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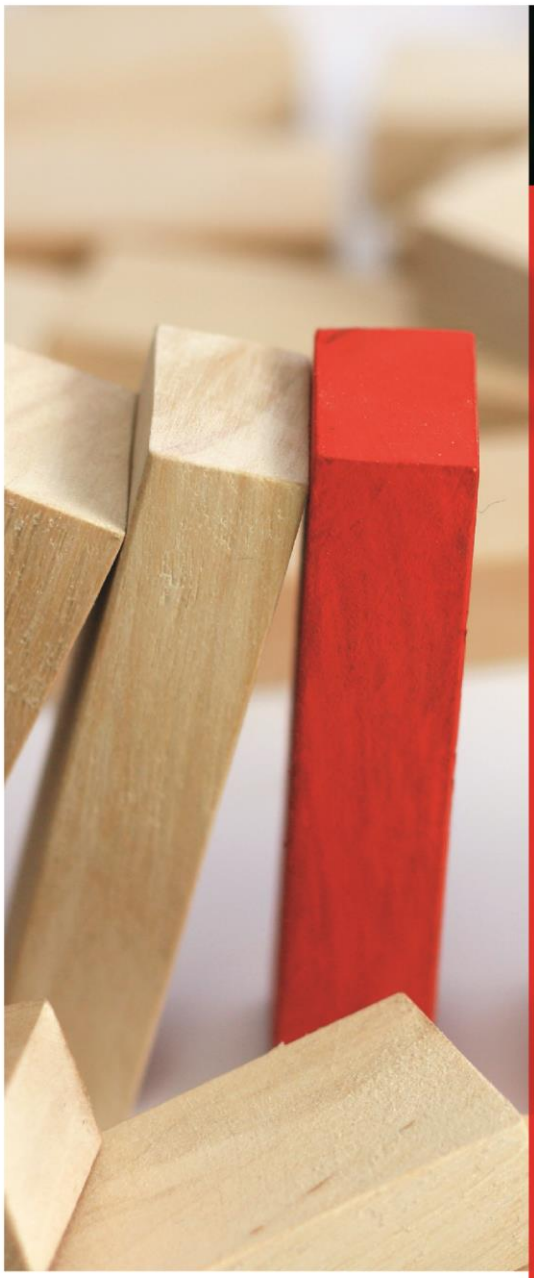

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AD HOC ADMISSION OF FOREIGN COUNSEL IN INTERNATIONAL ARBITRATION-RELATED JUDICIAL PROCEEDINGS

SINGAPORE HIGH COURT JUDGMENT OF 2 AUGUST 2016

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CASE INFORMATION

Court: Singapore High Court
Case no.: SGHC 172, Original Summons no. 643 of 2016
Judge: Steven Chong
Summary:[1]

Pursuant to the Legal Profession Act ("LPA") of Singapore, a British Queens' Counsel filed an ad hoc application to be admitted before the Singapore High Court and appear in judicial proceedings regarding the setting aside of an arbitral award.

The applicant, the Kingdom of Lesotho, argued that the British QC fulfilled all requirements provided in Article 15 of the LPA, including relevant and specialized expertise in the area of public international law and investment arbitration (namely, regarding the concept of "international investment", relevant to the underlying analysis of the award to be set aside). Likewise, the four elements established in the Legal Profession (Ad Hoc Admission) Notification 2012 were also met: complex topics with precedential value were to be discussed (e.g., the extent of a Member State's liability for acts undertaken by international organisations), the Singaporean pool of local counsel lacked advocates with equivalent experience, and the appearance of this lead counsel was considered reasonable and fair.

The defendants, Mr Josias Van Zyl, the Josias Van Zyl Family Trust and the Burmilla Trust (investors allegedly expropriated by the applicant) replied that the barrister in question did not, in fact, have any experience related to the law they deemed applicable, the International Arbitration Act ("IAA"), that it would be unreasonable to admit him taking into account that the legal issue at hand could be resolved through the application of principles of interpretation regarding commonly addressed treaties and respective case law, and also that the applicant had failed to demonstrate that it had undertaken reasonable efforts to find available local counsel.

After considering the stance of the Law Society of Singapore (that sided with the defendants) and of the Attorney-General (that, conversely, sided with the applicant), the judge decided in favour of the Kingdom of Lesotho, transitorily admitting the barrister's participation before the High Court of Singapore, in regard to the specific case mentioned.

The court concluded that, in light of Article 15 of the LPA, the applicant-counsel held the necessary qualifications and experience to aid both its client and the court regarding the requested annulment of the arbitral award, also because it considered that at the centre of the dispute were issues of public international law and Investor-State arbitration, including the concept of "international investment". Accordingly, the court concluded that this QC had indeed regularly explored this topic in previous cases. Furthermore, the court highlighted that these topics had been object of a dissenting opinion by one of the arbitrators in the underlying arbitration award (in crisis).

Following the summarized analysis, the judge moved on to the elements established in the Legal Profession (Ad Hoc Admission) Notification 2012, and decided that the same conclusion was due considering the potential precedential value, with significant public (and international) impact, of an eventual setting aside decision. Lastly, as local counsel had no expertise regarding the legal topics at hand, the judge considered the presence of the British QC as "necessary", more so than "convenient".

This decision constitutes the second recorded acceptance of a foreign counsel ad hoc admission application since the LPA's newest amendment in 2012, and the first decision addressing international arbitration.

[1] Award available at: https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/os-643-of-2016---re-samuel-sherratt-wordsworth-qc-(amd-v2-for-release)-(27-09-16)-pdf.

CASE NOTE

1. INTRODUCTION

The Singapore High Court Judgment of 2 August 2016, under analysis here, decided in favour of a request for the ad hoc admission of foreign counsel in the judicial actions seeking the setting aside of an arbitral award.

The fact that Singapore is the seat of numerous arbitrations, under the auspices of the International Court of Arbitration of the International Chamber of Commerce (ICC) and of the Singapore International Arbitration Centre (SIAC), among others, in addition to the circumstance that it is a small city-state which thus has a limited number of practicing lawyers, has prompted several requests for ad hoc admission of foreign counsel in arbitration-related proceedings. These applications have a special framework, provided for by this Asian city-state's legislation.

These two favourable aspects – the positive outcome of this application and the affirmation of Singapore as an Asian arbitral hub – are not a coincidence. The possibility of admitting foreign lawyers to appear before Singaporean courts from time to time is seen as a step towards the development of this arbitration location. By allowing the parties to international arbitration proceedings to be represented in any proceedings that may be brought to set aside the respective arbitral award by the same counsel that represented them during those arbitral proceedings, this regime generates a stable environment that supports choosing Singapore as the seat for international arbitrations.

This decision is also extremely interesting because it is of an exceptional nature, even in Singapore – there are more refused applications than approved ones, and it is not sufficient for their success that the legal proceedings be related to international arbitration, as will be explained further in this case note.

But if today this ad hoc admission of foreign counsel is extraordinary, in Singapore as is in the rest of the world, this decision, allowing the admission of a foreign lawyer before the Singaporean courts, raises questions about the future of international legal practice. In a globalised world, in which a growing number of companies do business in an international market, the many barriers raised will become, sooner or later, with more or less ease, obstacles to easily overcome.

2. THE ARBITRATION

In the arbitral award under analysis, a British *Queen's Counsel* ("QC")[2] applied to be admitted, under Singapore's *Legal Profession Act* ("LPA"), to represent the Kingdom of Lesotho in its application to set aside an arbitral award at the Singapore High Court.[3]

The decision subject to the setting aside proceedings was a final arbitral award, deciding both on merits and jurisdiction, dated 18 April 2016. It was the outcome of an arbitration seated in Singapore that took place under the UNCITRAL Arbitration Rules. The said British QC was lead counsel in these arbitral proceedings.

The underlying dispute related to the concession of mining leases in five areas of Lesotho in 1988, to Swissborough Diamond Mines (Pty) Limited (company registered under the laws of Lesotho, the shares of which were owned by Mr Josias Van Zyl and the Josias Van Zyl Family Trust and Burmilla Trust, all established under the laws of South Africa). Between 1989 and 1990, this company entered into licensing agreements with other five companies (also registered under the laws of Lesotho) assigning them the rights to each of the five areas covered by the mining leases. These companies were Matsoku Diamonds (Pty) Limited, Motete Diamonds (Pty) Limited, Orange Diamonds (Pty) Limited, Patiseng Diamonds (Pty) Ltd, and Rampai Diamonds (Pty) Limited.

Sometime in the middle of 1991, disputes emerged over the validity of the mining leases and the Kingdom of Lesotho took measures reporting to cancel them. In reaction to this alleged expropriation, the six companies (the licensee and the five assignees of the mining leases) commenced proceedings in the Lesotho High Court to recover damages. However, in separate parallel proceedings, the same Court held that the lease and the respective licencing agreements were void *ab initio*, a decision that was upheld on appeal in 6 October 2000.

Regardless of this adverse decision, the allegedly expropriated companies tried their luck with the *Southern African Development Community* ("**SADC**"). This is an international organisation of 15 members, established by the Windhoek Treaty, signed on 17 August 1992 and in effect since 1 September

[2] Samuel Sherratt Wordsworth QC.

[3] On 14 August 2017, the judge Kannan Ramesh of the Singapore High Court anulled the mentioned arbitral award. This was the first time na investment arbitration award was set aside in Singapore on the basis of jurisdiction and merits – see *Josias Van Zyl v Lesotho* [2017] SGHC 104, Decision of 14 August 2017.

1993.[4] The main objectives of the SADC are to promote development, peace, security, and economic growth, to alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa, building it based on democratic principles and equitable and sustainable development. Alongside its several decision-making institutions (among which we highlight the Summit of Heads or State or Governments, or "**SADC Summit**") and executive institutions, the SADC Treaty provides for a community tribunal that ensures adherence to and proper interpretation of its provisions and subsidiary instruments ("**SADC Tribunal**"). It was established by the Protocol on the Tribunal, which was signed in Windhoek (Namibia), on 7 August 2000, and has been in effect since 14 August 2001.[5]

The companies in question issued proceedings against the Kingdom of Lesotho on 12 June 2009, claiming compensation for the alleged expropriation by Lesotho of the mining leases, on grounds that this country had breached a number of provisions of the SADC Treaty as well as other obligations provided for under international law. These proceedings were however suspended when the SADC Summit unanimously decided not to renew the terms of office of five judges of the SADC Tribunal, whose terms would expire in October 2010 (at the initiative of the Republic of Zimbabwe, in reaction to an unrelated case, *Mike Campbell (Pvt) Ltd* v Zimbabwe, was decided against Zimbabwe by this Tribunal).[6] The SADC Tribunal thus ceased to function, and was dissolved in August 2012.[7]

Shortly afterwards, on 20 June 2012, the companies attempted to take yet another measure to resolve the dispute within the SADC – arbitration. Their request for arbitration was admitted under Article 28 of Annex I to the SADC Investment Protocol. This Article provides that all disputes emerging after the entry into force of the Protocol (16 April 2010) between an investor and a State Party, concerning an obligation of the latter in relation to an admitted investment of the former, which has not been amicably settled, and after exhausting local remedies, will be submitted to international arbitration.[8]

In the first phase of proceedings, the companies asked the tribunal to recognise that it had jurisdiction and to declare that Lesotho had violated its obligations under the SADC Tribunal Protocol, the SADC Protocol on Finance and Investment and the SADC Treaty, and also that it award such relief and compensation to the defendants as could have been granted by the SADC Tribunal (already dissolved at that time). The companies also requested that upon conclusion of the second phase of proceedings, the Kingdom of Lesotho be ordered to pay compensation in similar terms as could have been granted by the SADC Tribunal, along with its costs.

The hearing took place in Singapore during the year of 2015, and on 18 April 2016 the arbitral award was rendered.

In this award, the tribunal found it had jurisdiction only to hear and resolve the claims of the shareholders of the first company (Swissborough Diamond Mines (Pty) Limited), i.e., Mr Josias Van Zyl, and the two funds Josias Van Zyl Family Trust and Burmilla Trust, but not the claims made by the licensee and assignee companies. The arbitral tribunal held that in light of the SADC Protocol on Finance and Investment,[9] the applicable law in that case, only these shareholders were considered "*investors*", as only they fulfilled the legally established requirements, and therefore only they could be parties to arbitration.[10]

This is because the "*investment*" in question comprised the shares owned in the licensee and assignee companies, the mining leases and the rights arising thereunder, in addition to the money, effort and resources expended to pursue the exploitation of the mining leases in Lesotho. The tribunal considered the investment was pursued by the shareholders even if indirectly through the licensee and assignee companies. The tribunal also held that, because the right to bring a claim arising from an investment was a necessary and integral part of the concept of

[4] The SADC was preceded by the *Southern African Development Coordinating Conference* (SADCC), established on 1 April 1980. At its origin were concerns to reduce the dependence of its Member States on South Africa, which, at that time was still under the Apartheid system, and to promote an integrated regional development. Its Member States are Angola, Botswana, Democratic Republic of Congo, Kingdom of Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia e Zimbabwe. For more official information see: http://www.sadc.int/member-states/ .

[5] The SADC Treaty provides in its Article 9 for the creation of a Tribunal to judge all cases that may be submitted to it under the Treaty. The SADC Tribunal Protocol establishes the composition, powers, jurisdiction and procedures for the SADC Tribunal. Available at: http://www.sadc.int/ .

[6] For official information by the SADC see: http://www.sadc.int/about-sadc/sadc-institutions/tribun/ . In this action, the SADC Tribunal concluded that the government of Zimbabwe had breached provisions of the SADC Treaty when denying access to courts to white farmers, and by performing acts of racial discrimination against them, whose lands were confiscated in the process of an agricultural reform in the country.

[7] The SADC Summit adopted a new protocol governing the functioning of the SADC Tribunal on 19 August 2014. However, it has not yet come into force.

[8] Article 28 of Annex I of the SADC Protocol on Finance and Investment, signed in Masedu on 18 August 2006. Available at: http://www.sadc.int/ . With the most recent amendment of this annex, dated 17 May 2017, this article has disappeared.

[9] According to Article 1(2) of the SADC Protocol on Finance and Investment and Article 1(2) of the Annex to the Protocol. This last section defines investment as "*the purchase, acquisition or establishment of productive and portfolio investment assets, and in particular, though not exclusively, includes: (a) movable and immovable property and any other property rights such as mortgages, liens or pledges; (b) shares, stocks and debentures of companies or interest in the property of such companies; (c) claims to money or to any performance under contract having a financial value, and loans; (d) copyrights, know-how (goodwill) and industrial property rights such as patents for inventions, trademarks, industrial designs and trade names; (e) rights conferred by law or under contract, including licences to search for, cultivate, extract or exploit natural resources*". The same section also defines investor as "*a person that has been admitted to make or has made an investment*".

[10] However, this tribunal issued an interpretation award on 27 June 2016 adding that the licensee and assignee companies were not prevented from applying to participate in the subsequent arbitration proceedings.

"*investment*" to be protected under international law, the shareholders' investment remained alive, even if it had allegedly ended by the termination of the mining leases. The tribunal further observed that the investment arising out of the mining leases had been "admitted" by the Kingdom of Lesotho, based on its conduct, as it had demonstrated acceptance of the investment in its territory over the years.

The arbitral tribunal also found that the Kingdom of Lesotho had violated its obligations under the SADC Treaty, Tribunal Protocol and Protocol on Finance and Investment towards the investors. Specifically, the Kingdom of Lesotho had interfered with the secondary right granted to investors, under their investment, to litigate in the SADC Tribunal, and thus, demarcated the shuttering of the SADC Tribunal as the dispute to be decided.

Although this shuttering of the SADC Tribunal was the result of an act of an international organisation - the SADC -, the tribunal found that the Kingdom of Lesotho had contributed in part to the breach the investors' rights.

As a consequence, the arbitral tribunal decided it had jurisdiction to determine the violation of the SADC Treaty and Protocols, as the violation had occurred when the SADC Protocol on Finance and Investment was already in force (the Protocol came into force in April 2010 and the shuttering of the SADC Tribunal took place in August 2012). Conversely, the arbitral tribunal decided it did not have jurisdiction to decide on the merits (the alleged expropriation) as it pertained to a time (1991) prior to the SADC Protocol on Finance and Investment taking effect. On this topic, the arbitral tribunal added that the parties should begin new arbitral proceedings.[11]

The arbitral award was not reached unanimously. One of the arbitrators issued a dissenting opinion, in which he rejected the re-characterisation of the relevant dispute as the shuttering of the SADC Tribunal.[12] In his view, the object of the dispute could be no other than the expropriation of the mining leases, an issue that the companies themselves admitted was not within the scope of Article 28(1) of Annex I of the SADC Protocol on Finance and Investment. Consequently, this arbitrator considered that the arbitral tribunal lacked jurisdiction to decide on any of the licensee and assignee companies' claims, as the true dispute at stake – expropriation of the mining leases – had occurred before the SADC Protocol on Finance and Investment entered into force. This in itself was a breach of the Vienna Convention of the Law of Treaties.[13] The arbitrator added that the shuttering of the SADC Tribunal had no connection to the investment made by the companies, and thus did not amount to a violation of any obligation imposed on the Kingdom of Lesotho by the SADC. The shuttering related solely to the legality of a political decision of the SADC Summit that did not renew the terms of office of the respective judges – a decision the arbitral tribunal lacked jurisdiction to explore. He further added that the companies had not exhausted local remedies in Lesotho prior to filing the arbitration claim, as the SADC Protocol on Finance and Investment required.

The Kingdom of Lesotho sought an application to set aside this arbitral award in the courts of Singapore, on the basis that the tribunal did not have jurisdiction to hear the dispute, in light of the International Arbitration Act ("**IAA**")[14] and the UNCITRAL Model Law on International Commercial Arbitration.[15]

3. THE AD HOC APPLICATION OF THE FOREIGN COUNSEL TO PARTICIPATE IN THE SETTING ASIDE PROCEEDINGS

It was in these setting aside proceedings filed in the courts of Singapore that the British QC, lead counsel in the arbitral proceedings, applied for an ad hoc appearance to represent the Kingdom of Lesotho.

In order to better understand the decision at hand, it is necessary to briefly introduce the legal framework of the problem, according to the law of Singapore.

The Legal Profession Act,[16] which regulates the exercise of the legal profession in Singapore, provides the following requirements for admission of advocates and solicitors: to be over 21 years old, to be of good character,[17] to have undertaken a six-month pupillage, to have attended courses and to have passed the examinations prescribed by the Singapore's Board of Legal Education, and to have petitioned the court to be admitted as an advocate or solicitor.[18] As this is a *common law* jurisdiction, the courts are the entities that permit lawyers to practice before them, and enrolment in the respective professional association (*Singapore Bar*) is merely a consequence of meeting the LPA's requirements.

[11] This new arbitral tribunal – currently seated in the Mauritius and with proceedings pending - would then hear the claims the shareholders at previously made before the SADC Tribunal. The arbitral tribunal concluded that it could not order the reestablishment of the SADC Tribunal, as it was not an enforceable measure under the local courts of the Kingdom of Lesotho.

[12] This arbitrator was the South-African Petrus Nienaber, appointed by the Kingdom of Lesotho. The other arbitrators were Doak Bishop and David A. R. Williams QC (president).

[13] Available at: https://treaties.un.org/.

[14] Article 10(3) of IAA. Available at: http://statutes.agc.gov.sg/.

[15] Article 3(1) of IAA, read together with Article 34(2(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration.

[16] As amended in 2012. Available at: http://statutes.agc.gov.sg/.

[17] This requirement is assessed on the basis of two "*Certificates of Good Character*", drafted and signed by two people that swear to know the applicant, and inform the court since when and how they are acquainted, as well as provide situations whereby they could assess his or her character, respectability and adequacy to practice law in the jurisdiction of Singapore. To access a draft, see: https://www.mlaw.gov.sg/content/dam/minlaw/corp/LSRA/Miscellaneous/Sample%20of%20a%20Certificate%20of%20Good%20Character.pdf

[18] Articles 11 to 18 of the LPA.

The LPA also provides for the possibility of a lawyer qualified overseas to petition the courts to appear as foreign counsel and litigate on issues of foreign law, and in some circumstances also on issues of Singapore law.[19]

Since 1962,[20] the LPA has also made it possible for a lawyer who is not considered qualified and who is not registered as a foreign lawyer according to the LPA provisions mentioned in the previous paragraph to apply to the courts for an ad hoc admission to be allowed to appear before them in a specific case.

The relevant application, provided under Article 15 of the LPA, lists three cumulative elements:

(i) holding Her Majesty's Patent of "*Queen's Counsel*"[21] or any appointment of equivalent distinction of any jurisdiction;
(ii) not residing in Singapore or Malaysia, but with the intention of coming to Singapore for the purpose of appearing in the case;
(iii) having special qualifications or experience for the purpose of the case.

It is important to highlight that certain areas of law are excluded from the scope of the ad hoc admission regime, the so-called "*ring-fenced areas of law*", unless a justifiable reason is presented otherwise. These areas of law include, among others, constitutional law, public law, criminal law, property law, family law and succession law.

Article 15(6-A) of the LPA provides for the possibility of the **Chief Justice** to specify the criteria that the court may consider when deciding on admitting lawyers under this section. This was done with the issuance of the **Legal Profession (Ad Hoc Admission) Notification 2012**,[22] which specifies in its paragraph 3, four additional non-cumulative conditions for the courts to take into account:

(i) the nature of the factual and legal issues involved in the case;
(ii) the necessity for the services of foreign senior counsel;
(iii) the availability of Senior Counsel, [23] or another advocate or local solicitor with appropriate experience; and
(iv) having regard to the circumstances of the case, if it is reasonable to admit foreign senior counsel.

These legal requirements mean that, in a first phase, in order to admit a lawyer under this regime, the three mandatory requirements provided for in Article 15 of the LPA must be met. Only after this is confirmed, will the court, in a second phase, look into the four elements established in the Legal Profession (Ad Hoc Admission) Notification 2012.

In the judgment being analysed, the court remarked that this method was applied in the case *Re Beloff*, [24] where it was emphasised that the "*necessity*" of the intervention of foreign legal counsel should be the guiding principle of the court. Thus, this "*necessity*" also arises from the angle of reasonableness of admitting foreign counsel. The court must consider each of the four elements of the Legal Profession (Ad Hoc Admission) Notification 2012 as signposts of reasonableness, without requiring their cumulative application, as the court may assess and weight each one differently. The concept of "*necessity*" must then be defined in light of the characteristics of the case and the availability and areas of expertise of the local professionals.

These provisions have already been in analysed in many judgments in Singaporean cases – we highlight the cases *Re Beloff* (already mentioned) and *Re Fordham*[25] – which explored the element of necessity regarding ad hoc admission of foreign counsel. We will refer to these cases later on.

4. THE PARTIES' ARGUMENTS

When called upon to comment on this application, the parties held diverging positions.

The **applicant**, the Kingdom of Lesotho, argued that the British QC satisfied the requirement in Article 15(1)(c) of the LPA, as he had practical expertise in public international law and investor-state arbitration. Particularly, the barrister in question had specialised knowledge of the issue regarding the concept of international "*investment*". Equally, the applicant stated that the four additional elements provided for in the Legal Profession (Ad Hoc Admission) Notification 2012 were met, as complex topics with precedential value were discussed, for example, the extent of a Member State's liability for acts undertaken by international

[19] Singapore has a specific regime to welcome lawyers qualified overseas, allowing their registration with the local courts as foreign counsel (which permits them to advise clients on matters of foreign law) and also the enrolment as foreign counsel able to practice in some areas of Singapore law, after completing an exam for this purpose. For more information, see: https://www.mlaw.gov.sg/.
[20] This was an amendment introduced in 1962 to the *Advocates and Solicitors Ordinance*, which regulated the legal profession at that time, through *Bill 174/1962*. Available at: http://statutes.agc.gov.sg/, and analysed in detail in *Re Geraldine Mary Andrews QC* [2012] SGHC 229, decision of 15 November 2012, § 21 and following.
[21] *Queen's Counsel*, as opposed to *junior counsel*, is an honorific title granted by the Crown to barristers, rewarding excellency as demonstrated before the higher courts to professionals of over 10 years of experience. This is an appointment that is autonomous from the *Bar Council* (entity that represents barristers; http://www.barcouncil.org.uk/) and from the *Law Society* (entity that represents solicitors; http://www.lawsociety.org.uk/). Very often these professionals are referred to as "*silks*", as their professional garment consists of a silk gown of a particular design. For more information, see: http://www.qcappointments.org/.
[22] Notification S 132/2012, effective 1 April 2012.
[23] In Singapore, Senior Counsel are lawyers with 10 years plus experience that obtain this title after being appointed for their experience and abilities. This title is the result of British influence, and is equated to that of *Queen's Counsel*, and does not have any equivalent in Portuguese.
[24] *Re Michael Jacob Beloff QC* [2014] SGCA 25, decision of 16 May 2014.
[25] *Re Michael Fordham QC* [2014] SGHC 223, decision of 5 November 2014.

organisations (with potential implications for rights and obligations of other sovereign States in the international environment) and a vast set of facts and legislation was taken into account. The lack of professionals in Singapore with comparable experience was notorious, and as such the Kingdom of Lesotho argued that it would be reasonable and fair to allow the intervention of its lead counsel.

The defendants, Mr Josias Van Zyl, the Josias Van Zyl Family Trust and the Burmilla Trust, counter-argued that the British QC in question had no expertise regarding the IAA, which the defendants deemed to be the applicable law for interpretation, and not the international law issues raised by the Kingdom of Lesotho. The defendants further argued that it would be unreasonable to admit the British QC as the allegations made by the Kingdom of Lesotho were not especially complex and the dispute could be resolved by applying well-established principles of treaty interpretation, investment treaty jurisprudence, and the decisions of the SADC Tribunal. Lastly, it was added that Lesotho had not taken reasonable steps to ascertain the availability of appropriate local counsel.

The professional entity representing advocates in Singapore – **Law Society of Singapore** – sided with the investors-defendants. It asserted that it would be unreasonable, and even dangerous, to admit the British QC solely on the basis that he had been lead counsel during the underlying arbitral proceedings. The Law Society considered that there was no evidence on how this foreign counsel's experience related to the specific issues surrounding the SADC Treaties. Further, it added that due credit had not been given to local counsel's availability, expertise and quality, reflecting poorly on the credibility of the local Bar.

Conversely, the **Attorney-General** supported the position of the state-applicant. He invoked the wider public interest in enhancing the attractiveness of Singapore as a venue for international arbitration, in addition to underlining the professional qualities of the British QC in question.

5. THE COURT'S JUDGMENT

As initially stated, the Court decided in favour of admitting the British QC to represent the Kingdom of Lesotho in the proceedings to set aside the arbitral award. Let us turn to the reasoning of the judgment on this application.

1. "Need" for foreign senior counsel

The judge started by setting forth the historical and systematic interpretations of the element of "necessity" of foreign senior counsel, as introduced by the 2012 amendment to the LPA.

Until then, the third cumulative condition provided for in the admissions regime demanded a demonstration that the case was of "*sufficient difficulty and complexity*", as opposed to the criteria of "*need*" presently required.

Following this, reflecting on various considerations of the *Re Beloff* judgment and on the logic underlying this admissions regime, the judge posited that the analysed "*need*" should not be considered solely within the prism of the parties, but in a broader manner aiming also to enlighten the court before which the case was presented.

This also explains that, in regard to the "*ring-fenced areas of law*" it was presumed that, as they were directly related with the local social norms and were the result of a common base of values, the court would be satisfied with the participation of local counsel. Conversely, the more esoteric and complex the *thema decidendum* was, the more relevant was the need to aid the court.
The court then proceeded to analyse the specific requirements provided in the LPA and the elements provided in the Legal Profession (Ad Hoc Admission) Notification 2012.

2. The legal issues at hand

As the two first conditions provided for in Article 15 of the LPA (holding Her Majesty's patent of "*Queen's Counsel*" and not residing in Singapore or Malaysia, but having the intention of coming into Singapore for the purpose of appearing in the case) were met, it was essentially relevant to evaluate whether the applicant counsel had special qualifications or experience for the purpose of the case and whether it was pertinent to consider the four additional elements within the discretion of the court.

Regarding the first requirement, the judge explained that an applicant must possess special qualifications or experience relevant to the specific issues that arise in the case at hand, and not just expertise in a generic practice area. Thus, the specific **issues to be decided** in any given case should first and foremost be clearly identified and characterised in the proceedings.

The judge considered that the issues to be decided in this case were intrinsically in the realm of public international law, as the arbitral tribunal's jurisdiction was grounded on Article 28(1) of Annex I of the SADC Finance and Investment Protocol. This position was in line with the applicant State's argument, as this was also the ground invoked by the Kingdom of Lesotho on which it based its request for assistance from counsel with experience in investor-state dispute resolution. The court rejected both the investors-defendants' attempt to characterize the issues as principally involving the interpretation of the IAA,

and the position of the Law Society that demanded foreign counsel to be an expert in SADC Treaty and Protocols issues.[26]

The judge concluded that it was necessary – and vital – to assess whether the tribunal was correct in interpreting the term "*investment*" as encompassing both the right to exploit the mining leases and the right to a remedy for interference with that underlying investment (a matter which was a point of departure between the majority of the tribunal and the dissenting arbitrator).[27]

3. Special qualifications and experience for the purpose of the case

Turning to the **qualifications and experience of foreign counsel**, the judge concluded that the British QC satisfied the legally imposed requirement. The applicant had accompanied and led the arbitral proceedings from beginning to end (an aspect that, considered in isolation, would not have been decisive, as the judge points out and as results from case *Re David*).[28] This barrister was frequently appointed as counsel both on behalf of States and investors before international tribunals, such as the International Court of Justice or the International Tribunal for the Law of the Sea. He was also a Visiting Professor teaching investment arbitration at Kings College, London. More importantly, the foreign counsel had already argued about the issue at the core of the present dispute - characterisation of an "*investment*" - in various previous cases. Therefore, the abovementioned qualifications and experience demonstrated that the counsel-applicant would be able to fulfil his duty of assistance both to the client and to the court in the setting aside proceedings, in line with the underlying aims of the ad hoc admission application regime.

4. The reasonableness of the admission

Finally, Judge Steven Chong scrutinised the four elements postulated in the Legal Profession (Ad Hoc Admission) Notification 2012.

Regarding the nature of the issues involved, it was necessary to determine if they were complex, difficult, novel, or of significant precedential value. In the opinion of the judge, because the setting aside procedure would primarily focus on legal issues (interpretation of the SADC Treaties and Protocols and the application of principles of public international law), more than on factual issues, and because the decision had potential precedential value with significant public (and international) impact, he concluded that the first element was met.

Regarding the necessity for foreign counsel and availability of local Senior Counsel, advocates or solicitors with appropriate expertise, concurring with the opinion of the Attorney-General, the judge considered these elements were met. The judge reiterated that it was only necessary to make a reasonably conscientious effort to secure the services of competent local counsel and that said effort was to be shown in court (according to case *Re Caplan*).[29] The defendants put forth the argument that the Kingdom of Lesotho was already adequately assisted by a large law firm, and that the proceedings would be based principally on written advocacy, rather than oral advocacy, which would make the intervention of foreign counsel unnecessary (for this purpose, it raised two prior judgments rendered by the same court). The judge however dismissed this argument and renewed his conclusion that any foreign counsel admitted before the courts under this regime, so long as all legally imposed conditions were met, would be able to appear before them without limitations, including any written or oral intervention in the proceedings.

Finally regarding the reasonableness element, the judge highlighted that (the very relevant) argument mentioned by the Attorney-General of the public interest in promoting Singapore as an attractive venue for arbitration could not distort the legal concept of "*necessity*".

Having considered all due requirements and elements, the judge finally admitted the British QC to represent the Kingdom of Lesotho in the setting aside proceedings pending before the courts of Singapore.

6. OTHER DECISIONS OF THE COURTS OF SINGAPORE ON AD HOC ADMISSION APPLICATIONS

[26] §§ 44 and 45 of the judgment under analysis, *Re Wordsworth Samuel Sherratt QC* [2016] SGHC 172, decision of 2 August 2016.

[27] In the judge's view, this issue would also raise three subsidiary questions of public international law for the court analysing the setting aside application to consider, which are: (i) whether there is retroactive application of the SADC Finance and Investment Protocol contrary to Article 28(4) of Annex 1 to the Protocol, (ii) the liability of Lesotho for the acts of the SADC Summit, and (iii) whether and how the requirement to exhaust local remedies can apply in the circumstances of the dispute (§43, *Re Wordsworth Samuel Sherratt QC* [2016] SGHC 172, decision of 2 August 2016).

[28] *Re Joseph David QC* [2012] 1 SLR 791, decision of 12 December 2011.

[29] In this case, the court established that full details of the efforts to secure local counsel had to be furnished in the affidavits supporting the application for ad hoc admission, including the nature of contacts between the party and local counsel, the form of contact, the dates and duration of any meetings and a summary of the discussions with local counsel. In addition, the date of local counsel's refusal to take up the case and the reasons given should also be specified. Thus, it would be insufficient for the applicant to simply assert before the court that it had considered the available local counsel to discharge it of its burden of proof. Only then could would the court be able to verify whether the legally imposed requirement of "*reasonably conscientious search for local counsel*" had been met. Curiously, in the case at hand, the judge admits that these formalities were omitted, but also admits the present case they would have been of little utility, as he was already cognisant of the lack of available local counsel in the field of public international law (§§63 and 64, *Re Wordsworth Samuel Sherratt QC* [2016] SGHC 172, decision of 2 August 2016).

It has already been stated that this decision was of an exceptional nature, not only because it applies a very narrow regime, but also because most applications made under it have been rejected. It is then critical to understand whether this decision represents a break from the previous case law or if it is part of the consolidation of an established trend.

Since the 2012 amendment to the LPA, only one ad hoc admission application had been allowed - *Re Andrews.* [30] Although it was not an international arbitration-related case, it was relevant insofar as it explained the new criteria set forth in the LPA, emphasising the joint comprehension of all the issues set forth by the new law and notification.

The judgment under analysis here was therefore the second decision accepting an ad hoc admission of foreign counsel since 2012, and the first addressing international arbitration.

The *Re Andrews* case related to a dispute regarding the enforcement of a settlement agreement and the ownership of shares in a company. During the proceedings, two previous procedural issues had been raised before higher courts, and were unsuccessful due to the insufficiently well-founded statement of claim that was drafted by various local counsel that the applicant had had during the proceedings. Faced with this situation, and in a case considered to be of manifest simplicity, the judge concluded that the applicant had lost confidence in the possibility of resorting to local counsel and that the participation of foreign senior counsel was necessary to fill in the gaps left in the applicant's statement of claim. The judge supported this decision on the need to allow the applicant to pursue its procedural rights in the most rapid and cost-effective way.[31]

In other known cases, the applications were rejected either because they pertained to areas of law where the LPA, in Article 15(2), did not encourage the intervention of foreign counsel (*Re Caplan*, *Re Lord Goldsmith,* [32] *Re Fordham*), or because they addressed solely local issues (*Re Rogers*), [33] or because representation by local counsel was deemed sufficient (*Re Beloff*).

More recently, and after the judgment under analysis here, a new decision issued by the Singapore High Court on 28 November 2016 concerning the ad hoc admission regime of Article 15 of the LPA rejected a British QC's appeal to participate in the setting aside proceedings of another arbitral award – *Re Landau.*[34]

In this case, the applicant QC asked to represent the company China Machine New Energy Corporation ("CMNC"), which he had also represented during the arbitral proceedings, ultimately unfavourable to this party. The Law Society of Singapore again sided with the defendants, Jaguar Energy Guatemala LLC and AEI Guatemala Jaguar Ltd, whereas CMNC had the support of Singapore's Attorney-General.

CMNC argued that the arbitral award should be set aside due to the breach of natural justice and/or rules of public order of Singapore. The High Court applied the criteria set out in the already extensively explained regime and, without a doubt, concluded that the application satisfied the three requirements set out in Article 15(1) of the LPA. Nevertheless, and unlike our case, the Higher Court, considering the four elements provided in the Legal Profession (Ad Hoc Admission) Notification 2012, held that because both local counsel and the Singaporean courts had experience in arguing and deciding the issues in question, there was no issue of special complexity justifying the admission of foreign counsel.

The divergence in this case pertains directly to the grounds invoked to set aside the arbitral award – the public order of Singapore – in fact considered a local issue, and not an international issue. The court did not hesitate to determine that it was not the presence of international arbitration per se, as a legal institute, that would prompt the ad hoc admission of foreign counsel, but instead the specific issues introduced as grounds to annul the arbitral award that would be the key consideration.

From a case law standpoint, we can conclude that the essential requirement of necessity is narrowly applied, which was the case in both *Re Andrews* and the judgment presently under scrutiny. We would say that these decisions, although appearing to be counter-current, are in line with the previous case law that strictly applies the ad hoc admission of foreign counsel in Singapore.

7. FOREIGN COUNSEL ADMISSION REGIMES AROUND THE WORLD

Before concluding, it seems important to grasp, on the one hand, the reasons for this specific legislation as it stands in Singapore, and on the other hand, regimes regarding this topic in other jurisdictions. The problem of appearance in court of foreign counsel is truly an international matter that will be affected by overseas trends.

1. Reasons in Singapore

The Singaporean system for the ad hoc admission of foreign counsel permits the harmonisation of several relevant interests relating to legal representation. If, on one side, it allows a swift

[30] *Re Geraldine Mary Andrews QC* [2012] SGHC 229, decision of 15 November 2012.
[31] *Id.* §§ 73 and following.
[32] *Re Jonathan Michael Caplan QC* [2013] SGHC 75, decision of 8 April 2013; *Re Lord Peter Henry Goldsmith PC QC* [2013] SGHC 181, decision of 19 September 2013. The latter mentioned case related to the appeal at the constitutional level of a criminal law rule in Singapore.
[33] *Re Heather Rogers QC* [2015] SGCH 174, decision of 8 July 2015.
[34] Toby Landau QC. *Re Toby Thomas Landau QC* [2016] SGHC 258, decision of 28 November 2016.

and adequate administration of justice, on the other side, it enforces the parties' choice of representation without neglecting the competence and experience of the local pool of counsel.[35]

On the one hand, the reasons behind the existence of this exceptionally natured regime of ad hoc admission of foreign counsel in cases related to commercial law issues, beyond the already implemented registration system, are understandable.

When the 2012 amendment of the LPA was discussed, the Singapore Parliament debated the need to multiply the offer of lawyers for some cases. Specifically, the Parliament addressed a recurring problem that appeared before parties to commercial disputes in Singapore when attempting to secure their court representation. Local counsel frequently rejected appointments by parties as they were mainly clustered in a few large firms in Singapore, and were thus prevented from acting against local banks or corporate clients (unable or unwilling to) due to potential conflicts of interest. [36] The Parliament posited that it was necessary to allow foreign counsel to fill in the gaps left by the lack of available Senior Counsel practicing in this city-state.

In this same parliamentary debate, the Minister for Law adopted the position that it would be necessary to broaden the scope of the concept of "*need*" mentioned in this discussion, allowing the courts discretion to admit foreign counsel also in complex civil matters, mentioning the issue of knowledge and experience of local professionals.[37]

As already mentioned in relation to rarely debated issues or issues that demanded great expertise, the intervention of a lawyer with renown competence in a specific matter may be crucial for a fair result of the dispute, which if not achieved could amount to denial of justice.

On the other hand, it seems the ad hoc admission applications regime provided in Article 15 of the LPA was implemented with great care.

As has been mentioned, the issues in which foreign counsel simply cannot intervene are numerous and broad, save if a special reason justifies otherwise. Furthermore, these admission requests in Singapore are rarely granted, as is evidenced by the fact that the second positive decision granted under this regime was only issued in 2016.

In addition, the requirements provide for criteria of rigorous understanding and application. In the *Re Beloff* case the Singapore High Court determined that the requirement of necessity was in itself a demanding requirement that did not overlap with the desire or convenience of choice by the parties. Thus, in this case, the court decided that the threshold of "need" would be met if the litigant seeking admission of foreign counsel would be prejudiced if the application were disallowed.

The 2012 parliamentary discussion mentioned above also pondered the interest of an equivalent representation of the parties. It was highlighted that the choice of a Queen's Counsel should not be dependent on the financial means of the parties, which could create unbalanced litigation positions, but rather the ad hoc admission of foreign counsel, not being a free for all, should be granted based on other relevant and fair considerations.[38] These thoughts are directly connected with the principle of equality of arms, and the courts have made it clear that its position was that if one party is represented by foreign counsel, the other need not be as well. However, it may apply to choose one if it so wishes.

2. Global Context

In the **global context**, as a rule, the admission of counsel before courts continues to be territorial, and also takes into account the interest of protection of the parties' legitimate expectations and the interests of proper administration of justice. Therefore, very few countries allow for ad hoc regimes similar to the one that exists in Singapore.

In the **European Union**, the consideration of the freedoms resulting from the single market and legislation protecting consumer rights and legitimate expectations, lead to the production of several relevant documents. Council Directive 77/249/EEC of 22 March 1977 sets out the regime for establishment of lawyers, in order to facilitate the effective exercise by lawyers of the freedom to provide services, and Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 intends to facilitate practice of the legal profession on a permanent basis in a Member State other than the one in which the qualification was obtained (enacted in Portugal in Law no. 9/2009 of 4 March, amended by Law no. 41/2012 of 28 August and Law no. 25/2014 of 2 May).

Upon looking into their content, one can conclude that a lawyer qualified in any European Union or European Economic Area jurisdiction is entitled to practice with the title obtained in the Member State from which he or she comes from.

English law establishes a similar regime to the Singaporean one named "*Temporary Call*", where foreign counsel may apply to appear before the courts of **England and Wales** through local

[35] Balance mentioned in § 66 of case *Re Geraldine Mary Andrews QC* [2012] SGHC 229, decision of 15 November 2012.
[36] § 35 of case *Re Wordsworth*.
[37] *Idem*.
[38] §§ 31 and 32 of case *Re Geraldine Mary Andrews QC* [2012] SGHC 229, decision of 15 November 2012.

counsel, in order to conduct a specific case. To do so, the applicant must produce evidence that the he or she appears frequently in courts of the jurisdiction of origin, evidence to establish good character and repute, evidence of all academic and professional qualifications, criminal record and any other documents considered to support the application.[39]

In tandem, we highlight that **Hong Kong** not only provides for a regime that allows registration of foreign counsel, but since 1999, also includes an ad hoc admission regime for foreign counsel (which, in practice, welcomes *Queen's Counsel*) not registered in this jurisdiction, through an application to the Hong Kong High Court. The local bar association also reviews these applications, but it is the court that ultimately decides if the legal requirements are satisfied (these are substantial experience in advocacy in a court, court's consideration that the applicant is a fit and proper person to be a barrister, and the acquisition of equivalent qualification).[40]

It is necessary to highlight that local case law stresses the importance of this regime, for reasons such as its inherent public interest, in search of a balance between the right of Hong Kong residents to select their counsel, the need for the continuing development of case law with the aid of the best professionals of *common law*, the continued effort to maintain its recognised quality and confidence, the need of the bar association to preserve its independence as an institution but also to allow proper training for younger lawyers.[41]

Likewise, **India** also offers a system known as the "***Fly-in, Fly-out***" that allows foreign counsel to participate in local court proceedings that involve law of other jurisdictions and international law. This country typically adopts a protectionist and limitative position regarding the admission of foreign counsel and does not allow their appearance in court or the rendering of legal advice, thus this relatively open system is still regarded with restraint.[42]

In other jurisdictions, the approach is often centred on the **local rules regarding admission to practice law** and on the possibility of allowing the registration of foreign counsel (without the ad hoc aspect, but with permanent effect). In this regard, the adopted solutions diverge.

For example, in the **United States of America**, each State regulates access to the legal profession differently and some States adopt a less rigid posture when it comes to registering lawyers that obtained their law training overseas and/or that have obtained their licence in a different State, demanding only that they take the respective bar exam.[43] Still, there is an application of exceptional nature named "*Pro hac vice*", where a lawyer from the State where the application is made may apply for the courts to allow the appearance of counsel that obtained their qualification in a different State, regarding a specific case and under its guidance.[44]

Japan allows the registration of counsel qualified abroad under the respective title, after evidence is provided that the lawyer has practiced at least three years in the jurisdiction where he or she qualified, and only when the applicant is a resident in Japan.[45]

Russia also provides for an enrolment regime for foreign counsel with the Ministry of Justice, so long as a request is filed with the immigration authorities. This enrolment only allows the successful applicants to provide legal advice and to appear before Russian courts when matters pertaining to the law of their jurisdiction arise, save for very exceptional cases.[46]

Other countries provide no solutions on this topic, omitting any possibility for registration for foreign professionals with the respective titles in their territory.

The **Peoples' Republic of China** imposes a similar regime, where, provided he or she works with a Chinese or foreign law

[39] In order to establish that a person is of good character and repute, the applicant must provide documents such as a Certificate of the Senior Judge, Attorney General or Senior Law Officer of the Superior Court in which the applicant has practised showing that: for a period of not less than three years he or she has regularly exercised rights of audience in that court (identifying the period(s) and he or she is a fit and proper person to be Called to the Bar. For more information, see: https://www.barstandardsboard.org.uk. All the mentioned information regarding different jurisdictions may be checked at the IBA page, where the *Cross Border Legal Services Report 2014* is available: http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Map.aspx.

[40] The legal base for this regime is section 27(4) of the Legal Practitioners Ordinance (Cap 159), available at: https://www.elegislation.gov.hk/.

[41] These criteria were developed on the basis of case *Re Flesch* QC [1999], 1 HKLRD 506), and others that followed. For a further analysis, see the guidelines of the *Hong Kong Bar Association* on this issue, available at: http://www.hkba.org/sites/default/files/2015%20Revised%20Practice%20Guidelines%20for%20Admission%20of%20Overseas%20Counsel%20dd%207%20July%202015.pdf

[42] This is the case since the *Chennai High Court* decision of 2012; for more information, see Brendan K. Smith, *Protecting the Home Turf: National Bar Associations and the Foreign Lawyer,* in Indiana Journal of Global Legal Studies, Vol. 21, Iss. 2, Article 11, 2014, p. 674, available at: http://www.repository.law.indiana.edu/ijgls/vol21/iss2/11/. Malaysia previously provided this limitation, but since 2013, the said rule has not applied to arbitrators and to counsel representing all parties in international arbitration proceedings (see the Kuala Lumpur's arbitration centre communication on this issue: https://klrca.org/announcements-announcements-details.php?id=132).

[43] Examples of States that allow law graduates from overseas to take their Bar Examination are New York, California, Alabama, New Hampshire and Virginia, see "*Comprehensive guide to Bar Admissions Requirements 2016*", National Conference of Bar Examiners and the American Bar Association, p. 12 and 13, available at: http://www.ncbex.org/pubs/bar-admissions-guide/2016/mobile/index.html#p=1.

[44] For more information, see: https://www.law.cornell.edu/wex/pro_hac_vice/; and also the American Bar Association's report on this topic, available at: https://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/report_201f.authcheckdam.pdf.

[45] See the webpage of the Japanese Bar association, available at: https://www.nichibenren.or.jp/en/.

[46] See the webpage of the Russian Federation Bar association, available at: http://www.en.fparf.ru/documents/test/21156/.

firm with duly authorised offices in China, a foreign lawyer may practice as a foreign law consultant. Only nationals may apply to take the national judicial exam that gives access to the full profession.[47]

In **Turkey** foreign counsel may not appear before local courts, as the applicable rules only allow these practitioners to provide legal advice regarding foreign and international law within certain investment partnerships.[48] Even though the bar associations of different countries assume different positions, the truth of the matter is that in general they tend to restrict access to the legal profession regarding foreign qualified counsel.[49] These protectionist regimes contrast with the current growing economic globalisation.

3. Portuguese Speaking Countries

In **Portugal**, a lawyer qualified in any European Union Member State, in line with the EU regime mentioned above, may only appear before Portuguese courts in representation of a client with the title obtained in the Member State from which he or she comes and under the supervision of a lawyer registered with the Portuguese Bar Association ("*Ordem dos Advogados")*. Alternatively, he or she may pursue this legal profession in Portugal under the title obtained in the Member State of origin, under an establishment regime, by means of a prior registration with the Portuguese Bar Association.[50] These rules also establish a reciprocity regime that allows Brazilian lawyers that studied in Portugal or Brazil to also enrol in the Portuguese Bar Association.[51]

The Portuguese law that regulates the acts that are to be exclusively performed by lawyers ("*Lei dos Atos Próprios dos Advogados*") provides that these acts encompass both the representation of clients before courts and the provision of legal advice. Additionally, the title "lawyer" is exclusively reserved for law graduates properly enrolled in the Portuguese Bar Association, as well as for all other professionals who, under the respective regulation, meet the conditions required to obtain it.[52]

As such, outside this reciprocity context and without the prior registration of lawyers that intend to appear before Portuguese courts, Portuguese law does not provide for an ad hoc admission regime for foreign counsel and, in this respect, it is similar to most other jurisdictions.

Much like the global analysis undertaken previously, Portuguese-speaking jurisdictions have more or less favourable stances on this matter.

Countries like **São Tomé and Principe** expressly provide for admission of foreign counsel in general. The Statutes of the Bar Association expressly allow both foreign counsel and people with a law degree obtained overseas in any of the member states of the Community of Portuguese Speaking Countries (CPLP) to register with the bar. The Statutes also cover people with a foreign law degree with residence in Guinea – always under a reciprocity regime.[53]

In its Bar Association Statues, **Guinea Bissau** also provides, under the condition of reciprocity, for the possibility of registration of foreign citizens when satisfying the requirements imposed on local professionals – law degree, enjoyment full civic rights and no criminal record.[54] Specifically, this institution entered into a Protocol with the Portuguese Bar that allows for the free temporary provision of services in both countries for counsel regularly registered in the respective bar associations. For this to happen, the applicant must notify the local bar of the type and nature of service he or she intends to provide and the identity of the lawyer in the receiving country that will ensure joint representation. In additions, regarding the permanent and effective registration of foreign lawyers, both bar associations reciprocally recognise the foreign lawyers' respective licences in Portugal and Guinea Bissau, pursuant to the terms of both bars' rules regarding the registration of foreign lawyers.[55]

Without allowing generic reception of foreign lawyers, **Cape Verde** still recognises Portuguese lawyers' qualifications, as the respective Bar Association signed a similar Protocol with the Portuguese Bar Association, providing for a similar regime to the one described above.[56]

East Timor's regime also provides for two alternate registration procedures, one for the occasional admission of foreign counsel, and one for the permanent registration of these professionals.

[47] For more information, see the page of the Chinese Ministry of Justice, available at: http://www.moj.gov.cn/.
[48] For more information, see the page of the Union of Turkish Bar Associations, available at: http://eski.barobirlik.org.tr/eng/.
[49] *Protecting the Home Turf*, pp. 681 e 682.
[50] Articles 203 to 207 of the Portuguese Bar Association Statute. Available at: www.oa.pt.
[51] Article 201 of the Portuguese Bar Association Statute.
[52] Law no. 49/2004, of 24 August, Articles 1 to 5, available at: www.dre.pt.
[53] Articles 125 and 126 of the Statutes of the São Tomé and Príncipe Bar Association, available at: http://www.oastp.st/pdf/estatutodaordemadvogadosdestp.pdf.
[54] Article 36 of the Guinea Bissau Bar Association Statutes, 7 November 1991, available at: http://www.guinebissau.oa.pt/estatuto.htm
[55] Second paragraph no. 2, tenth to thirteenth paragraphs of the Protocol between the Portuguese Bar Association and the Guinea Bissau Bar Association, 15 November 2011, available at: https://portal.oa.pt/advogados/protocolos-de-cooperacao-institucional/protocolo-entre-a-ordem-dos-advogados-e-a-ordem-dos-advogados-da-guine-bissau/.
[56] Second paragraph, no. 2, and eleventh to thirteenth paragraphs of the Protocol between the Portuguese Bar Association and the Cape Verde Bar Association, 25 October 2011, available at: Https://portal.oa.pt/advogados/protocolos-de-cooperacao-institucional/protocolo-entre-a-ordem-dos-advogados-e-a-ordem-dos-advogados-de-cabo-verde/.

Regarding the first procedure, the Legal Regime for Private Advocacy and Training of Lawyers provides that foreign counsel, not registered according to the regime provided therein and licenced overseas may represent a party in court in up to four cases a year. For that, counsel needs only to notify the relevant authority presiding over the case and the Lawyer Management and Supervisory Counsel that its client prefers to be represented or assisted by him or her.[57]

Regarding the second option, the possibility of registration for permanent representation, the Legal Regime for Private Advocacy and Training of Lawyers establishes several cumulative conditions: law degree, licence to practice overseas, knowledge of the local legal system and proficiency in either Portuguese or Tetum (both official languages of East Timor) (evidenced though a public exam, that may be waived if the applicant is a Timorese citizen licenced to practice overseas and with 3 years of experience practicing in East Timor), and prior practice of 5 years. After registration, the lawyer may only appear in court and provide legal services jointly with a local lawyer, and must set out legal fees also in agreement with this local lawyer.[58]

Other Portuguese-speaking countries stipulate similarly generally restrictive rules.

Brazil, where foreign counsel may only enrol as foreign law consultants with the Brazilian Bar Association ("*Ordem dos Advogados Brasileira*"), even though foreign law firms may open offices in the country.[59]

Angola is especially limitative and fails to provide any regime for receiving foreign professionals who, as such, may not perform any acts pertaining to the legal profession. Foreign citizens may enrol in the local bar association to undertake the relevant training procedures if they have previously studied law in an Angolan university. The Angolan Bar Association's regulations ("*Ordem dos Advogados Angolana*") also provide for the possibility of a foreign lawyer to enrol if he or she has resided in Angola for more than 15 years and the enrolment was concluded under the terms of the law previously in effect (which allowed enrolment of foreign counsel resident in Angola for over 15 years at the National Advocacy Bureau of the Angolan Ministry of Justice – "*Departamento Nacional de Advocacia do Ministério da Justiça de Angola*", prior to the creation of the Angolan Bar Association).[60]

In **Mozambique,** the applicable legislation provides for the possibility of foreign counsel enrolling in the Mozambican bar association through a bilateral agreement (celebrated with their bar of origin) or by sitting exams with this body. Foreign citizens with studies in Mozambican law may also apply to undertake the full local training.[61]

Finally, in the Special Administrative Region of **Macau**, where an ad hoc admission regime is also absent, a foreign lawyer, who is a law graduate from a university recognised in Macau, may however undergo an adaptation course, instead of completing a full traineeship, in order to register with the local Bar. Lawyers with relevant local legal experience may be exempted from taking in these exams, as may anyone that is not required to undertake a traineeship. [62] The Macau Lawyers Association had a Protocol in effect with the Portuguese Bar Association providing for the reciprocal recognition of counsel from both territories. However, this was revoked in 2013.[63]

In conclusion, Portuguese lawyers enjoy increased mobility, as most Portuguese-speaking countries recognise their qualifications and facilitate their appearance before local courts.

4.Foreign Counsel in International Arbitration Proceedings

With regard to intervention of foreign counsel in **international arbitration** proceedings seated in any given country, the outlook is the opposite. In this area of law, the grand majority of domestic arbitration legislation is open to party representation by counsel that is qualified in a jurisdiction other than the seat of the arbitration.[64] This is the case in Singapore,

[57] Article 68 of the Legal Regime for Private Advocacy and Training of Lawyers, Law no. 11/2008 of 30 July, available at: http://www.mj.gov.tl/jornal/public/docs/2015/serie_1/SERIE_I_NO_50.pdf. The Lawyer Management and Supervisory Counsel, according to the mentioned regime, regulates and supervises the exercise of the legal profession for lawyers in Timor until the creation of the Bar Association. The Statutes for this association have already been drafted as a bill, currently up for public consultation, according to the East Timor Ministry of Justice website - http://www.mj.gov.tl/?q=codigo_do_registo_civil-versao_para_consulta_publica.

[58] Articles 2, nos. 3 and 5 to 7 of the Legal Regime for Private Advocacy and Training of Lawyers.

[59] Note no. 91/2000, document issued by the Brazilian Bar Association (OAB), available at: http://www.oab.org.br/visualizador/17/estatuto-da-advocacia-e-da-oab.

[60] Article 98 of the Angolan Bar Association Statutes, and Law of Advocacy (Law no. 1/95 of 6 January), available at: http://www.oaang.org/.

[61] Article 150 of the Mozambican Bar Association Statutes, available at: http://www.oam.org.mz/. In 2009 this institution signed a Protocol with the Portuguese Bar Association that does not establish the possibility of enrolment of foreign counsel. This is relevant as the previous Cooperation Protocol concluded between these institutions related to the provision of services and enrolment of lawyers of 1996 did provide for that possibility, which, as of now, conflicts with with the Statute of this institution. These protocols are available at: http://www.oa.pt/.

[62] These are law professors teaching in Macau for over 2 years with a Master's degree or higher, and former magistrates – judges and prosecutors, or notaries working in Macau for over 2 years. See the Rules on Access to Advocacy of the Macau Lawyers Association, Articles 1, 4, 16 and 23, available at: http://aam.org.mo/wp-content/uploads/2016/10/Regulamento_Acesso_Advocacia_PT.pdf.

[63] See previous Protocols here: http://www.oa.pt/Conteudos/Artigos/detalhe_artigo.aspx?idc=1&idsc=31158&ida=108980 and http://www.oa.pt/Conteudos/Artigos/detalhe_artigo.aspx?idsc=31158&ida=15483.

[64] As Gary Born mentions in *International Commercial Arbitration*, 2nd edition, Kluwer Law International, The Hague, 2014, p. 2839.

the United Kingdom, Hong Kong, the United States of America, Japan, Russia, Brazil, China, India, Turkey and others. In the European Union, countries such as Germany, Austria, the Netherlands, Spain, Belgium, France, Switzerland and Sweden adopt a similar approach.[65]

However, in some countries like Turkey or Thailand, arbitration relating to purely domestic legal issues is reserved for local professionals.[66] Other countries reject the intervention of foreign counsel in all arbitrations seated in the respective jurisdiction, such as Angola, due to the strict interpretation of the above-mentioned professional rules, or Mozambique, where again the same requirements for admission of local counsel apply to foreign counsel (law degree in Mozambique, or enrolment through bilateral agreement).

Curiously, Singapore's original position on this issue was prohibitive – in 1988, the case *Builders Federal (Hong Kong) Ltd. And Joseph Gartner & Co. V. Tuerner (East Asia) Pte Ltd*. established that the presence of foreign counsel was not welcome in arbitration proceedings seated in Singapore, a rule that was overcome by the 1992 amendment of the LPA.

Furthermore, the arbitral institutions' rules usually provide for a limitless possibility of appointing foreign counsel. Notably, the rules of the most reputable institutions, such as the ICA-ICC, SIAC, HKIAC (Hong Kong International Arbitration Centre), LCIA (London International Arbitration Centre), CIETAC (China International Economic and Trade Arbitration Commission), and the CAC-CCIP (*Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa*) do not impose any requirements on party representation, other than holding the necessary authority to do so.[67]

The International Bar Association (IBA) Guidelines on Party Representation in International Arbitration 2013 for example, set out a concept of Party Representative which includes "*any person, including a Party's employee, who appears in an arbitration on behalf of a Party and makes submissions, arguments or representations to the Arbitral Tribunal on behalf of such Party, other than in the capacity as a Witness or Expert, and whether or not legally qualified or admitted to a Domestic Bar*".[68]

Even the New York Convention, with regard to the enforcement of arbitral awards, provides for the possibility of annulling an arbitral award when a violation of the right to free choice of representation takes place, in light of its article V(1)(d).[69] The relevance of avoiding internal restrictions on the choice of parties' representatives is thus of greater consequence, as it may even affect the neutrality of the proceedings and the parties' expectations.[70]

In sum, generally speaking, the national regimes regulating the appearance of foreign counsel before courts are restrictive; while party representation in international arbitration proceedings is, as a rule, extremely broad. This clear difference has a number of explanations, but requires moments of interconnection. An example of this is precisely the possibility of an ad hoc admission regime like the one commented on in this case note.

8. CONCLUSION

In the case addressed by this case note, Judge Steven Chong found that the requirements imposed in Article 15 of the LPA and the elements provided for in the Legal Profession (Ad Hoc Admission) Notification 2012 to allow the appearance before Singaporean courts of a British QC on behalf of the Kingdom of Lesotho in the setting aside proceedings of an arbitral award were met.

There was nothing "local" about the underlying arbitration dispute – all parties resided outside Singapore, the dispute concerned alleged breaches of international obligations and events which occurred in Lesotho, the origin of the dispute can be traced partly to a multilateral treaty involving 15 States of the

[65] German Code of Civil Procedure (ZPO) §1042 (stating that counsel cannot be excluded as representatives of the parties), Austrian Code of Civil Procedure (ZPO) §594(3) (providing that parties may be represented by a person of their choosing, without that right being excluded or limited in any way), Dutch Code of Civil Procedure, Article 1038(1) and (2) (establishing that parties may appear in court represented by a lawyer or any other person with power of attorney), Law 60/2003 of 23 December regarding Arbitration in Spain (does not set any limitation), Swiss Code of Civil Procedure Article 373 (indicating that parties may be represented in arbitral proceedings), French Code of Civil Procedure Article 1481 (providing that an award must indicate the names of counsel or other representatives of the parties). In regard to Belgium, the restrictions regarding foreign counsel existing in judicial proceedings do not apply to arbitration. Looking in more in depth at the Swedish regime, its Code of Civil Procedure merely provides in chapters 11 and 12 principles that may justify rejection of a party representative by an arbitral tribunal. However, the domestic arbitration law omits any kind of formal limitation on this issue. For more information, see Gary Born, *International Commercial Arbitration*, p. 2834.

[66] "*Legal representation in arbitration – Interview with Gary Born*", 14 July 2014, available at Lexis Nexis; see: https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/legal-representation-in-arbitration-gary-born-14-July-2014.pdf.

[67] Article 17 and 26(4) of the ICC Arbitration Rules 2012 (mentioning only the need of authority by the party representative), Article 23 of the SIAC Arbitration Rules 2016 (stating that parties can appear represented by legal practitioners or any other authorised representatives), Article 13(6) HKIAC Administered Arbitration Rules (allowing parties to be represented by persons of their choice, making reference to the demand for the need for a fair and efficient conduct of the arbitration), Article 18(2) of LCIA Arbitration Rules 2014 (requiring an authorised legal representative), Article 22 of CIETAC Arbitration Rules 2015 (stating the need to have a Chinese or foreign authorised representative), Article 17 of the Arbitration Rules of the CAC-CCIP (establishing the free choice of legal representation).

[68] See: https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

[69] Gary Born explains that that may happen in cases where a party is forced to continue to arbitrate with representation it does not desire, which differs from the situation where a State imposes specific limitations regarding the qualification of party representatives, as is discussed in this case note – see Gary Born, *International Commercial Arbitration*, p. 2845 and 2846.

[70] Gary Born, *International Commercial Arbitration*, p. 2844.

SADC (to which Singapore is not a party) and the legal issues which will be fully aired in the setting aside proceedings are predominantly governed by principles of public international law.

The "necessity" and not only "convenience" of the intervention of the British barrister, with the title of "Queen's Counsel", was demonstrated based on his special qualifications and experience. His presence will benefit not only the litigant seeking admission, but also the court before which he appears and ultimately the proper judgment of the case.

Curiously, the court decided against the Law Society of Singapore's position, stressing the contribution of the lawyer in question both to the training of local counsel not versed in the public international law topics addressed, and to the court; and the court decided in line with the Attorney-General's position, that held that a favourable position would reinforce the strategic, public and established endorsement of Singapore as an attractive venue to administer arbitration proceedings.

Being one of the main economic and financial hubs in Asia, the availability and diversity of legal representation must be ensured to all economic players that come to this city-state. Besides this, as one of the biggest venues for arbitration in Asia, the concern to maintain this status and to promote it is constant.[71]

Considering the above, this judgment is a clear sign that parties that choose Singapore as the seat to resolve their dispute through international arbitration can trust that local courts will seek to achieve the most appropriate solution in setting aside applications of arbitral awards when the legal issues at hand are diverse and complex. This reaction fits the *ambiance* of international arbitration, which is a means of dispute resolution with special characteristics and usually encompasses different jurisdictions. This fosters the growing internationalisation of the legal professionals present in its development.

Even though this is an exceptional regime, it is essential to allow the competent and structured analysis of complex and novel legal issues in the courts of Singapore. Similarly, it invites the presence of jurists specialised in specific areas of law. The possibility of juggling these multiple interests benefits Singapore's legal system, and favours the status of this city-state as an arbitral hub of the Asian southeast.

The ad hoc admission regime of foreign lawyers in Singapore raises questions regarding the wanderings of international advocacy and the future of the national exercise of the legal profession, namely appearance before courts. In a world where litigation is becoming increasingly global, will the exception become the rule?

[71] See the new SIAC rules that entered into force on 1 July 2016, the new Investment Arbitration Rules also from SIAC that entered into force on 1 January 2017. Also, as an example, the efforts to regulate the phenomenon of Third-Party Funding.