IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 06

Civil Appeal No 49 of 2017

Between

Harish Salve

… *Appellant*

And

BPW

… *Respondent*

In the Matter of HC/Originating Summons
No 1115 of 2016

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

Between

Harish Salve

… *Applicant*

And

Law Society of Singapore

… *Defendant*

Civil Appeal No 50 of 2017

Between

Harish Salve

… *Appellant*

And

BPW

… *Respondent*

In the Matter of HC/Originating Summons
No 1114 of 2016

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

Between

Harish Salve

… *Applicant*

And

Law Society of Singapore

… *Defendant*

GROUNDS OF DECISION

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

Re Harish Salve and another appeal

[2018] SGCA 06

Court of Appeal — Civil Appeal Nos 49 and 50 of 2017
Sundaresh Menon CJ, Judith Prakash JA and Tay Yong Kwang JA
16 and 23 October 2017

25 January 2018

Judith Prakash JA (delivering the grounds of decision of the court):

Introduction

1 The appellant, Mr Harish Salve, who holds the appointment of Senior Advocate in India, applied in Originating Summonses No 1114 and 1115 of 2016 ("OS 1114" and "OS 1115") for *ad hoc* admission as an advocate. The purpose of admission was for the applicant to argue issues of Indian law (and only such issues, while local counsel would argue the other issues) in applications to set aside a final award in an ICC arbitration ("the Award") and to resist the enforcement of the Award in Singapore.

2 The appellant's applications for admission were dismissed by the High Court judge ("the Judge"), whose decision can be found at *Re Harish Salve* [2017] SGHC 28 ("the Judgment"). The appellant appealed. After careful consideration of the arguments made by the parties, the Law Society of Singapore and the Attorney-General, we allowed the appeals. We gave brief reasons for our decision at the time and now set out the full grounds.

Background facts

3 On 11 June 2008, the respondent, [BPW], entered into a share purchase and share subscription agreement ("the Agreement") with certain shareholders ("the Sellers") of [P] Limited ("the Company") to purchase their controlling stake in the Company. The Agreement is governed by Indian law and contains an ICC arbitration clause designating Singapore as the place of arbitration. On 12 November 2012, the respondent commenced arbitration proceedings against the Sellers pursuant to the arbitration clause in the Agreement ("the Arbitration Agreement"). The crux of the respondent's claim was that during the negotiations leading to the Agreement, the Sellers had fraudulently misled them and concealed facts concerning certain investigations that the United States Department of Justice and the United States Food and Drug Administration had commenced against the Company. The respondent claimed that such non-disclosure constituted fraud under the Indian Contract Act 1872 (Act No 9 of 1872) ("Indian Contract Act"). It also sought monetary damages pursuant to s 19 of the Indian Contract Act, to put it in the same position as if the representations made had been true. The Sellers contested their liability for fraud. They also objected to the computation, scope, and measure of damages which the respondent claimed pursuant to the Indian Contract Act.

4 The Award was delivered on 29 April 2016 by the majority of the three-member arbitral tribunal ("the Tribunal") who found in favour of the respondent. The third arbitrator issued a dissenting award. Thereafter, the respondent started enforcement proceedings in India. The appellant was appointed lead counsel by some of the Sellers to assist them in resisting the Indian enforcement proceedings.

5 Around the same time, by way of Originating Summons No 490 of 2016 ("OS 490"), the respondent also sought to enforce the Award in Singapore. Leave to enforce the Award against the Sellers in Singapore was granted on 18 May 2016 ("the Leave Order").

6 The Sellers responded by taking out applications in OS 490 to set aside the Leave Order, and filing Originating Summonses 784 and 787 of 2016 against the respondent to set aside the Award (collectively, "the Singapore Proceedings"). It will be noted that the Sellers filed two separate applications in the Singapore Proceedings and, correspondingly, two separate applications for the *ad hoc* admission of the appellant in OS 1114 and OS 1115. This is because the Sellers comprise two groups. The first group comprises 15 adult and corporate sellers ("the Adult Sellers"). The second group comprises five minor sellers ("the Minor Sellers"). The two groups raised different arguments in their applications, and these differences are elaborated on below at [11]. Before delving into the Sellers' arguments, we note material aspects of the Award.

7 By the Award, the majority held that the Sellers were liable for fraudulently misrepresenting or concealing from the respondent the genesis, nature, and severity of the Company's regulatory problems. It is the majority's computation of damages, however, that forms the focus of the Singapore Proceedings. The Award recorded that it was "not disputed" that the measure of damages recoverable under s 19 of the Indian Contract Act would be similar to that recoverable for fraudulent misrepresentation under general tort principles. In this regard, the Award cited the Gujarat High Court decision in *R C Thakkar v Gujarat Housing Board* AIR 1973 Guj 34 ("*R C Thakkar* High Court Decision") and the English House of Lords decision in *Smith New Court Securities Ltd v Citibank N A* [1997] AC 254 ("*Smith New Court*"). Therefore, by the Award, damages were granted in order to put the respondent back in the

monetary position it would have been in had the wrong not been committed (*ie*, pre-acquisition of the Company's shares). Because the Arbitration Agreement provides that the arbitrators "shall not award punitive, exemplary, multiple or consequential damages", the Award benchmarked the sum awarded against alternative quantum calculations.

8 The dissenting arbitrator was of the view that if a contract was obtained by fraudulent misrepresentation, the innocent party had to elect to either rescind the contract under s 19 of the Indian Contract Act or insist that it be specifically performed so as to put that party in the position in which it would have been if the representation made had been true. Because the respondent did not exercise its option to rescind the contract on the ground of fraud, it could not claim damages under s 19 of the Indian Contract Act (*ie*, it had waived its right to damages for misrepresentation).

9 As noted, the appellant's admission was sought solely so that he might address difficult and novel Indian law issues inherent in the Singapore Proceedings. Therefore, not all the grounds which the Sellers have raised in their attempts to set aside the Award were relevant for our consideration of the appeals. In our view, the relevant grounds fell into two broad categories:

(a) First, that the Tribunal exceeded its jurisdiction because the Award contained decisions on matters beyond the scope of submission ("the Jurisdictional Challenge").

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

10 The main thrust of the Jurisdictional Challenge was that the majority exceeded the Tribunal's jurisdiction by assessing and awarding damages in a manner contrary to the Arbitration Agreement (see above at [7]).

11 The Adult Sellers and the Minor Sellers raised different arguments in their Public Policy Challenge. The former argued that the majority's reliance on the *R C Thakkar* High Court Decision, which has been overruled by the Indian Supreme Court in *R C Thakkar v Gujarat Housing Board* Civil Appeal No 2652 of 1972 ("*R C Thakkar* Supreme Court Decision"), violated Indian public policy. This in turn would violate Singapore's public policy. The Minor Sellers argued that the Award violated the public policy of Singapore because, by finding the Sellers jointly and severally liable for the full sum of damages, the majority of the Tribunal had imposed grossly disproportionate liability for damages on the Minor Sellers, and had failed to protect their welfare and best interests.

The statutory regime

12 The provision governing *ad hoc* admissions in Singapore is s 15 of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("the Act"). In order for foreign counsel to be admitted, the following requirements stipulated under s 15(1) must be satisfied:

> **Ad hoc admissions**
>
> 15.—(1) Notwithstanding anything to the contrary in this Act, the court may, for the purpose of any one case, admit to practise as an advocate and solicitor any person who —
>
> (a) holds —
>
> (i) Her Majesty's Patent as Queen's Counsel; or
>
> (ii) any appointment of equivalent distinction of any jurisdiction;

> (b) does not ordinarily reside in Singapore or Malaysia, but has come or intends to come to Singapore for the purpose of appearing in the case; and
>
> (c) has special qualifications or experience for the purpose of the case.

13 If the mandatory requirements in s 15(1) are satisfied, the court goes on to decide whether to exercise its discretion to admit the applicant, having regard to the matters specified in para 3 of the Legal Profession (Ad Hoc Admissions) Notification 2012 (S 132/2012) ("Notification Matters"):

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

The decision below

14 The Judge dismissed the appellant's applications for admission. He began his analysis by identifying the specific Indian law issues that arose in the Singapore Proceedings. He classified the disputed issues in the Adult Sellers' applications as "the Damages Issues" and framed them in the following manner (at [20] of the Judgment):

> (a) What is the measure of damages permissible under s 19 of the Indian Contract Act? In particular, can a party who has elected to affirm

the contract be awarded damages that put it back in the position it would have been in if the misrepresentation had not been made?

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

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

15 The Judge classified the issues in the applications made by the Minor Sellers as "the Minors' Issues" and framed them as follows (at [28] of the Judgment):

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

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

(c) Whether the Minor Sellers' liability under the Award is disproportionate to their interests under the Agreement and therefore offends Indian public policy.

According to the Judge, the essence of the Damages Issues concerned the appropriate measure of damages for misrepresentation under the Indian Contract Act while the essential feature of the Minors' Issues was that they engaged Indian law and public policy on the protection of minors.

16 Since it was undisputed that the appellant satisfied the two formal requirements under ss 15(1)(*a*) and 15(1)(*b*) of the Act, the Judgment centred on s 15(1)(*c*), which required the appellant to possess special qualifications or experience relevant to the *specific* issues which arise in the case at hand. The Judge held that the appellant had failed to show that apart from his general expertise in Indian law, he had the requisite "special qualifications or experience" for the purposes of the specific issues in this case (at [43] of the Judgment).

17 In so finding, the Judge observed that the appellant's affidavits contained largely general averments that the appellant was an expert in Indian law and, at best, commercial and contractual disputes. Little attempt was made to draw a link between the cases previously conducted by the appellant and the Indian law issues arising in the case at hand (at [46] of the Judgment). However, he noted that the appellant had emphasised two of his specific qualifications: First, the appellant's past experience as counsel before the Supreme Court of India in the *R C Thakkar* Supreme Court Decision, which was said to be relevant to the Damages Issue. Secondly, the appellant's role as lead counsel for certain Sellers in parallel enforcement proceedings against the respondent in India.

18 With respect to the first of the appellant's specific qualifications, the Judge found that there was no material on the face of the *R C Thakkar* Supreme Court Decision to support a finding that the appellant had any special expertise regarding the appropriate measure of damages for fraudulent misrepresentation in India. The *R C Thakkar* Supreme Court Decision contained no discussion whatsoever on the appropriate award of damages for fraudulent misrepresentation. The appellant's involvement in that decision therefore did not demonstrate that he had previously argued this specific issue. Since the appellant, as counsel, would not be able to supplement the Supreme Court of

India's grounds extra-judicially beyond the face of the order (*ie*, the *R C Thakkar* Supreme Court Decision), the appellant's understanding of the genesis of the order was of limited utility (at [48]–[49] of the Judgment).

19 With respect to the second of the appellant's specific qualifications, the Judge was of the view that the appellant's familiarity with his clients' case did not qualify as "special qualifications or experience" within s 15(1)(*c*) of the Act. The Sellers had instructed local Senior Counsel who would have as thorough an understanding of the events and factual nuances as the appellant did in relation to the enforcement proceedings in India (at [50] of the Judgment).

20 With respect to the Minors' Issues, the Judge was of the view that the appellant's position was even weaker. It was conceded that no Senior Advocate in India has had specific experience dealing with the Minors' Issues. The appellant therefore would not be of greater assistance than the equally distinguished Indian law experts who had submitted reports to assist the court in ascertaining the preferred position under Indian law (at [51] of the Judgment).

21 With regard to the argument that the appellant was formerly the Solicitor General of India and would therefore be familiar with Indian public policy, the Judge held that the appellant's general familiarity with Indian public policy did not satisfy the requirement of "special qualifications or experience" for the purposes of the specific issues in the Singapore Proceedings (at [52] of the Judgment).

22 The Judge's finding in relation to s 15(1)(*c*) of the Act meant that the question of the court's discretion to admit the appellant having regard to the Notification Matters was, strictly speaking, not engaged. Nevertheless, the Judge was of the view that there were important observations to be made about

how these matters would be considered in cases concerning *ad hoc* admission for the sole purpose of enabling foreign counsel to argue disputed issues of foreign law. He therefore proceeded to discuss the Notification Matters.

23 In relation to the role of foreign counsel in proving foreign law, the Judge observed that where foreign law has to be proved as a fact, the court has always handled this evidential inquiry by way of foreign law experts rather than submissions by foreign counsel (at [59] of the Judgment). He opined that it would set an undesirable precedent to allow foreign counsel to be admitted to argue cases when foreign law is to be proved (at [59]–[60] of the Judgment).

24 In relation to the first of the Notification Matters, namely the nature of factual and legal issues in the present case, the Judge observed that the Indian law issues arose in the Singapore Proceedings as matters of fact to be presented by evidence. Therefore, the question was whether the *evidence* on Indian law was so exceptionally complex, convoluted or esoteric as to require *Indian* counsel (instead of local counsel) to make submissions with reference to the expert reports (at [66] of the Judgment).

25 The Judge considered that the experts' divergence in views did not in itself demonstrate complexity or novelty. In relation to the Damages Issues, the position appeared to turn on how several cases should be reconciled with the Indian Contract Act and how the doctrine of precedent operated in India. Testing the soundness of the experts' views on these matters did not seem particularly complex, since only a relatively limited pool of material was involved. As for the Minors' Issues, the difficulty appeared to be an absence of clear authority in India. Nevertheless, it was rightfully within the legal experts' roles to predict the likely decision of the Indian courts in those circumstances. As long as these views were backed by objectively verifiable reasons, it was not unduly complex

to make submissions on the state of the expert evidence (at [67] of the Judgment). The Judge found that the expert evidence tendered was indeed well supported by objective material, which would give the court an objective basis on which to ascertain the content of foreign law (at [70] of the Judgment). Admitting the appellant so that he could (a) inform the court of the contents of Indian law; (b) explain what status the Indian authorities have; or (c) predict how Indian courts are likely to rule on the unsettled Minors' Issues, would cause him to inappropriately perform the role of a legal expert from the bar (at [69] of the Judgment).

26 In relation to the second and third Notification Matters, the Judge observed that the lack of local lawyers with expertise in Indian law was precisely why foreign legal experts were called to give an opinion. It was not, however, a reason for the admission of Indian counsel. Since Indian law was to be proved by evidence and not by submissions, the relevant experience and expertise needed were those of evaluating the competing expert evidence and making submissions with the assistance of expert reports. There was no need for counsel to have subject matter knowledge of Indian law for this purpose (at [74] of the Judgment).

27 Finally, the Judge considered whether the fourth of the Notification Matters, namely that of reasonableness, justified the admission of the appellant. In this regard, the Attorney-General submitted that admitting the appellant was reasonable in view of the policy of promoting Singapore as a venue for international arbitration. The Judge held that where necessity was not otherwise established under the other Notification Matters, the promotion of Singapore as a venue for international arbitration should not be a dominant or "governing" reason for admitting foreign counsel (at [76] of the Judgment).

28 For these reasons, the Judge dismissed the appellant's applications.

Our decision

29 As set out at [12]–[13] above, the analysis when considering the admission of a foreign counsel to practise in any particular case under s 15 of the Act, proceeds in two stages. At the first stage, the court has to consider whether the foreign counsel meets the mandatory requirements set out in s 15(1). If he or she does, then the court has a discretion to admit the applicant and moves on to the second stage where it considers whether the Notification Matters issued under s 15(6A) of the Act weigh in favour of or against the admission. The court also reminds itself that foreign senior counsel should only be admitted on the basis of need and that this, not desirability or convenience, is the touchstone.

30 The court must also be mindful that a decision on the admission of foreign counsel is one that calls for the exercise of judicial discretion, and an appellate court ought not to interfere with the exercise of a judge's discretion simply because its members consider that they would, if themselves sitting at first instance, have reached a different conclusion. Interference is only warranted on three grounds: (a) where the judge misdirected himself with regard to the principles in accordance with which the discretion is to be exercised; (b) where the judge, in exercising his discretion, took into account matters which he ought not to have, or failed to take into account matters which he ought to have; or (c) where his decision is plainly wrong. These principles on appellate intervention are not to be applied in an unduly technical manner. Instead, the court would assess the judge's decision in the round, having regard to the broad principles in accordance with which the discretion is to be exercised (see *Re Beloff Michael Jacob QC* [2014] 3 SLR 424 ("*Re Beloff*") at [21]–[23]).

The mandatory requirements

31 Turning to the first stage of the analysis, in the present case, it was common ground that the appellant met the mandatory requirements in s 15(1)(*a*) and (*b*) of the Act. The question was whether he satisfied the third requirement which was that he should have "special qualifications or experience for the purpose of the case". Determining this question called for a consideration of the issues in the case. In relation to the Singapore Proceedings all parties agreed that the relevant issues were the Damages Issues and the Minors' Issues.

32 For ease of reference, we again reproduce the Judge's manner of framing the issues. The Judge framed the Damages Issues as being:

> (a) What is the measure of damages permissible under s 19 of the Indian Contract Act? In particular, can a party who has elected to affirm the contract be awarded damages that would put it back in the position it would have been in if the misrepresentation had not been made?
>
> (b) The status of the authorities of *Smith New Court* and the *R C Thakkar* High Court Decision in Indian contract law; and
>
> (c) What constitutes consequential damages under the Indian Contract Act?

33 The appellant argued that the above formulation of the issues was too narrow. In court, his counsel endeavoured to persuade us that the appellant need only have expertise and experience in the area of law relevant to the issues to be decided. Counsel suggested that it would be sufficient if the appellant had expertise in Indian contract law on the basis that, because this law is codified, expertise in the Indian Contract Act would be a specialised rather than general expertise. We did not accept this argument and considered that a formulation

that refers to expertise in "Indian contract law" would be too wide and general to help the court ascertain whether the applicant indeed had the expertise necessary to assist the court on the issues to be decided. In *Re Beloff*, we gave the following guidance on how one should characterise the issues for the purposes of an application under s 15(1) (at [68]):

> … In general, the issue should be framed at a level where it is sufficiently general so that the formulation remains neutral and does not in and of itself suggest the answer to the ultimate question presented to the court. At the same time, it should be sufficiently particular so that the utility of framing the issues is not lost in vague generalisations.

34 During oral argument, we put it to counsel that an appropriate framing of the issue would be something along the lines of "what are the damages available for fraudulent misrepresentation under Indian contract law and in what circumstances can such damages be awarded?" We noted that in the Skeletal Arguments for CA 49, the appellant contended that the Damages Issues should have been framed as:

> (a) What damages should be awarded for fraudulent misrepresentation under Indian law? and
>
> (b) What constitutes consequential damages under Indian law?

In our view, the above formulations were appropriate for the Damages Issues under Indian law.

35 We had also to consider how the Minors' Issues should be formulated. As noted above at [15], the Judge formulated them as follows:

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

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

(c) Whether the Minor Sellers' liability under the Award is disproportionate to their interests under the Agreement and therefore offends Indian public policy.

36 These formulations were also criticised by the appellant as being too narrow. We did not accept that criticism in relation to issue (a) above as that was a general question regarding the law of India on the protection and welfare of minors. If there was any difficulty at all with the width of the formulation, it was in fact too general. We agreed, however, that the phraseology of the other two issues rendered them too specific and that they should be discarded. The appellant argued in CA 49 that the Minors' Issues should be re-formulated into a single Minor's Issue: "what constitutes the law and public policy of India in relation to minors". We considered that re-formulation to be too general to be helpful, although we agreed that there was indeed only one Minor's Issue. Accordingly, we framed the Minors' Issue as follows: "What constitutes the law and public policy of India in relation to the contractual capacity of minors and their liability for contracts made on their behalf?"

37 Having framed the issues, we turned to consider the appellant's expertise and experience in dealing with such issues. In this regard, we considered that the Judge's focus on rather narrow issues also led him to assess the appellant's expertise in an unduly restrictive fashion. He observed that the appellant had not made arguments in any court on the specific issue of the appropriate measure of damages for misrepresentation in India (see above at [18]). We agreed with

counsel's observation that if any applicant for admission had to demonstrate previous experience with the actual issue under consideration before the Singapore court, it would be practically impossible for such an application to succeed. As long as an applicant's curriculum vitae ("CV") demonstrates that he has wide as well as deep expertise and experience in the area of law with which the court will be concerned, it should not matter that he has not previously dealt with the particular issue in dispute. If it were otherwise, no application under s 15 of the Act would succeed in a case where the Singapore court is faced with a truly novel point of law not argued or dealt with before in any jurisdiction, because no one would have had any experience in respect of that issue.

38 In the present case, the appellant's CV showed that he had proficiency and experience in arbitration and commercial disputes, in particular in matters concerning contractual disputes. He has been described as a star individual in the field of dispute resolution and is regarded in India as an authority in the fields of commercial, contractual, arbitration and tax law. Having said that, we agreed with the Judge that in the court below there was not much substantiation of those various assertions in the CV (see above at [17]). Realising this deficiency, before us counsel belatedly produced a bundle of documents containing case authorities in which the appellant was involved and which evidenced his experience in commercial and contractual disputes in India. We were, therefore, in a better position than the Judge to assess the appellant's expertise and experience.

39 We also noted that the appellant was the counsel who appeared before the Supreme Court of India to challenge the *R C Thakkar* High Court Decision. That case also concerned s 19 of the Indian Contract Act which falls to be considered in the substantive litigation here. While the Indian Supreme Court did not refer to that provision in the *R C Thakkar* Supreme Court Decision, we

accepted counsel's submission that the appellant would have had to make arguments on the whole range of issues before the Indian Supreme Court when he appeared. It would have been helpful, however, had counsel adduced those submissions in support of the appellant's application for admission. We also found it relevant that the appellant represented the parties here in their challenge of the Award in India.

40 In relation to the Minors' Issue, as we have pointed out, this is a question involving Indian contract law. Our earlier observations relating to the appellant's expertise in commercial and contractual disputes at [38] above are equally applicable to this issue. The Minors' Issue also involves Indian public policy and we accepted that, as Solicitor-General of India for three years, the appellant would have had considerable experience in Indian public policy as well as broad experience in Indian law.

41 Having considered the evidence and the submissions, we concluded that the appellant possessed "special qualifications or experience" for the purpose of the Singapore Proceedings. He therefore met the three mandatory requirements in s 15(1) of the Act.

The Notification Matters

42 We then turned to the Notification Matters. As noted in *Re Beloff* (at [59], there is often a degree of overlap among the Notification Matters and they must therefore be considered holistically rather than as a check list of discrete requirements. This is reflected in the fourth Notification Matter which lays down the ultimate question for the court, which is, whether in the light of all the circumstances of the case, including the mandatory considerations as well as the three other listed Notification Matters, it is reasonable, in the sense that

there is good and sufficient reason, to admit the foreign senior counsel for the purpose of the case in question (*Re Beloff* at [64]). Thus, there is no requirement to establish absolute necessity in respect of such admission.

43 In this instance, we considered that the Notification Matters needed to be examined in the light of the unique challenges presented by cases where *ad hoc* admission is sought solely for foreign counsel to argue disputed issues of foreign law. As the Judge recognised, there are important observations to be made in this regard.

44 We were mindful that the issues of Indian law and policy arising in the Singapore Proceedings had been addressed by two Indian law experts on each side who had filed substantial opinions and supporting documents. We were also mindful that the parties whom the appellant would represent in the Singapore Proceedings were also represented by Singapore Senior Counsel. In light of these facts, our main concern was as to the role that the appellant would play. Would he be counsel or would he be giving evidence on Indian law and policy from the bar? The latter role would not promote the purpose of the admission and would be unfair to the other party.

45 There were, however, other considerations. Ordinarily, foreign law is an issue of fact which must be proved in our courts either by directly adducing raw sources of foreign law as evidence or adducing the opinion of an expert in foreign law (*Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [54]). When faced with two foreign law experts proffering contradictory views, the usual method of testing evidence by cross-examination and forensic nit-picking may lead to more confusion for the judge doing his best to grasp foreign concepts. The domestic regime may be contrasted with proceedings in the Singapore International Commercial Court ("SICC"),

where parties may apply for questions of foreign law to be determined on the basis of submissions instead of proof (see O 110 r 25(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC")), and foreign counsel may be registered for the purposes of making such submissions (see O 110 r 28(2)(*e*) of the ROC and s 36P(2)(*c*) of the Act). The different treatment accorded to issues of foreign law in the SICC is a recognition that such issues deal with a special category of "facts", the understanding of which may be greatly helped when they are presented in a holistic manner by counsel who can apply techniques of legal reasoning in their submissions and analysis.

46 Counsel for the appellant submitted that the appellant would not be seeking to *prove* Indian law by his submissions. Instead, as an advocate familiar with Indian law, he would be arguing issues of that law and making submissions on the evidence led on Indian law both by way of the expert opinions and by way of any primary documents of Indian law, *eg*, statutes and case authorities, that were adduced in court. It would be wrong, counsel argued, to conflate submissions on Indian law with giving evidence on the same. Where foreign law is concerned it would assist the court to admit foreign counsel who are familiar with that law to argue issues of that law (for example how an Indian statute might be read) instead of relying on Singapore counsel who would naturally be less familiar with the law in question and limited in their ability to deal with questions that might arise. In our view, whilst this argument certainly made sense, when foreign law has to be proved as a matter of fact there will often be a fine line between making submissions and giving evidence. On the other hand, opposing counsel should be able to draw any crossing of that line to the court's attention.

47 Bearing the above in mind, we concluded that the circumstances of this case, to use the formulation in *Re Beloff* (at [64]), made it "reasonable, in the

sense that there is good and sufficient reason", to admit the appellant for the purpose of the Singapore Proceedings. Our conclusion was based on the following factors set out below.

48 First, in relation to the first Notification Matter, which was "directed at a qualitative evaluation of the character of the issues in the case for the purpose of determining whether the admission of foreign counsel is called for" (*Re Beloff* at [61]), we observed that the centrality of Indian law and policy to the Singapore Proceedings was accepted by all the parties who took care to provide opinions of Indian law experts of a very high calibre. The experts referred to numerous pieces of legislation and case authorities to bolster their opinions. This, together with the fact that the Award is a split decision with the majority and minority coming to different conclusions on the issues of Indian law and policy, also indicated that the Singapore Proceedings involve complex and unsettled issues which do not admit of easy resolution by reference to a particular statutory provision or case authority.

49 We then turned to the second and third Notification Matters, which concern whether the services of a foreign senior counsel were necessary and whether local counsel has the appropriate expertise to argue the case. In our view, given our findings on the complexity of the Indian law issues, the court hearing the Singapore Proceedings would definitely be more assisted by Indian counsel than by local counsel. An Indian lawyer with years of experience in the relevant law and policy in a wide variety of cases would naturally be of greater assistance than local counsel, who would have to bone up on the issues for the particular case and would not have the same breadth of background. We are all familiar with the different ways in which legal arguments can be put and with the differing levels of sophistication in the explication of the law which are seen when counsel is an expert in the field as compared with counsel who, while

competent in other areas, has had to master a new area specifically for the case at hand. With due respect to the senior counsel engaged for the Singapore Proceedings, this was a paradigm example of such a situation.

50 Another factor relevant to the consideration of the second and third Notification Matters was that the Singapore Proceedings arose out of an international arbitration in which the governing law was foreign law but the seat was Singapore. Where the foreign law involved is complex, it would aid the Singapore court in exercising its supervisory powers, especially in relation to questions of excess of jurisdiction as are involved here, to have the most complete possible picture of the foreign law and policy and how they operate in the jurisdiction they spring from. Having said that, we should also state that we agreed with the Judge in considering that the promotion of Singapore as a venue for international arbitration cannot be a significant factor in applications for *ad hoc* admissions. The emphasis in such applications must always be on what will assist the court rather than on achieving external and unrelated ambitions.

51 Finally, we turned to the fourth Notification Matter concerning the reasonableness of admitting the applicant. In this regard we considered it relevant to take into account that in 2012, s 15(1) of the Act was amended to allow for the admission of any senior foreign counsel of any jurisdiction who holds appointment of equivalent distinction to the appointment of Queen's Counsel in the United Kingdom. Previously, only Queen's Counsel in the United Kingdom could be admitted under the *ad hoc* admission regime. This broadening of the pool of qualified lawyers implied that Parliament recognised that in the right circumstances, our courts could be aided by the expertise of lawyers who practised in any foreign jurisdiction whether or not that jurisdiction applied English law.

52 Indeed, during the parliamentary debates leading to the amendment of the Act in 2012, the Minister for Law, Mr K Shanmugam ("the Law Minister"), identified "giving flexibility to clients" as one of the purposes of the amendment. Using Australia as an example, the Law Minister observed that "Australia has its own Senior Counsel scheme and, in some areas, their expertise might well be more relevant in Singapore" (see *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88). This recognition may have been spurred by the growth of the international arbitration industry in Singapore, and the corresponding increase in arbitration proceedings that are governed by foreign law or involve it to an important degree. In litigation that arises out of such arbitration proceedings (such as the present case), admitting foreign counsel will be consistent with Parliament's intention in amending the Act. This is not to say that in every case involving arbitration proceedings governed by foreign law, foreign counsel will be admitted or will be required to assist the court. There is no such general rule. It is all a question of what the court needs to assist it in achieving a correct and just result in the case before it, as we noted in [50] above. The main matters that would be relevant for the court are:

(a) whether foreign law is central to the issue in dispute;

(b) whether the experts on foreign law are diametrically opposed or opposed to a significant degree;

(c) whether there are adequate independent written materials to help the court find its way through the issues of foreign law;

(d) whether the issues of foreign law go towards the jurisdiction of the tribunal; and

(e) whether the court may have to come to a view on foreign law in an uncertain situation.

53 In the circumstances of the Singapore Proceedings, we were satisfied that the need for the assistance of qualified Indian counsel had been amply demonstrated.

Conclusion

54 For the foregoing reasons, we allowed the appeals and directed that parties were to furnish written submissions as to the appropriate order on costs for the appeal and the proceedings below within four weeks of the hearing. The parties have since reached an agreement on costs.

Sundaresh Menon	Judith Prakash	Tay Yong Kwang
Chief Justice	Judge of Appeal	Judge of Appeal

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