Rule 6.1 was the rule regarding appointment of arbitrators. It reads:

> 6.1 A sole arbitrator shall be appointed unless the parties have agreed otherwise or unless it appears to the Registrar, giving due regard to any proposals by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators.

88 The Judge held that the appointment of three arbitrators was incorrect because the SIAC was under the erroneous impression that cl 19 of the Participation Agreement was applicable to the dispute submitted for arbitration (see *Sanum HC* at [110]). Sanum's argument on appeal is that this appointment was proper because Rule 6.1 allows the Registrar of the SIAC to appoint three arbitrators where it appears to him that the circumstances of the dispute warrant the appointment of three arbitrators. It further argues that the Lao Parties have not shown that the Registrar's exercise of discretion was improper. The Lao Parties point out that this argument is being raised for the first time in this court.

89 We agree, however, with the submission by the Lao Parties that in this case the existence of a discretion empowering the Registrar to make such an appointment is beside the point. The Tribunal was not constituted pursuant to any such exercise of discretion by the Registrar. In its letter dated 30 September

2015 to the parties, the SIAC confirmed that the constitution of the Tribunal as a three-member panel was based on Sanum's reliance on cl 19 of the Participation Agreement. As the Judge pointed out in [110] of *Sanum HC*, once it was determined that the Dispute arose only under the Master Agreement and did not involve the Participation Agreement, cl 19 of the Participation Agreement could not support the appointment of a three-member panel in place of the usual default one-member panel.

What effect do mistakes as to seat and composition of panel have?

90 We deal first with a preliminary point. Sanum argues that even if the seat and composition of the Tribunal were erroneous, the Lao Parties have waived their right to object to these issues or are estopped from raising these issues. Although this is a new issue being raised on appeal, as no new evidence is necessary to dispose of this point, we will consider the point.

91 Sanum's argument is premised on Art 4 of the Model Law and the case of *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 4 SLR 995 ("*Rakna HC*"). Neither applies to the present case. Article 4 of the Model Law states:

> A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and *yet proceeds with the arbitration* without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object. [emphasis added]

92 The Lao Parties have not proceeded with arbitration, and thus do not fall within Art 4. As for *Rakna HC*, the decision on estoppel and waiver was confined to the situation where a party is seeking the *active remedy* of setting

aside an award. The judgment made it explicit that the considerations and principles would be different in relation to *passive remedies* such as resisting enforcement. In any event, *Rakna HC* was overturned on appeal (see *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131) as this Court held that a party who objected to the jurisdiction of the tribunal but did not participate in the arbitration proceedings at all would still be able to rely on that objection in setting aside proceedings taken after the issue of the final award. Thus, in any case, the Lao Parties cannot be prevented from raising their objections to the seat and the composition of the Tribunal in support of their contention that the Award should not be enforced in Singapore.

93 We now move to the substantive question which is whether the errors in choice of seat and composition of the Tribunal in themselves provide a reason for the court to refuse recognition of the Award or whether in addition the Lao Parties have to show that they suffered prejudice as a result of these errors. Sanum argues that the errors are procedural not jurisdictional matters and therefore prejudice is required for them to have the desired effect. It is not disputed that the general principle is that lack of prejudice is not relevant to a jurisdictional challenge but would be relevant to a procedural challenge.

94 The differing treatment of procedural and jurisdictional challenges is justified because of the need to avoid misusing the applicable procedural provisions as "a basis for denying recognition of an award [on the ground] that there was a minor or incidental violation of the parties' agreement or the breach of an incidental or unimportant term of the agreement" (see *Sanum HC* at [112]). Implicit in this proposition, extracted from Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014), is the acknowledgment that not every term of an arbitration clause is so fundamental

to the clause that a breach would automatically render an arbitral award issued pursuant to the clause invalid. This underlying principle is consistent with the pro-enforcement bias inherent in the New York Convention. It is also analogous to the concept of repudiation in general contract law: just as not every breach of contract would entitle an innocent party to terminate a contract, not every breach of an arbitration clause would result in completely foreclosing arbitration.

95 The Judge described the wrong choice of seat and wrong composition of the tribunal as "procedural irregularities" and considered that the Lao Parties had "done little to demonstrate the manner in which these procedural irregularities have affected the arbitral procedure adopted" (at [111] of *Sanum HC*). As prejudice had not been shown, she considered that the court ought to exercise its residual discretion in favour of enforcing the Award. The Judge noted the argument by the Lao Parties that the correct seating of an arbitration is vital and that there are authorities that held that refusal of enforcement of an award is immediate if the arbitration had been incorrectly seated. Her view was, however, that the importance of the seat was diminished where the court was asked to enforce an award rather than to set it aside. With respect, we take a different view as to the importance of the seat.

96 The choice of an arbitral seat is one of the most important matters for parties to consider when negotiating an arbitration agreement because the choice of seat carries with it the national law under whose auspices the arbitration shall be conducted. Arbitration is built on autonomy and free choice. Thus, as it must, the Model Law recognises the autonomy of the parties in relation to the seat. It provides specifically by Art 20(1) that parties are "free to agree on the place of arbitration". Additionally, Art 31(3) provides that the award is to state "its date and the place of arbitration as determined in

accordance with Article 20(1)" which means the Award must state what the seat was. While the parties can, of course, whether deliberately or neglectfully, omit to specify a seat such a course has been described as unwise (see Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2nd Ed, 2015) at section 6.03).

97 In section 6.01 of the same text, Gary Born explains, as we earlier noted, that the arbitral seat is the legal or juridical home of the arbitration and that therefore the choice results in a number of significant legal consequences. Under the Model Law it is the law of the seat that governs a number of important matters relating to the arbitration. As Born states:

> Under Article 1(2) of the Model Law, virtually all aspects of an international arbitration's "*external*" relationship with national courts are determined by where the "place" or "seat" of arbitration is located. Among other things, the law of the arbitral seat applies to provisions regarding judicial power to appoint and remove arbitrators (Articles 11-13), to consider jurisdictional issues (Article 16), to assist in evidence-taking (Article 27) and to annul arbitral awards (Article 34). These various judicial powers may be exercised by – and only by – the courts in the arbitral seat: in particular, as discussed below, only the courts in the seat of the arbitration may remove an arbitrator or annul an award made in the arbitration.
>
> The same conclusion applies, also by virtue of Article 1(2) of the Model Law, to "*internal*" procedural issues including the applicability of basic guarantees regarding party autonomy and due process. Thus, Articles 18 and 19 of the Model Law provide mandatory requirements regarding the equal treatment of the parties and the recognition of the parties' procedural autonomy from which the parties may not deviate – in each case applicable only to arbitrations seated locally and not to foreign arbitrations. Conversely, the laws of states other than the arbitral seat cannot impose mandatory requirements regarding the arbitral procedures.
>
> [emphasis in original]

98 In addition to the external relationship with national courts, the law of the seat is also vital in governing significant issues relating to the conduct of an international arbitration and the validity and finality of the award resulting from the proceedings. The choice of the seat in and of itself represents a choice of forum for remedies. In *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR(R) 401, this Court recognised that a Singapore court only has the power to set aside an arbitration award if that arbitration was seated in Singapore. As a collorary, in *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56, Belinda Ang Saw Ean J held that an agreement to arbitrate gives rise to a negative obligation not to set aside or otherwise actively attack an arbitral award in jurisdictions other than the seat of the arbitration.

99 It might be contended that so far as Model Law jurisdictions are concerned (like Macau and Singapore for example) it makes no difference whether an arbitration is seated in one or another since Art 34 of the Model Law which specifies the grounds on which an award may be set aside would be the same in both jurisdictions. That contention would be incorrect and the significance of the siting of an arbitration in the correct seat is not lessened by the fact that the choice is between two Model Law jurisdictions. This is because in adopting the Model Law, each jurisdiction may augment or reduce the grounds for setting aside in such jurisdiction. In this regard, s 24 of the IAA provides for two additional grounds that a party seeking to set aside an award may invoke (apart from those set out in Art 34 of the Model Law). Thus as between jurisdictions parties may have more or fewer options to rely on in their efforts to set aside an award. This is something that is of prime importance to the parties and might have played a part in the choice of seat.

100 Additionally, different national courts approach arbitration-related applications in different ways. As stated in Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Wolters Kluwer, 5th Ed, 2016) at p 56:

> Because of differing standards under national law for the annulment of arbitral awards, this can have significant consequences … absent contrary agreement, English courts will subject the arbitrators' decision to a measure of substantive review, while courts in Switzerland, France and UNCITRAL Model Law jurisdictions will not. Similarly, there are some nations where the parties can exclude any local judicial review in certain international arbitrations (*e.g.*, in Belgium, Switzerland and Sweden), while other states permit limiting judicial review.

101 As an example, the English courts have gone further than many others in their recognition of the importance of a choice of seat in an arbitration

agreement. In *A v B* [2007] 1 Lloyd's Rep 237, it was observed that "an agreement as to the seat of the arbitration" is "analogous to an exclusive jurisdiction clause". Therefore, "[a]ny claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration" (at pp 255-256). Indeed, in the same case it was held that it would be a breach of the arbitration agreement seating the arbitration in Switzerland for either party to invite the courts of any other jurisdiction to resolve an issue relating to the validity of the agreement.

102 Arbitration proceedings derive their force and binding character from the parties' freely chosen agreement. It may be a statement we have made before, but it bears repeating that party autonomy is of central importance to the legitimacy and binding nature of an arbitral award. Bearing this in mind and the legal consequences of differing choices of seat, when the parties do make such a choice as part of their arbitration agreement, the court must give the same full effect. In our view, therefore, once an arbitration is wrongly seated, in the absence of waiver of the wrong seat, any award that ensues should not be recognised and enforced by other jurisdictions because such award had not been obtained in accordance with the parties' arbitration agreement. Therefore, the award would not be the result of the arbitration that the parties had bargained for.

103 We have concluded that it is not necessary for a party who is resisting enforcement of an award arising out of a wrongly seated arbitration to demonstrate actual prejudice arising from the wrong seat. It is sufficient that had the arbitration been correctly seated a different supervisory court would have been available to the parties, had court recourse been necessary, both in

relation to issues arising in the course of the proceedings and to issues arising in relation to the final award. The availability and the suitability of the procedures and remedies administered by the court of the "wrong" seat would be irrelevant. The Lao Parties submitted that because the arbitration here was wrongly seated, the Tribunal lacked "substantive jurisdiction". We prefer not to use that term as there is no statutory basis for it in Singapore and it may lead to confusion as questions of jurisdiction generally concern the validity of the arbitration agreement and whether the dispute submitted to arbitration comes within the language of the arbitration clause.

104 In the present case, the choice made by the parties was to seat any arbitration under cl 2(10) in Macau. The Lao Parties have never waived that choice. In fact they objected to the SIAC's appointment as the arbitral institution to conduct the arbitration. Accordingly, we must refuse leave to Sanum to enforce the Award against ST Group, Mr Sithat and ST Vegas.

105 Although we have held that it was not necessary for the Lao Parties to demonstrate prejudice we will say a few words about what the wrongful choice of seat led to. As Macau was the chosen seat, it was the Macanese court that had jurisdiction over questions relating to the arbitral proceedings. Further, the Award should have been issued in Macau and when it was issued in Singapore instead as the product of a Singapore-seated arbitration, the Lao Parties were, if not completely deprived of their rights to set aside the Award, certainly in a very difficult position. *Prima facie* it would have been the High Court that was the supervisory court but applying to the High Court to set aside the Award could have been taken as an acceptance of Singapore as the seat as otherwise the High Court would have no jurisdiction to decide the matter. On the other hand, the Macanese court faced with an Award that stated it had been made in

Singapore could very well refuse jurisdiction on that basis, *ie*, reject the case because the place of the Award was not Macau.

106 Further, as a practical matter, it was only around two weeks after the issue of the Award that Sanum applied to the High Court for leave to enforce it here. From about the same time, therefore, the Lao Parties were embroiled in Singapore proceedings to resist enforcement when they might otherwise have been taking steps to set aside the Award in Macau.

107 The final point relates to the appointment of a three-member tribunal. The Lao Parties submit that the Judge erred in finding that the error in the appointment was one of arbitral procedure so that the party seeking to rely on it would have to demonstrate prejudice in order to be granted relief. And further that the Judge was wrong to find that the Lao Parties had not suffered any prejudice arising out of this breach. In this connection, they point to the two disjunctive limbs of s 31(2)(*e*) of the IAA, the first relating to the composition of the arbitral authority and the second relating to arbitral procedure. They submit that the Judge, like the court in *AQZ v ARA* [2015] 2 SLR 972 ("*AQZ*"), erred in not distinguishing between the two limbs. In *AQZ,* the court observed in *obiter* remarks that even if the applicant was right in that the arbitration should not have proceeded before a sole arbitrator, it had not demonstrated that it had suffered any prejudice as a result of the arbitral procedure adopted.

108 We do not propose to deal with this point in this case. It is not necessary because our finding in relation to the effect of a wrong choice of seat disposes of CA 113. Secondly, although theoretically it is certainly arguable that a tribunal made up of three persons is totally different from a single person tribunal and might result in a different outcome (notwithstanding how ill such

an argument might lie in the mouth of a party who did not participate at all in the proceedings), it is difficult in this case to disentangle the effect of the wrong composition from the adverse impact of the wrong seat choice. We, therefore, leave this question to be decided in a future case where it may be more central to the outcome of the case.

Conclusion

109 For the reasons give above, we allow CA 113 and set aside the Leave Order granted to Sanum. We also dismiss CA 114.

110 Unless they are able to come to an agreement on the matter, the parties shall furnish their written submissions on costs, limited to ten pages each within 14 days hereof.

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

Francis Xavier SC, Tee Su Mien and Edwin Tan (Rajah & Tann Singapore LLP) (instructed); Christopher Tan and Vanessa Claire Koh Yuet Feng (Lee & Lee); Thomas Tan and Tan Xue Ting (Haridass Ho & Partners) for the appellants in CA 113/2018 and the respondent in CA 114/2018;
Alvin Yeo SC, Wendy Lin, Monica Chong and Teh Zi Ling, Stephanie (WongPartnership LLP) for the respondent in CA 113/2018 and the appellant in CA 114/2018.