



The Limits of Arbitration

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The arbitration landscape has changed significantly over the last few years. Fault lines have emerged, including the rising cost of arbitrations, the length of time taken to conclude arbitrations, the concerns over the true impartiality of arbitrators, the dissatisfaction with an unregulated industry, and the growing disconnect with end-users. Focusing on the Singapore experience, this article raises some limitations to arbitration, and in doing so engenders discussion as to how these limitations can be overcome.

Le domaine de l'arbitrage a grandement évolué au courant des dernières années. Corolairement, de nombreux défauts ont été mis en évidence. L'augmentation croissante des frais, la durée des procédures, l'indépendance des arbitres, le manque de réglementation et la déconnexion avec ses utilisateurs, n'en sont que quelques illustrations. En se concentrant sur l'expérience vécue à Singapour, cet article se penche sur les limites de l'arbitrage afin de proposer des solutions potentielles.

* Judge, Supreme Court of Singapore. The views expressed in this article are personal and as a student of the law; they do not represent the views of the Singapore Judiciary. I would like to acknowledge with gratitude the assistance of Chen Zhida, Justices' Law Clerk, Supreme Court of Singapore, for his assistance in the research and preparation of this article. All errors, however, remain mine.

I. INTRODUCTION

Arbitration is now firmly rooted as a primary mode of dispute resolution in international commercial transactions. Indeed, it has become the preferred method of dispute resolution,¹ and slowly but surely, the drive to leave behind differences in national laws and to seek uniformity in international arbitration is getting stronger with each passing year.² Its pervasion and recognition can be seen in the ever increasing establishment of new national arbitral institutions.

The number of disputes resolved through arbitration is growing exponentially. Singapore, which is geographically well situated within Asia, is an undoubted beneficiary of this phenomenal growth.

Singapore has grown in a relatively short time to become the third most preferred seat of arbitration in the world, behind London and Geneva and on par with Tokyo and Paris.³ The Singapore International Arbitration Centre (SIAC) is also the fourth most preferred arbitral institution, behind the International Court of Arbitration of the International Chamber of Commerce (ICC), London Court of International Arbitration and American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR).⁴ The total number of new cases handled by the SIAC increased from 99 cases in 2008 to 259 cases in 2013.⁵ The total sum in dispute for new cases filed in 2013 amounted to \$6.06 billion, and the average value of a dispute dealt with by the SIAC was \$24.44 million.⁶ A significant portion of the SIAC caseload involves a foreign party – 86% of the new cases filed with SIAC in 2013 were international in nature, and 48% had no connection with Singapore.⁷ The trend is likely to continue and the signs are clear that the popularity of Singapore as a seat of arbitration will continue to intensify – in 2012, the Baltic and International Maritime Council (BIMCO) included Singapore as an arbitration seat in the BIMCO contracts, alongside the venerable maritime centres of London and New York.

Singapore strives to provide both the hardware and software for a dispute resolution hub in Asia. Maxwell Chambers, a state-of-the-art integrated dispute resolution building, built especially for arbitrations (complete with hearing and break-out rooms and support facilities), opened its doors on January 2010. It houses alternative dispute resolution institutions like the SIAC, the ICC,

1 School of International Arbitration, Queen Mary, University of London & PwC, *Corporate Choices in International Arbitration Industry Perspectives* (2013), online: <<http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>> at 6 [*Corporate Choices*].

2 See e.g. the growth of UNCITRAL Model Law's adoption; International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration*, London: IBA, 2010; International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitrations*, London, IBA 2004.

3 School of International Arbitration, Queen Mary, University of London and White & Case International Arbitration Group, *2010 International Arbitration Survey: Choices in International Arbitration*, online: <http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf> at 19.

4 *Ibid* at 23.

5 Singapore International Arbitration Centre, *Singapore International Arbitration Centre Annual Report 2013*, online: <http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2013.pdf> at 06/07.

6 *Ibid*.

7 *Ibid*.

the ICDR (the international division of the AAA), the Arbitration and Mediation Centre of the World Intellectual Property Organisation (WIPO), the Singapore Chamber of Maritime Arbitration (SCMA) and the Singapore Institute of Arbitrators (SIArb). There is a sound legislative framework in place, including the International Arbitration Act (Cap 143A, 2002 Rev Ed) which incorporates and adds to the UNCITRAL Model Law on International Commercial Arbitration (Model Law) and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention); it is continually reviewed and revised to ensure that it meets the needs of the international arbitration community. The Singapore judiciary has long recognised the value of arbitration and has maintained a judicial philosophy that is fully supportive of arbitration. It espouses the finality of arbitral awards and minimal curial intervention on limited grounds allowed by Model Law and the International Arbitration Act. It is only necessary to pick but one citation out of the many to illustrate this judicial philosophy; in the words of Justice of Appeal VK Rajah (as he then was) in *Tjong Very Sumito and others v Antig Investments Pte Ltd*:

There was a time when arbitration was viewed disdainfully as an inferior process of justice. Those days are now well behind us. An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. [...] [T]he role of the court is now to support, and not to displace, the arbitral process.⁸

This judicial philosophy underpins arbitration cases in Singapore. Singapore's ever supportive Minister for Law, Mr K Shanmugam, has suggested that the success of the Singapore arbitration initiatives was built on "the trust premium in the Singapore brand" and the "ability to create a 'Dispute Resolution Eco-System' where arbitration activity could thrive".⁹

These developments have led to the characterisation by Singapore's Chief Justice Sundaresh Menon of the times as the "golden age" of arbitration, both for Singapore and elsewhere.¹⁰

However, the arbitration landscape has changed significantly over the last few years. Singapore's Chief Justice Menon has also cautioned stakeholders about emergent fault lines (e.g. the rising cost of arbitrations, the length of time taken to conclude arbitrations, the concerns over the true impartiality of arbitrators, the dissatisfaction with an unregulated industry and the growing disconnect with end-users), and that it would be remiss not to address them before they threaten to destabilise and undermine the utility of arbitration as a dispute resolution mechanism.¹¹

I would like, in this short article, to raise some limitations to arbitration and in doing so, perhaps engender discussion as to how these limitations can be overcome. An example of the limitations to arbitration is the hitherto limited use of arbitration in the financial sector. Unlike

8 *Tjong Very Sumito and others v Antig Investments Pte Ltd*, [2009] 4 SLR(R) 732 at paras 28, 29.

9 K Shanmugam, (Speech delivered at the Arbitration Dialogue, 10 June 2012), Ministry of Law Singapore Government.

10 Sundaresh Menon, SC, Attorney General of Singapore, "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)" (Speech delivered at the ICCA Congress 2012) at 1. See also Indraneel Rajah, Senior Minister of State for Law and Education, (Speech delivered at the inaugural Singapore Institute of Arbitrators National Arbitration Conference, 30 July 2013) at para 7.

11 See also Sundaresh Menon, "Some Cautionary Notes for an Age of Opportunity" (Keynote Address delivered at the Chartered Institute of Arbitrators International Arbitration Conference in Penang, 22 August 2013).

the international trade and the construction and energy industries, where arbitration is clearly the preferred mode of dispute resolution, the financial services sector incline towards litigation because, among other things, there is a need for binding precedent in the construction of the terms in financial documents.¹² The recent survey by Queen Mary, University of London revealed that a substantial majority of the in-house counsel in the financial services sector still prefer court litigation, with 82% ranking court litigation as their “most preferred” choice.¹³ Arbitration came in second but only with a mere 23%.¹⁴ Notwithstanding that, there is a real possibility that the situation might change in the years ahead, in light of the new 2013 International Swaps and Derivatives Association, Inc (ISDA) Arbitration Guide which provides guidance on the use of an arbitration clause with the 1992 and 2002 versions of the ISDA Master Agreement. Traditionally, the ISDA Master Agreements have incorporated litigation clause in favour of the English or New York courts. The new ISDA Arbitration Guide, which contains a range of model arbitration clauses for users to choose from, might just become the catalyst for the use of arbitration in the financial sector.

II. LIMITS OF ARBITRATION

One of the major advantages of arbitration, built upon the consensual bedrock, is that traditional court procedures, which often mystify laypersons and are considered cumbersome by practitioners, no longer govern the proceedings. In arbitration, the dispute resolution mechanism and procedures can be customised to suit the needs of parties and the nature of their case. However, the very inherent consensual nature of this private process of dispute resolution necessarily limits its application in some areas. It is in this context that I highlight some recent decisions by the Singapore courts which illustrate these limitations.

A. Arbitrability

The Singapore courts have, in recent years, held that certain types of claims are considered to be non-arbitrable.¹⁵ In Singapore, it is accepted that the concept of non-arbitrability is a “cornerstone of the process of arbitration” and it allows the courts to “refuse to enforce an otherwise valid arbitration agreement on policy grounds”.¹⁶ This is the same for most jurisdictions,¹⁷ even though the policy considerations and the weight placed on them may vary. The Singapore courts have generally dealt with it in a robust manner, giving due recognition to the countervailing policy considerations and yet at the same time trying as much as possible to remain supportive of arbitration.

12 *Corporate Choices*, *supra* note 1 at 7.

13 *Ibid.*

14 *Ibid.*

15 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)*, [2011] 3 SLR 414 at para 3 [*Larsen Oil*]; *Silica Investors Limited v Tomolugen Holdings Limited and others*, [2014] SGHC 101 [*Silica*].

16 *Larsen Oil*, *supra* note 15 at para 44.

17 See generally, Mustill & Boyd, *Law and Practice of Commercial Arbitration in England*, 2d ed (London: Butterworths, 1989) at paras 149–150 and Gary Born, *International Commercial Arbitration*, 2d ed (Alphen aan den Rijn: Kluwer Law International, 2009) at 768.

In *Larsen Oil*,¹⁸ the parties entered into an agreement which stated that the appellant would provide management services to the respondent and its subsidiaries. As a result of the agreement, the appellant gained control over the finances of the respondent and its subsidiaries. Certain payments were made to the appellants. The respondent was placed under liquidation, and the liquidators brought, *inter alia*, avoidance claims against the appellant. In essence, the liquidators were seeking to avoid, first, a number of payments made to the appellant on the ground that these payments amounted to unfair preferences or transactions at an undervalue within the meaning of sections 98 and 99 of the Bankruptcy Act (Cap 20, 2009 Rev Ed), read with section 329(1) of the Companies Act (Cap 50, 2006 Rev Ed), and secondly, a number of payments made by the respondent's subsidiaries to the appellant pursuant to section 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) (CLPA) on the ground that they were made with the intent to defraud it as a creditor of its subsidiaries. The appellant applied for a stay in favour of arbitration, relying on the arbitration clause in the agreement. The trial judge dismissed the application and the appellant appealed.

On the issue of arbitrability, the Court of Appeal considered the legislative history of the Arbitration Act (Cap 10, 2002 Rev Ed) and the International Arbitration Act and took the view that the policy of encouraging arbitration is *subject nonetheless* to certain policy considerations.¹⁹ This is true particularly in relation to insolvency and bankruptcy, which are areas replete with public policy considerations that are too important to be settled by parties privately through the arbitral process.²⁰ Specifically, the Court of Appeal considered that:

[T]he insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard. *The courts should treat disputes arising from the operation of the statutory provisions of the insolvency regime per se as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement.*²¹

And the reason is clear – the avoidance provisions were meant to address situations that adversely affected the interests of third parties, i.e. creditors, which had to be protected.

However, and significantly, the Court of Appeal was clearly not willing to say that insolvency *per se* would automatically render any claims, however loosely related to the insolvent company, non-arbitrable. The Court of Appeal was cautious not to set out the law in a fashion that might be interpreted as being inconsistent with the pro-arbitration stance, and this manifested clearly in the judgement. First, the Court of Appeal astutely drew a distinction between claims that arose only upon the onset of insolvency and disputes that stemmed from pre-insolvency rights and obligations, and accepted that the latter were generally suitable for the arbitral process (unless they affect the substantive rights of other creditors).²² In this regard, the Court of Appeal accepted

18 *Larsen Oil*, *supra* note 15, at paras 3, 4.

19 *Ibid* at para 29, citing Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Sub-Committee on Review of Arbitration Laws*, LRRD No 3/2001 (August 1993).

20 *Ibid* at para 30.

21 *Ibid* at para 46 [emphasis added].

22 *Ibid* at para 51.

that the amount due to a party from the subsequently insolvent company could be determined by arbitration as the proof of debt process did not create new rights in the creditors or destroy old ones.²³ Secondly, the Court of Appeal explained that claim based on section 73B of the CLPA is “one that may straddle both a company’s pre-insolvency state of affairs, as well as its descent into the insolvency regime”,²⁴ and it follows that such a claim might, depending on the circumstances, be arbitrable.

At the heart of the issue of arbitrability arising in respect of insolvency law is the conflict between the *private* nature of arbitration and the *public* elements in the insolvency regime. A major question is how the boundary of arbitrability should be drawn. In the United States, the courts would generally have to consider if the claims involve any core insolvency issues which might render the dispute non-arbitrable.²⁵ Similarly, German law would allow arbitrators to decide disputes relating to bankruptcy proceedings unless they are incapable of resolution by arbitration, e.g., the collection and distribution of assets.²⁶ It would appear that the Singapore position on the arbitrability of insolvency issues is not radically different from that of the other jurisdictions.

Three years later, in May 2014, another case on arbitrability came before the Singapore High Court.²⁷ In *Silica Investors Limited v Tomolugen Holdings Limited and others (Tomolugen)*,²⁸ the plaintiff entered into a share purchase agreement with the second defendant to acquire approximately 4.2% of its shares in the eighth defendant. That agreement contained an arbitration clause. The plaintiff brought a minority oppression action under section 216 of the Companies Act against the first and second defendants, who were the majority shareholders of the eighth defendant, and the third to seventh defendants who were minor shareholders and/or directors of the eighth defendant and other associated or related companies. The plaintiff sought reliefs which included a buy-out order and/or an order to regulate the conduct of the eighth defendant and/or the winding up of the 8th defendant. The second defendant applied to stay proceedings under s 6 of the International Arbitration Act and the other defendants similarly applied for a stay under the inherent jurisdiction of the court. The learned Assistant Registrar refused the stay application, and the defendants appealed.

It was held, *inter alia*, that a statutory claim would not be non-arbitrable merely because it *may* be redressed or remedied by a statutory-based relief that could only be granted by the courts,²⁹ (for example, a winding up order). On analogous reasoning in *Larsen Oil*, a statutory claim may well straddle the line between arbitrability and non-arbitrability depending on the facts of the case, the manner in which the claim was framed and the remedy or relief sought.³⁰ In particular, it

23 *Larsen Oil*, *supra* note 15 at para 51, citing *Wight and others v Eckhardt Marine GmbH*, [2004] 1 AC 147.

24 *Ibid* at para 55.

25 Alan Redfern et al, *Redfern and Hunter on International Arbitration* (New York: Oxford University Press, 2009) at para 2.129.

26 *Ibid* at para 2.131, citing Vesna Lasic, *Insolvency Proceedings and Commercial Arbitration* (The Hague: Kluwer Law International, 1998) at 163-164.

27 I have to admit to being the judge in this case.

28 *Silica*, *supra* note 15.

29 *Ibid* at para 113.

30 *Ibid*.

was acknowledged that a minority oppression claim under section 216 of the Companies Act was one of the statutory claims that straddled the line between arbitrability and non-arbitrability.³¹ As such, it would not be desirable to lay down a general rule that all minority oppression claims were non-arbitrable.³² The door should be left ajar with respect to arbitration of minority oppression claims, even though it may only be for the exceptional of cases (e.g., where the oppression occurs between two parties to a joint venture, with no other relevant parties, no overtones of insolvency, and no remedy or relief sought that the arbitral tribunal is unable to make).³³

It is important to note that section 216(1) of the Companies Act provides that upon a minority shareholder satisfying *the court* that the affairs of the company are being conducted in a manner that is oppressive to one or more of the members and in disregard of his or their interests as members or shareholders, then *the court* is empowered to impose various orders or sanctions as it thinks fit *with a view to bringing an end to or remedying the matters complained of*. Without limiting the generality of these words, section 216(2) then spells out that the court may, *inter alia*, direct or prohibit any act or cancel or vary any transaction, regulate the conduct of the affairs of the company in future, provide for a buy-out, provide for a reduction accordingly of the company's share capital or provide that the company be wound up. These remedies are obviously not remedies an arbitral tribunal can make.

Some might argue that this approach in *Tomolugen* is not in line with a pro-arbitration stance taken by Singapore compared to the approaches taken by the other jurisdictions like England or Canada. Specifically, the English and Canadian courts made some novel proposals in relation to how this thorny issue may be resolved in a manner that, at first blush, appears to be more aligned with a pro-arbitration approach.

In *Fulham Football Club (1987) Ltd v Richards and another (Fulham)*,³⁴ the English Court of Appeal did not think that the plaintiff's minority oppression claim was non-arbitrable. There, the plaintiff, Fulham Football Club, (FFC), was a member of the Football Association Premier League, (FAPL), which organises and manages the Premier League under the jurisdiction of the Football Association. Each of the twenty clubs in the Premier League holds one share in the FAPL. The FFC alleged that the defendant, the Chairman of FAPL, acted in a way that unfairly prejudiced FFC as a member of FAPL. Under the FAPL rules, disputes *inter se* had to be referred to arbitration. Notwithstanding that agreement, FFC brought an action for minority oppression under section 994 of the English Companies Act 2006 and a stay was granted. However, it is important to note that the reliefs sought were limited, i.e., an injunction or order for the defendant Chairman to resign. No other club in the FAPL was made a defendant. Even though the claim included the prayer for "relief as the court shall think fit", there was, on the facts of that case, no possibility of a buy-out or winding up orders being made. Leaving aside the reasons for the decision, what is apposite is Lord Justice Patten's proposal that:

[T]he arbitration agreement would operate as an agreement not to present a winding-up petition unless and until the underlying dispute had been

31 *Silica*, *supra* note 15 at para 141.

32 *Ibid*.

33 *Ibid* at para 142.

34 [2012] Ch 333 [*Fulham*].

determined in the arbitration. The agreement could not arrogate to the arbitrator the question of whether a winding-up order should be made. That would remain a matter for the court in any subsequent proceedings. *But the arbitrator could, I think legitimately, decide whether the complaint of unfair prejudice was made out and whether it would be appropriate for winding-up proceedings to take place or whether the complainant should be limited to some lesser remedy.* [...] [I]t would, I think, be open to an arbitrator who considered that the proper solution to a dispute between a shareholder and the company was to give directions for the conduct of the company's affairs *to authorise the shareholder to seek such relief from the court under s.994.* But such cases are likely to be rare in practice. If the relief sought is of a kind which may affect other members who are not parties to the existing reference, *I can see no reason in principle why their views could not be canvassed by the arbitrators before deciding whether to make an award in those terms.* Opposition to the grant of such relief by those persons may be decisive. Similarly if the order sought is one which cannot take effect without the consent of third parties then the arbitrators' hands will be tied.³⁵

The British Columbia Court of Appeal in *ABOP LLC v Qtrade Canada Inc (ABOP)*³⁶ took a similar stance, stating that:

The arbitrator will make all the necessary findings of fact and come to a decision on the issues before him. If he finds in favour of Qtrade then there will be no foundation for an oppression action. If he finds in favour of ABOP it can carry on with the oppression petition to the court.³⁷

This was notwithstanding that both the trial judge and Court of Appeal in *ABOP* agreed that the minority oppression claim was a "court matter" and "within the exclusive jurisdiction of the court".³⁸ It was also acknowledged by the Court of Appeal that this might involve "procedural complexity".³⁹

The dilemma is that, on the one hand, there is a desire to respect party autonomy and grant the stay, and yet, on the other hand, it is trite that some of the statutory remedies, like winding up, cannot be preserved if the matter was to be decided solely by the arbitral tribunal. As a form of compromise, but primarily motivated by the desire to be seen as being "pro-arbitration", the English and Canadian courts both arrived at the conclusion that there must be some form of sequential resolution of the issues, i.e, the issues relevant to the minority oppression claim would be decided by the arbitral tribunal as a *precursor* to the plaintiff's request for the statutory reliefs which are within the exclusive jurisdiction of the courts. However, it is doubtful if a two-stage or sequential resolution of minority oppression claims is at all feasible. One commentator astutely noted, in relation to *Fulham* but similarly applicable to *ABOP*, that:

On the face of it, Patten LJ's approach has a certain degree of intuitive appeal. It is, after all, consistent with the facilitative party autonomy and, in its explicitly pro-arbitration stance, has the advantage of rescuing many disputes

35 *Fulham*, *supra* note 34, at para 83 [emphasis added].

36 2007 BCCA 290, 284 DLR (4th) 171.

37 *Ibid* at para 23.

38 *Ibid* at paras 12, 26.

39 *Ibid* at para 24.

from a potentially costly and time-consuming judicial process. Nevertheless, the practical merits of this approach are undercut to the extent that certain cases will effectively require a two-stage process: first, a process whereby the arbitrator adjudicates on the dispute itself; and secondly, one by which the matter reverts to the courts in the event that the appropriate remedy is of a type not obtainable in arbitral proceedings (eg, it is a remedy that, in affecting third parties, requires the supervisory jurisdiction of the court). *Regrettably, the Court of Appeal proffered no guidance on the question of how, in the event that a court disagrees with any arbitral finding with regard to remedies, such a difference of opinion is to be resolved.*⁴⁰

Apart from the inherent difficulties that come with any two-stage or sequential resolution of issues, there are also other concerns that might complicate matters, e.g., the solvency of the company and possible impact on would-be creditors, and the interests of other shareholders who are not party to the arbitration.

The approaches proposed in *Fulham* and *ABOP* appears, at first glance, to be more in line with a pro-arbitration stance insofar as they seek to give effect to the arbitration agreement. On closer examination, however, this becomes less clear. The English and Canadian courts appear to agree that the statutory remedies, like winding up, rest solely within the jurisdiction of the courts.⁴¹ If this holds true, then it might be pointless to say that the matter should proceed to arbitration in the first place as the court may have to rehear the entire dispute (especially if there are other parties who are not privy to the arbitration agreement and proceedings), in order to satisfy itself that there is minority oppression *and* that the remedy to be imposed is appropriate to bring an end to or remedy the matters complained of. It is doubtful if any court will accept directions from an arbitral tribunal as to what remedies should be imposed, *a fortiori*, if it is a winding-up order. Except in cases where the arbitral tribunal finds that there is no issue of minority oppression (and matter does not go on to the courts), this approach is likely to run into problems of multiplicity and possible inconsistencies. This would obviate most of the primary advantages of arbitration, e.g., quicker resolution, less procedural complexity, lower costs and confidentiality.

Instead of trying to stretch arbitration to its breaking point, the more logical step to take might be to accept that arbitration, useful as it may be, has its limitations. If the minority oppression claim involves other parties not bound by the arbitration agreement (as in *Tomolugen*, and who will therefore not be before the arbitral tribunal or bound by its award), or requires certain remedies that cannot be granted by the arbitral tribunal, then it might not be capable of being resolved by arbitration. This is not necessarily inconsistent with a pro-arbitration stance; it is merely to acknowledge the consensual nature of arbitration and its consequent inherent limitations.

B. Multi-Party Arbitration

Another aspect of arbitration that has, in recent years, been widely discussed by academics and practitioners alike is the topic of multi-party and multi-contract arbitrations. The traditional notion of arbitration is that it is generally bi-polar in nature, i.e., usually between one claimant

40 Harry McVea, “Section 994 of the Companies Act 2006 and the Primacy of Contract” (2012) 75 MLR 1123 at 1132 [emphasis added].

41 *Fulham*, *supra* note 34 at para 83; *ABOP*, *supra* note 36 at paras 12, 26.

and one respondent, with the dispute arising out of or in relation to one contract. This remains true for the majority of the arbitration cases, but with international commercial transactions becoming increasingly sophisticated, the number of complex disputes involving multiple parties and multiple contracts is growing. It remains largely unresolved as to how far can and should arbitration go in relation to joinder of parties and consolidation of disputes.

The position taken in Singapore with regard to the joinder of non-signatories remains relatively conservative. Two recent Singapore decisions are pertinent in this regard, namely, *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantrar International BV and others and another appeal (Astro)*,⁴² which deals with the joinder under the SIAC Rules, and *The “Titan Unity”*,⁴³ which concerns the power of the court to order a joinder.

Astro, in a nutshell, involved a dispute which arose out of a failed joint venture between the Lippo group of companies and the Astro group of companies for provision of multimedia and television services in Indonesia. The appellant, a company within the Lippo group, entered into an agreement with the first to fifth respondents. That agreement contained an arbitration clause. The sixth to eighth respondents were not party to the agreement but they provided funding and services to the joint venture. The respondents, including the sixth to eighth respondents, commenced arbitration proceedings pursuant to the arbitration clause in the agreement. An application was made for the sixth to eighth respondents to be joined as parties to the arbitration. The arbitral tribunal held that it had the power, pursuant to rule 24(b) of the 2007 SIAC Rules, to join non-signatories as long as they consented to being joined.⁴⁴

The Court of Appeal in *Astro* disagreed. In a unanimous decision by the Court of Appeal, delivered by Chief Justice Menon, it was held that rule 24(b) of the 2007 SIAC Rules did not confer upon the arbitral tribunal the power to join third parties who were not party to the arbitration agreement. Rule 24(b) of the 2007 SIAC Rules states that:

RULE 24

Additional Powers of the Tribunal

1. In addition and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have the power to:

[...]

(b) allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes among the parties to the arbitration.⁴⁵

The crux of the issue, as the Court of Appeal explained, lies with the definition of “other parties” within rule 24(b) of the 2007 SIAC Rules. The Court of Appeal considered, among other things, the “relative paucity of detail” in the 2007 SIAC Rules in relation to joinder, and the

42 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantrar International BV and others and another appeal* [2014] 1 SLR 372 (SGCA) [*Astro*].

43 *The “Titan Unity”* [2014] SGHCR 4 [*Titan Unity II*].

44 *Astro*, *supra* note 42 at paras 11, 178.

45 This has been amended in the 2013 edition of the SIAC Rules.

potential implications that “forced joinder” might have on party autonomy and confidentiality, before concluding that the proper construction of rule 24(b) must be that it permits other parties to the arbitration agreement (as opposed to non-signatories) who are not yet part of the arbitration reference to be joined into an existing arbitration reference.⁴⁶ The *Astro* decision clearly reflects Singapore’s adherence to the foundational principles of arbitration, which includes party autonomy and confidentiality.

The other decision, *The “Titan Unity”*,⁴⁷ deals with the issue of joinder in a slightly different context, that is, whether the court has the power to order a non-signatory to be joined in an arbitration. In that case, the cargo on board the *Titan Unity* was misdelivered. *Titan Unity* was owned by Singapore Tankers and demised chartered to Oceanic. Oceanic then entered into a time charterparty with Onsys Energy Pte Ltd (Onsys) to transport some cargo purchased by it. Portigon provided the financing for the purchase of the cargo and was the holder of the bill of lading. As a result of the misdelivery, Portigon sued Singapore Tankers and Oceanic. The action against Oceanic was stayed in favour of arbitration as it was found that the bill of lading validly incorporated the arbitration agreement found in the time charterparty between Oceanic and Onsys.⁴⁸ As a result, the court action against Singapore Tankers would continue alongside the arbitral proceedings between Portigon and Oceanic. Notably, Portigon’s claims against Singapore Tankers and Oceanic were based on the same causes of action arising out of the same facts. Accordingly, Singapore Tankers sought, among other things, to be joined in the arbitration proceedings between Portigon and Oceanic.

The learned Assistant Registrar refused to join Singapore Tankers to the arbitration proceedings. As noted earlier, *Astro* dealt with a slightly different question of whether the tribunal based on the 2007 SIAC Rules (as opposed to the court) would have the power to order a joinder. Nevertheless, the learned Assistant Registrar felt that “the judicial philosophy on according due significance to the principle of party autonomy would apply with no less compelling force”.⁴⁹ The “legitimate advantages and procedural efficiencies” of a forced joinder does not, in his view, provide the *authority* to derogate from the principle of party autonomy in the absence of any express statutory provision to that effect.⁵⁰ The learned Assistant Registrar considered that the International Arbitration Act was “silent on the issue of joinder”, and likewise found that the Model Law had deliberately left the question of joinder to the freedom of parties.⁵¹ However, the learned Assistant Registrar went further to state that:

[I]n so far as the only premise in which a joinder will take place under the framework envisaged by the drafters of the Model Law is upon the agreement of parties; *consent* is, in the minds of the drafters, a *necessary condition* for there to be a joinder.

[...]

46 *Astro*, *supra* note 42 at paras 174-198.

47 *Titan Unity II*, *supra* note 43.

48 *The “Titan Unity”* [2013] SGHCR 28 [*Titan Unity I*].

49 *Titan Unity II*, *supra* note 43 at paras 20–21, citing *Astro*, *supra* note 42 at paras 181–188.

50 *Ibid* at para 21.

51 *Ibid* at paras 21–23.

The rationale of the approach adopted by the drafters of the Model Law should be self-evident. Consent is the very foundation of arbitration, without which an arbitral tribunal's authority to hear and determine the dispute is non-existent [...] As such, in adherence with the spirit of the Model Law and the [1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards], a court has the power to order a joinder only with the parties' consent.⁵²

The learned Assistant Registrar explained that the court, when exercising its power to order a joinder with parties' consent, is merely recognising and giving effect to the arbitration agreement between the parties.⁵³ This is important. It means that the court may only legitimately order a joinder if the non-party is a contracting party to the arbitration agreement, or if the non-party is *not* a contracting party to the arbitration agreement but all parties agree to arbitrate.⁵⁴ In both cases, the court is merely giving effect to the parties' intention to arbitrate when it orders a joinder. However, there is an additional caveat – where the arbitration rules provides for joinder but is ambiguous if implied consent would suffice (like the SCMA Rules which only specify that “consent” is required), the court would defer to the views of the arbitral tribunal and not order a joinder even if the parties have impliedly consented to have the dispute resolved before an arbitral tribunal.⁵⁵

In contrast, there are some other jurisdictions and arbitral institutions that have taken a more liberal approach towards the issue of joinder of non-signatories. For instance, the Italian Code of Civil Procedure appears to provide that the intervention or joinder of a third party who is considered to be necessary for the adjudication of the dispute will always be allowed regardless of the consent of the original parties to the arbitration proceedings.⁵⁶ However, this is not the norm. Most national arbitration legislation, like the Singapore International Arbitration Act, do not provide guidance on the issue of joinder, while some, like Belgium and Netherlands, provides for third party joinder based on consent.⁵⁷ The arbitration institutions, on the other hand, appear to be less troubled with having liberal joinder rules; indeed, some of the rules do not even regard consent as a necessary element for joinder. Some notable examples include the 2012 Swiss Rules of International Arbitration (Swiss Rules),⁵⁸ and the 2013 Hong Kong International Arbitration Centre (HKIAC) Rules.⁵⁹ These can be contrasted with the SIAC Rules (discussed in *Astro*), the

52 *Titan Unity II*, *supra* note 43 at paras 23–24 [emphasis in original].

53 *Ibid* at para 24.

54 *Ibid*.

55 *Ibid* at paras 36–39.

56 Simona Grossi & Maria Cristina Pagni, *Commentary on the Italian Code of Civil Procedure* (New York: Oxford University Press USA, 2010) at 479; Ferdinando Emanuele & Milo Molfa, “Multiparty Arbitration: The Italian Perspective” in *The European & Middle Eastern Arbitration Review* (Global Arbitration Review, 2012) 64 at 66.

57 See e.g. *Bepalingen van het Belgisch Gerechtelijk Wetboek* (Belgian Judicial Code), 1 September 2013, art 1709 and *Wetboek van Burgerlijke Rechtsvordering* (Dutch Code of Civil Procedure), 1986 (2011), art 1045.

58 Switzerland, Chamber of Commerce and Industry, *Swiss Rules of International Arbitration*, art 4(2) [Swiss Rules].

59 Hong Kong International Arbitration Centre, *HKIAC Administered Arbitration Rules*, art 27 [HKIAC Rules]; contrast Hong Kong International Arbitration Centre, *HKIAC Administered Arbitration Rules*

SCMA Rules (discussed in *The “Titan Unity”*),⁶⁰ and some oft-used arbitration rules like the ICC Arbitration Rules,⁶¹ which either do not specifically provide for joinder or restrict it to cases where parties consent. These liberal joinder rules are by no means universally accepted, and some of the conceptual and practical difficulties will be highlighted later.

The diversity of views taken in relation to the topic of consent and the jurisdiction of the arbitral tribunal over a non-signatory to an arbitration agreement is also reflected in the *cause celebre* – *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*⁶² – where an arbitral tribunal, sitting in Paris, found that the respondent, the Government of Pakistan, was a “true party” to the arbitration agreement notwithstanding that the agreement made between the appellant and the Awami Hajj Trust. Significantly, the appellant failed to obtain enforcement of the award before the English High Court, Court of Appeal and the Supreme Court who took the opposite view as to whether the Government of Pakistan was really a party to the agreement to arbitrate. The intricacies of the conflicting judgements from the United Kingdom Supreme Court and the Paris *Cour d’Appel* are beyond the scope of this paper, but the point is that this is an area fraught with difficulties.

As it becomes apparent that the requirement of consent, express or otherwise, obstructs the use of arbitration in multi-party disputes, it has been suggested that consent should no longer be viewed as a necessary element for joinder:

[A]rbitration is not only an advanced theory of contract law. It has serious jurisdictional aspects that are overlooked. From a contractual point of view, the issue of third parties is often reduced into an issue of evidence of consent, which misses the point. And the point here might be not whether a tribunal may find enough evidence that the non-signatory party has consented to the arbitration clause, but whether and how closely the non-signatory party is implicated in the main dispute before a tribunal. Thus the crucial question here is: if a third party is strongly implicated in a dispute, should a tribunal assume jurisdiction over this party on grounds that this [*sic*] equitable and fair to do so in order to accomplish its main goad [*sic*], namely to effectively dispose of the dispute before it?

International commerce becomes increasingly complicated and companies are organized on the basis of previously unknown forms. In order to remain commercially pertinent and effective, arbitration must be able to take the new developments in international commerce into account, especially for jurisdictional purposes. We need to think that the commercial reality might soon outgrow the current contractual doctrine. Otherwise, parties with an important role in the commercial aspect of the dispute might be left outside the scope of arbitration for lack of sufficient evidence of consent.⁶³

2008, art 14.6.

60 SIAC Rules, *supra* note 45, art 24(b); Singapore Chamber of Maritime Arbitration, *Arbitration Rules of the Singapore Chamber of Maritime Arbitration*, r 32.2 [SCMA Rules].

61 International Chamber of Commerce, *ICC Rules of Arbitration*, art 7.

62 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* (2010), [2011] 1 AC 763 at paras 38-39, [2010] 2 CLC 793.

63 Stavros L Brekoulakis, “Third Parties in International Commercial Arbitration” (4 July 2011), *Transitional Notes* (blog), online: <<http://blogs.law.nyu.edu/transnational/2011/07/third-parties-in-international-commercial-arbitration>>.

In some ways, this appears to be the direction in which some of the arbitration institutions are seeking to move towards with their liberal joinder rules. For instance, Article 4(2) of the Swiss Rules provides that:

Where one or more third persons request to participate in arbitral proceedings already pending under these Rules or where a party to pending arbitral proceedings under these Rules requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances.

Similar provisions can be found in the HKIAC Rules.⁶⁴ In light of these developments, how should Singapore and the arbitration community react to stay arbitration-friendly?

It would not be necessary or appropriate, for the present purposes, to try and ascertain what the right answer might be; indeed, there might not be one that would be universally acceptable. Nevertheless, when considering the extent to which joinder of a non-signatory should be allowed, one should bear in mind that “[l]ike consummated romance, arbitration rests on consent”.⁶⁵ The fact that consent is treated as a *necessary* requirement for joinder (like in the SIAC Rules) should not be misconceived as taking a step back from the pro-arbitration stance. If at all, this would cohere more closely with the foundational principles of arbitration. As the Court of Appeal in *Astro* pointed out, the power to join non-parties at any stage without the consent of the existing parties and at the expense of confidentiality of proceedings is “such utter anathema to the internal logic of consensual arbitration”.⁶⁶ In other words, a joinder that is not based on any form of consent may be conceptually flawed, even though what would suffice as “consent” is a separate question.

On a more practical note, there is also something to be said against the use of excessively liberal joinder rules. It might, for instance, create problems at the enforcement stage if the enforcement court considers that the joinder was improper (e.g., no agreement to arbitrate or dispute not contemplated within terms of submission to arbitration).⁶⁷ The *Astro* decision is a clear example.

While it would appear at first blush that taking a liberal stance in relation to the joinder rules would be more “pro-arbitration”, given that it would allow more complex disputes involving multiple parties to be resolved by arbitration, it is not necessarily true. A joinder of a non-signatory to an arbitration without the consent of the parties (leaving aside the definition of consent which is a problem on its own)⁶⁸ could possibly ride roughshod over the intentions of the parties. Take *Astro* for example – why should the appellant be compelled to arbitrate with the sixth to eighth respondents when it had never agreed to do so? Businessmen would have good reason to opt-out from such liberal joinder rules, for they can never know when an arbitration agreement might

64 HKIAC Rules, *supra* note 59.

65 William W Park, “Non-Signatories and International Contracts: An Arbitrator’s Dilemma” in Belinda Macmahon, ed, *Multiple Party Actions in International Arbitration: Consent, Procedure and Enforcement* (Oxford University Press, 2009) at 3.

66 *Astro*, *supra* note 42 at para 197; see also paras 177, 184, 186, 188.

67 See e.g. *Astro*, *supra* note 42. See also *Titan Unity II*, *supra* note 43 at para 23.

68 See generally Park, *supra* note 65.

be used as a Trojan Horse to launch a surprise attack on them. It might possibly open them to arbitration with an “indeterminate class of potential disputants” which might have little, if at all, to do with the existing arbitration proceedings.⁶⁹ It would not be incredible to suggest, in the event that liberal joinder rules become the norm, that businessmen would have to seriously reconsider the utility of arbitration as a means of dispute resolution. This does not mean, however, that arbitration can never be used in a dispute involving multiple parties; it simply means that consent of parties should remain at the heart of arbitration. Ultimately, it must be acknowledged that arbitration, being essentially a dispute resolution mechanism based on the *consent* of parties, does have its limits. If the developments in international commerce are such that a consensual model of dispute resolution like arbitration may not be as effective or suitable in every case, then maybe it is time to realise that arbitration is not the one and only mode of dispute resolution available.

III. AN ALTERNATIVE: SINGAPORE INTERNATIONAL COMMERCIAL COURT

The issues of non-arbitrability and joinder of non-signatories are not unique to Singapore, and they raise critical questions regarding the nature of arbitration and the future of dispute resolution. It is apparent from the discussion above that the limitations of arbitration, including non-arbitrability and multi-party arbitration, arise out of the fact that arbitration is essentially based on the consent of parties. Some have tried to overcome these limitations – Patten LJ in *Fulham* suggested that an arbitrator may canvass the views of non-parties to an arbitration if the remedy is one that might affect them,⁷⁰ while the Swiss Rules allow arbitral tribunals to join non-signatories to an arbitration without the consent of parties.⁷¹ As mentioned earlier, it has also been suggested that arbitration must evolve to keep up with the new developments in international commerce.⁷² But can arbitration ever evolve beyond consent and confidentiality? It bears recalling that these are the same principles which confer on arbitration much of its advantages over litigation.

One way to think about it might be to acknowledge that there are certain limits that are inherent to arbitration, and accept that there are some matters which are better dealt with by the courts (e.g., multi-party disputes and non-arbitrable matters).⁷³ This idea has led to an interesting development in Singapore – the setting up of the Singapore International Commercial Court (SICC). The two drivers for the SICC were first, the massive growth of commercial disputes in Asia, and second, the need for another mode of dispute resolution that avoids some of the issues faced by arbitration. These two drivers were probably the main impetus for thinking about an international commercial court as another mode of dispute resolution, much like the English Commercial Court and similar courts elsewhere.

One of the main problems with multi-party and multi-contract arbitration is the risk of parallel proceedings, where more than one set of proceedings are commenced involving the same or related or contractually upstream or downstream parties and/or the same or closely

69 See *Astro*, *supra* note 42 at para 179.

70 *Fulham*, *supra* note 34 at para 82.

71 Swiss Rules, *supra* note 58.

72 Stavros, *supra* note 63.

73 Singapore International Commercial Court Committee, *Report of the Singapore International Commercial Court Committee* (Singapore: Singapore International Court, 2013) at para 16 [SICCC].

related issues. Leaving aside the question of time and costs, there is the real risk that the arbitral tribunals may come to inconsistent findings. This is vividly illustrated in the case of *Abu Dhabi Gas Liquefaction Co Ltd v Eastern Bechtel Corporation*.⁷⁴ The plaintiff, the owner of a liquefied natural gas plant, commenced arbitration proceedings in England against the main contractor for defects in one of the tanks that they had constructed. The main contractor denied liability and alleged that any defects in the tank would have been the fault of the sub-contractor. As such, the main contractor started separate arbitration proceedings against the sub-contractor. At the heart of the dispute was the cause of cracks that developed in the tank. Were the cracks due to design errors, construction errors, foundation issues (settlement due to the sandy nature of the ground upon which these large tanks were built), or a combination of one or more of these causes? It is not far-fetched in such a situation to think that two arbitral tribunals may arrive at two very different conclusions. A practical solution, as Lord Denning MR astutely noted in that case, was for the parties to agree to have the same arbitral tribunal hear both arbitrations.⁷⁵ However, this might run into issues of confidentiality in importing some evidence or knowledge gained in one arbitration into the second arbitration.⁷⁶ It is for this reason, amongst others, that many construction cases in England turn to their Technology and Construction Courts to resolve their disputes. The parties would, it seems, prefer to forego their arbitration agreements so that all relevant upstream and downstream parties can be brought before the same judge who would then decide on all the disputes. In most cases, the procedural rules in arbitration, like joinder and consolidation, do not adequately resolve the problems given that they are invariably limited by the consent of parties. Unlike arbitration, the SICC as a High Court⁷⁷ may join third parties to the proceedings with or without the third parties' consent.⁷⁸ If the third party consents, then there is no problem.⁷⁹ For the other cases, the SICC Rules will specifically provide that the court shall have the power to allow *any* third party to be joined in the proceedings, irrespective of whether the third party is a party to the SICC agreement.⁸⁰ The non-consenting third party may be brought into the jurisdiction of the SICC either by service of the writ in Singapore or out of the jurisdiction in accordance with existing civil procedure.⁸¹

Apart from the issue of multi-party and multi-contract arbitration, the SICC would also be capable of resolving certain non-arbitrable matters, including special torts arising from contract, and international intellectual property or trust disputes.⁸²

74 *Abu Dhabi Gas Liquefaction Co Ltd v Eastern Bechtel Corporation and another*, [1982] 2 Lloyd's Rep 425 [*Eastern Bechtel*].

75 *Ibid* at 427.

76 See e.g. *London & Leeds Estates Ltd v Paribas Ltd (No.2)*, [1995] 1 EGLR 102.

77 SICC, *supra* note 73 at paras 4(b), 17.

78 *Ibid* at para 22.

79 *Ibid* at para 23.

80 *Ibid* at para 24.

81 *Ibid* at para 25, citing the *Supreme Court of Judicature Act* (Cap 322, 1985 Rev Ed), s 16 and *Rules of Court* (Cap 322, R 5, 2006 Rev Ed), Order 11, r 1.

82 *Ibid* at para 16.

For some matters, the SICC might be a better option. But for many others, arbitration would still remain the ideal forum for dispute resolution – as its advantages make it deservedly so. While the Singapore judiciary would, wherever possible, prefer an arbitration-friendly approach, it certainly does not necessarily mean that it should ignore the limits of arbitration as a dispute resolution mechanism.

IV. CONCLUSION

There is no doubt that international arbitration will face many challenges in its maturity. Nevertheless, the needs of its end-users must always be kept firmly in mind. Periodic reviews must be undertaken and changes and improvements in international arbitration are essential. It behoves the stakeholders to do so and attend to these issues and concerns sooner rather than later.

The Singapore courts do not, in their desire to respect party autonomy and remain supportive of arbitration, ignore the limits of arbitration as a dispute resolution mechanism. This is apparent in the decisions like *Astro* and *Larsen Oil*. Instead, the Singapore courts would try to ensure that the arbitral process stays true to its promise of being a *consensual* dispute resolution tool that businesses remain familiar and comfortable with.