Neutral Citation Number: [2025] CICA (Civ) 11

IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CICA (CIVIL) APPEAL No. 15 of 2024
(Formerly FSD 304 of 2023(IKJ))

IN THE MATTER OF THE FOREIGN ARBITRAL AWARDS ENFORCEMENT ACT (1997 REVISION)

AND IN THE MATTER OF THE ARBITRATION ACT 2012

AND IN THE MATTER OF AN ARBITRATION BETWEEN CARREFOUR NEDERLAND BV (CLAIMANT) AND SUNING INTERNATIONAL GROUP CO LIMITED (FIRST RESPONDENT) AND SUNING.COM CO LTD (SECOND RESPONDENT)

BETWEEN

(1) SUNING INTERNATIONAL GROUP CO LIMITED

-AND-

(2) SUNING.COM CO LTD

APPELLANTS

-AND-

CARREFOUR NEDERLAND BV

RESPONDENT

Before: **The Hon Sir Richard Field, JA**
The Rt Hon Sir Michael Birt, JA
The Rt Hon Sir Jack Beatson, JA

Appearances:	**Mr Alex Potts, KC instructed by Jonathon Milne and Sean – Anna Thompson of Conyers for Appellants.** **Mr Graham Chapman KC instructed by Liam Faulkner of Campbells for the Respondent.**
Heard:	**12 May 2025**
Draft circulated:	**13 August**
Judgment delivered:	**28 August 2025**

JUDGMENT

Sir Michael Birt, JA

1. On 2 November 2023, Kawaley J ("the judge") made an order ex parte on the papers ("the Order") giving the respondent (to whom I shall refer as "the plaintiff") leave to enforce in this jurisdiction an arbitration award which it had obtained against the appellants (to whom I shall refer respectively as "the first defendant", "the second defendant" or "the defendants") in Hong Kong in the same manner as a judgment of the Grand Court. The judge also made certain orders as to service of the Order and associated documents.

2. The defendants subsequently applied to set aside the Order on various grounds (described below) including that it had not been validly served because the method of service authorised by the judge was irregular and not in accordance with relevant law. For the reasons set out in a judgment dated 15 April 2024 ("the Judgment") the judge rejected all the grounds relied upon by the defendants and dismissed the application to set aside the Order.

3. Subsequently, on 25 July 2024, the judge granted leave to appeal against his decision on the basis that the manner in which service of an ex parte order giving leave to enforce a foreign arbitration award can properly be ordered was a matter of public interest which would benefit from a decision of this court.

4. Before turning to the arguments, it is necessary to set out the factual background. In this respect, the court has been much assisted by the agreed background and chronology document prepared by the parties upon which, together with other material before the court, I have drawn in what follows.

Factual background

5. The plaintiff is a private limited company incorporated in the Netherlands. The first defendant is a private limited company incorporated under the laws of Hong Kong with its registered office in Hong Kong and the second defendant is a company incorporated under the laws of the People's Republic of China ("China") and listed on the Shenzhen Stock Exchange. Its registered office is in Nanjing, China.

6. On 22 June 2019, the plaintiff as seller and the first defendant as purchaser entered into a sale and purchase agreement ("the SPA") whereby the first defendant purchased shares in Carrefour China Holdings NV ("the Company") representing 80% of the outstanding share capital of the Company. The SPA contained an arbitration agreement in respect of any dispute.

7. On 26 September 2019, the plaintiff, the first defendant and the Company entered into a shareholders' agreement in relation to the Company ("the SHA"). Under the SHA the plaintiff was entitled to two put options enabling it to require the first defendant to purchase the plaintiff's remaining 20% shareholding in the Company ("the Put Shares"). The first of these ("the Initial Put Option") was exercisable after the second anniversary of the completion of the SPA and required the first defendant to purchase the Put Shares at a price defined in the SPA ("the Initial Put Price"). The second defendant guaranteed the obligations of the first defendant in relation to the Initial Put Option ("the Guarantee").

8. On 27 September 2021, the plaintiff exercised the Initial Put Option by notice to the first defendant requiring it to purchase the Put Shares at the Initial Put Price. The first defendant failed to pay the Initial Put Price or complete the acquisition of the Put Shares

9. Following negotiations, on 28 April 2022, the plaintiff and the first defendant entered into a settlement agreement ("the Settlement Agreement") which acknowledged the plaintiff's exercise of the Initial Put Option and the first defendant's obligation to pay the Initial Put Price. It set out a payment schedule of nine instalments of the Initial Put Price plus interest. The plaintiff would transfer a pro rata number of the Put Shares to the first defendant against payment of each instalment. The second defendant executed a guarantee supplemental letter ("the Guarantee Supplemental Letter") to amend and restate its obligations under the Guarantee so as to include the first defendant's obligations under the Settlement Agreement. The Settlement Agreement and the Guarantee Supplemental Letter contained an arbitration agreement for disputes concerning either of them or the SHA, which was separate from the arbitration agreement in the SPA.

10. The first defendant paid the first four scheduled instalments of the Initial Put Price and corresponding tranches of the Put Shares were transferred to the first defendant. However, the first defendant did not pay an instalment due on 31 August 2022, as a result of which the plaintiff made demand for the full outstanding balance of the Initial Put Price of RMB 1 billion plus interest and also made demand for that sum on the second defendant under the Guarantee Supplemental Letter.

11. In accordance with the arbitration agreement in the Settlement Agreement, the matter was referred to an arbitration tribunal (consisting of a single arbitrator) with its seat in Hong Kong (the "tribunal") administered by the Hong Kong International Arbitration Centre (the "First HKIAC Arbitration"). The arbitration agreement provided that the *'expedited procedure'* set out in Rule 42 of the Rules of the HKIAC should apply and that the agreed deadline for the arbitral award to be communicated to the parties by the tribunal should be three months from the date that the HKIAC transmitted the case file to the tribunal. As well as contending that the Settlement Agreement and the Guarantee Supplemental Letter were void and unenforceable, the defendants raised a counterclaim alleging misrepresentations by the plaintiff in relation to the SPA. They submitted that the tribunal should determine whether the counterclaim was reasonably arguable and whether it could be set off against the plaintiff's claim. At paras 174-205 of its award (the "Award") the tribunal held that it

did not have jurisdiction in relation to the counterclaim because it was constituted pursuant to the arbitration provisions in the Settlement Agreement rather than the SPA and had no jurisdiction in relation to disputes in connection with the SPA. It further held at paras 206-230 that, in view of the express terms of clause 3(a) of the Settlement Agreement (whereby the first defendant covenanted to pay the Initial Put Price in instalments without any withholding, set-off, counterclaim, retention or deduction), the defendants were not entitled to set-off any loss and damage suffered as a result of the misrepresentations pleaded in the counterclaim against their liability to the plaintiff for the Initial Put Price under the Settlement Agreement and Guarantee Supplemental Letter.

12. The Award was issued on 30 April 2023 and, amongst other things, ordered the defendants, on a joint and several basis, to pay the remaining Initial Put Price in the sum of RMB 1 billion (plus interest and costs) due under the Settlement Agreement and the Guarantee Supplemental Letter to the plaintiff forthwith '*without any withholding, set-off, counterclaim, retention or deduction*'. The defendants did not make any application to the Hong Kong court to set aside the Award within the statutory time limit.

13. The first defendant subsequently commenced a HKIAC arbitration against the plaintiff and another entity pursuant to the arbitration agreement in the SPA (the "Second HKIAC Arbitration"). In that arbitration, the first defendant has advanced a claim for RMB 2.21 billion resulting from the alleged misrepresentations on the part of the plaintiff which, it says, induced it to enter into the SPA. The hearing of the Second HKIAC Arbitration took place in January 2025 and a decision was expected no later than 24 June 2025. The court is not aware whether this decision has been issued.

14. On 25 July 2023, the High Court of the Hong Kong Special Administrative Region (the "Hong Kong Court") granted leave ex parte to the plaintiff to enforce the Award in the same manner as a judgment or order of the Hong Kong court (the "Hong Kong Enforcement Order"). The defendants applied on 28 August 2023 to stay the execution and/or enforcement of the Hong Kong Enforcement Order pending the outcome of the Second HKIAC Arbitration and this application was heard by the Hong Kong Court on 30

January 2024. At the time of the hearing before the judge in the present proceedings and the Judgment on 15 April 2024, the outcome of the stay application in Hong Kong was unknown, but subsequently the Hong Kong Court dismissed the stay application in a judgment of Mimmie Chan J dated 4 June 2024 – *CF and SHK v S Listco* [2024] HKCFI 1493. It did so on the basis that the Settlement Agreement had expressly prohibited any right of set-off etc and accordingly there should not be a stay pending the outcome of the first defendant's claim for misrepresentation in the Second HKIAC Arbitration. In passing, Mimmie Chan J observed at [11] that there was no application by the defendants to set aside the Award or the Hong Kong Enforcement Order.

15. On 9 August 2023, a winding up petition was issued against the first defendant in the Hong Kong Court. On 17 November 2023, the plaintiff was substituted as the petitioner in the winding up petition. The hearing of the petition took place in August 2024, i.e. after the Judgment, and judgment was due to be handed down on 2 June 2025. Again, the court is not aware whether that judgment has in fact been issued.

The proceedings in this jurisdiction

16. Pursuant to section 5 of the Foreign Arbitral Awards Enforcement Act (1997 Revision) ("the Act"), with the leave of the Grand Court, an arbitration award made in pursuance of an arbitration agreement in the territory of a state which is party to the New York Convention (a "Convention award") may be enforced in the same manner as a judgment or order of the Grand Court. It is accepted that the Award is a Convention award as Hong Kong is a party to the Convention.

17. GCR O.73 deals with proceedings concerning arbitrations. Part I (rr.1-30) deals with applications to the Grand Court in a supervisory capacity in relation to arbitrations. However, r.2(2) specifically excludes proceedings to enforce an arbitral award from Part I and they are dealt with exclusively in Part II (rr.31-36). R.31 deals with the procedure to be followed on applications under section 5 of the Act and, so far as relevant, provides as follows:

"Enforcement of awards

31(1) An application for leave under Section 52 or 72 of the 2012 Act [meaning the Arbitration Act, 2012] *or under Section 5 of the 1975 Act* [meaning the Act] *to enforce an arbitral award, shall be made by ex parte originating summons.*

(2) The Court hearing an application under paragraph (1) may direct that the application is to be served on such parties to the arbitration as it may specify and service of the application out of the jurisdiction is permissible with the leave of the Court irrespective of where the award is, or is treated as, made.

(3) Where a direction is given under paragraph (2), rules 11 and 13 to 17 shall with the necessary modifications as they apply to applications under Part I of this Order.

(4) .....

(5) An application for leave must be supported by an affidavit –

(a) Exhibiting –

(i) ...

(ii) where the application is made under Section 5 of the 1975 Act, exhibiting (sic) the document specified in Section 6 of the 1975 Act.

(b) stating the name and usual or last known place of residence or business of the applicant and of the person against whom it is sought to enforce the award respectively;

(c) stating as the case may require, either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

(6) An order giving leave must be drawn up by or on behalf of the applicant and must be served on the respondent by delivering a copy to the respondent personally or by sending a copy to the respondent at the respondent's usual or last known place of residence or business or in such other manner as the Court may direct, including electronically.

(7) Service of the order out of the jurisdiction is permissible without leave, and O.11, rr.5 to 8 shall apply in relation to such an order as they apply in relation to a writ.

(8) Within 14 days after service of the order or, if the order is to be served out of the jurisdiction, within such other period as the Court may fix, the respondent may apply to set aside the order and the award shall not be enforced until after the expiration of that period or, if the respondent applies within that period to set aside the order, until after the application is finally disposed of.

(9) The copy of the order served on the respondent shall state the effect of paragraph (8).

(10) In relation to a body corporate this rule shall have effect as if for any reference to the place of residence or business of the applicant or the respondent there were substituted a reference to the registered or principal address of the body corporate."

18. On 10 October 2023, the plaintiff applied by ex parte originating summons under section 5 of the Act for an order granting leave to enforce the Award in this jurisdiction in the same manner as a judgment. The application was supported by an affidavit sworn by Jonathan Wong ("Wong 1"), a partner in the Hong Kong office of Clifford Chance, which firm acted for the plaintiff in the First HKIAC Arbitration.

19. The judge considered the matter ex parte on the papers and on 2 November 2023, made the Order in the following terms (so far as relevant):

"1. *Pursuant to section 5 of the Foreign Arbitral Awards Enforcement Act (1997 Revision) leave be granted to enforce the Final Award in the Cayman Islands in the same manner as a judgment or order of this Court to the same effect.*

2. *The Plaintiff shall serve the Originating Summons, Wong 1 and this Order out of the jurisdiction on the Defendants by service on their counsel in the arbitration proceedings, Nixon Peabody CWL of 5/F Standard Chartered Bank building, 4-4A Des Voeux Road Central, Hong Kong.*

3. *The Defendants shall have 21 days from the date that the Order is served on them in accordance with paragraph 2 above to apply to the Court to set aside the Order. The Order must not be enforced until after the end of that period, or until final disposal of any application made by the Defendants within that period to set aside the Order.*

4. *After the conclusion of the period referred to in paragraph 3 above, judgment be entered against the Defendants in the terms of the Final Award as follows:*

    a. *The First Defendant and the Second Defendant do make payment to the Plaintiff forthwith, on a joint and several basis, without any withholding, set off, counterclaim, retention or deduction, of*
        i. *The remaining Initial Put Price (as defined in the Final Award) in the amount of RMB 1,000,000,000.00;*
        ii. *Simple interest over the remaining Initial Put Price at 5.7% per annum as from 22 February 2022 until the date of the Final Award (i.e. 30 April 2023) and thereafter at the Hong Kong judgment rate (currently at 8.583% per annum) until the date of payment in full of the Initial Put Price;*
        iii. *The sums of EUR 875,725.00 and HKD 803,206.00, being the assessed costs of the arbitration within the meaning of Article 34 of the Hong Kong International Arbitration Centre Administered Arbitration Rules (the "Arbitration Costs"); and*
        iv. *Simple interest over the Arbitration Costs at the Hong Kong judgment rate (currently at 8.583% per annum) from the date of the Final Award until the date of payment in full, pursuant to Section 80 of the Arbitration Ordinance.*

5. *....*
6 *..."*

20. As can be seen, so far as service was concerned, the judge ordered that the Order together with the originating summons and Wong 1 be served on the defendants by service on Nixon Peabody CWL at their office in Hong Kong. They were the solicitors who had acted for the defendants in the First HKIAC Arbitration. As set out in Wong 1 and para 21 of the Award, they had confirmed to HKIAC that all correspondence in connection with the First HKIAC Arbitration could be sent to them. However, they had not been authorised to accept service of any Cayman Islands proceedings.

21. The plaintiff delivered the above documents by courier to Nixon Peabody at their office in Hong Kong on 3 November 2023. It contends that this was valid service on the defendants in accordance with the Order. Although no order to this effect was made by the judge, the plaintiff also delivered the above documents by courier to the registered office of the first defendant in Hong Kong on 9 November 2023 and the registered office of the second defendant in China on 15 November 2023 and also effected personal service on the first defendant by hand delivery of the above documents to its registered office in Hong Kong on 8 December 2023.

22. On 23 November 2023, the defendants applied for (i) a declaration that the Order was not validly served on the defendants, (ii) an order setting aside the purported service of the documents on the ground that the plaintiff had failed to make full and frank disclosure and/or that paras 2 and 4 of the Order were irregular, and (iii) an order staying the Order. This was the matter which came before the judge on 21 February 2024 and gave rise to the Judgment.

23. As summarised by the judge, the defendants' application raised four issues:

(i) Was the method of service contained in the Order permissible?

(ii) Did Wong 1 fail to comply with the duty of full and frank disclosure required in an ex parte application?

(iii) Did Wong 1 fail to comply with the requirement concerning the calculation of interest on an arbitral award as contained in O.73, r.32(1)(d)?

(iv) Should the Order be stayed in view of the first defendant's claim in the Second HKIAC Arbitration for misrepresentation in connection with the SPA, which, if successful, would exceed the amount of the Award?

24. As stated above, the judge rejected the defendants' application and declined to set aside or stay the Order. I shall summarise his reasons when considering each of the four issues below.

25. On 24 July 2024, for reasons set out subsequently in a judgment dated 7 August 2024, the judge granted leave to appeal against his decision on the basis that his decision on the service point (para 23(i) above) raised a matter of public importance upon which it would be useful to have a decision of this court for future guidance. The defendants have appealed the judge's decision on all four issues.

(i) The service point

26. The Defendants accept that the Order and accompanying documents were duly served in accordance with the terms of the Order by delivering copies to Nixon Peabody in Hong Kong. The issue is whether it was proper for the judge to order service in this way.

(a) The judge's decision

27. As can be seen from r.31(1) (quoted at para 17 above), an application to enforce an arbitral award (whether domestic or foreign) as a judgment is to be made by ex parte originating summons. The Grand Court has two alternative methods of proceeding when considering such an application.

28. The first alternative is that referred to in r.31(2), namely to order an inter partes hearing of the application. In that event, para (3) applies certain rules set out in part I of O.73 but they

are not relevant for present purposes. Where this course is pursued, the originating summons needs to be served by personal service or ordinary service (as the case may be). If personal service is required, the court may order substituted service under O.65, r.4 on the ground that it is *'impracticable'* to serve the application personally.

29. The second alternative is for the Grand Court to grant the application to enforce the award as a judgment ex parte and to make an order to that effect. The ex parte order then has to be served and the party against whom the order is made has a specified time in order to apply to set it aside. In these circumstances, r.31(6) applies and provides that the order (not the originating summons) must be served in one of three ways, namely (i) by personal service, (ii) by ordinary service or (iii) in such other manner as the court may direct, including electronically.

30. It has to be said that the skeleton argument of the plaintiff lodged with the originating summons was unclear and confused. Although it suggested that the judge should make an ex parte order permitting enforcement, it then referred to r.31(2) and (3) (which do not apply where the court has made an ex parte order) and also to r.7(2) (which applies only to applications in connection with domestic arbitrations and specifically does not apply to applications to enforce an arbitral award). The plaintiff also asked for an order that both the Order and the originating summons be served which had the effect of muddying the waters as to how the plaintiff wished the judge to proceed. The Order as drawn up did not specify under which part of r.31 it had been made and, as requested, ordered service of both the originating summons and the Order as well as Wong 1.

31. The matter was however clarified by the judge in a Case Management Ruling following the application by the defendant to set service aside and he made clear that the order for service had been made under r.31(6). In the Judgment, the judge accepted that it had been wrong for para 2 of the Order to refer to service of both the Order and the originating summons, but confirmed that his direction as to service of the Order had been made under r.31(6) and should therefore have referred only to the Order.

32. At the hearing before the judge, the defendants submitted that service of an ex parte order pursuant to r.31(6) should be by way of service on a body corporate at its principal or registered address and that the option of serving in some other manner should only be utilised on exceptional grounds. They further submitted that there was no evidence before the court to show that service in accordance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("the Hague Convention") would cause any particular difficulty or delay. It was submitted that there was no justification for in effect ordering substituted service in the present case.

33. The judge rejected these submissions. He held that the wording of r.31(6) gave the Grand Court a suite of equal options rather than a suite of options sequentially ranked. He drew a distinction with the wording of O.65, r.4 dealing with substituted service which only applied where service had to be effected by way of personal service and that such service was *'impracticable'*. As to the Hague Convention, he said merely that no specific contravention of it was alleged and there was no suggestion that serving the documents on the defendants' arbitration attorneys was contrary to Hong Kong law.

(b) Discussion

34. Mr Potts' key submission was that the judge was wrong to conclude that r.31(6) enables or entitles the Grand Court – as a matter of course – to direct the plaintiff to effect service of court documents (whether in the form of an order or an originating process) on foreign parties (in Hong Kong and China) by way of delivery to foreign lawyers in Hong Kong (rather than by way of delivery to the defendants themselves), without first considering the relevant provisions of the Hague Convention (as applicable in that foreign jurisdiction) and the authorities dealing with Hague Convention issues and/or the provisions for service of proceedings directly on the defendants (save in exceptional circumstances where that may be impracticable having regard to O.65, r.4 dealing with substituted service). Furthermore the judge failed to address or wrongly overlooked that, because of China's objection under Article 10 of the Hague Convention, court documents to be served on a defendant incorporated and doing business in China must ordinarily be served on that defendant in

China under the provisions of the Hague Convention and that it is only in exceptional circumstances (which, he submitted, did not exist in this case) that service by an alternative method (such as delivery to foreign lawyers based in Hong Kong) might be appropriate.

35. I propose to begin by explaining what I consider to be the proper approach to service of an ex parte order giving leave to enforce a foreign arbitral award as a judgment of the Grand Court where the person to be served is resident in a jurisdiction which is a party to the Hague Convention. It is common ground that the Cayman Islands (through the UK), Hong Kong and China are all parties to the Hague Convention.

36. The relevant provisions of the Hague Convention provide as follows:

> *"Article 1*
> *The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad….*
>
> *Article 2*
> *Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Article 3 to 6….*
>
> *Article 3*
> *The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention…. The document to be served or a copy thereof should be annexed to the request.*
>
> *…..*
>
> *Article 5*
> *The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –*
>
> *(a) By a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or*

> *(b) By a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.*
>
> ...
>
> *Article 10*
> *Provided the State of destination does not object, the present Convention shall not interfere with –*
>
> *(a) The freedom to send judicial documents, by postal channels, directly to persons abroad…."*

The evidence before the judge from Ms Wu of Nixon Peabody was that China is a jurisdiction which has objected to service under Article 10.

37. The court was referred to a number of English authorities where the Hague Convention has been considered both in relation to ordinary civil proceedings and in relation to applications in connection with domestic arbitrations (i.e. arbitrations where the seat was in England and Wales). I consider that the position under English law is helpfully summarised in the judgment of Foxton J in *M v N* [2021] EWHC 360 (Comm).

38. But before turning to his observations, I should note that the relevant provisions of the Civil Procedure Rules of England and Wales ("CPR") are not the same as r.31(6) in this jurisdiction as quoted above. CPR 62.18(7) provides as follows:

> *"(7) An order giving permission* [to enforce an award as a judgment] *must –*
> *(a) be drawn up by the claimant; and*
> *(b) be served on the defendant by –*
> *(i) delivering a copy to him personally; or*
> *(ii) sending a copy to him at his usual or last known place of residence or business."*

39. The provision applies to both domestic and foreign arbitral awards but, as can be seen, there is no equivalent to the third possible method of service as set out in r.31(6) (see para 17 above). If an applicant in the Commercial Court in England and Wales ("the Commercial Court") wishes to effect service by some method other than the two methods mentioned above, he has to apply for an order for alternative service under CPR 6.15(1) which requires 'good reason' to authorise service in some other manner.

40. The background to the decision in *M v N* was that the claimant (M) sought permission to enforce a domestic arbitration award as a judgment. The respondent (N) appears to have been a company incorporated in Egypt. Cockerill J had made an order ex parte giving the claimant permission to enforce the award as a judgment and had also made an order for alternative service of that order by email on N's vice-chairman and by recorded delivery to N's address in Egypt. According to the judgment, Egypt has objected to Article 10 of the Hague Convention so that service of foreign process can only be validly effected through the Egyptian Central Authority.

41. Although the following is a lengthy citation, I think it is helpful for the purposes of the court's decision. Thus Foxton J said as follows (omitting some references):

> "8. *The question of when is appropriate to make an order for alternative service on a defendant who would otherwise have to be served abroad under the HSC [the Hague Convention] or another service convention is well-trodden ground, and I do not propose to tread it again in this judgment. In brief, and I hope uncontroversial, terms, the effect of those authorities is broadly as follows (the references to the HSC being intended to encompass other service conventions as well):*
>
> *(i) CPR 6.15(1) provides:*
> *"Where it appears to the court that there is good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place."*
> *The fact that the Court is being asked to make an order for alternative service on a defendant domiciled in a*

HSC country is a relevant factor in considering whether a good reason has been made out; see for example Deutsche Bank AG v Sebastian Holdings Inc [2014] EWHC 112 (Comm), [19] ("a critically important distinction", Cooke J).

In proceedings in which the HSC is engaged, there are a number of cases which have held that merely avoiding delay or inconvenience will not be sufficient to constitute "good reason" (Deutsche Bank AG v Sebastian Holdings Inc, [28]), Société Generale v Goldas Kuyumculuk Sanayi [2017] EWHC 667 (Comm), [49](9)(a)]).

In those cases where the country in question has stated its objection under Article 10 of the HSC to service otherwise than through its designated authority, it has been held that relief under Rule 6.15 will only be granted in "exceptional circumstances" (Société Generale, [49(9)(b)], approved at [2018] EWCA Civ 1093, [33-35]; Marashen Limited v Kenvett Limited [2017] EWHC 1706 (Ch), [57]; Punjab National Bank (International) Ltd v Srinivasan [2019] EWHC 89 (Ch) or in "special circumstances" (if that is different); Russian Commercial Bank (Cyprus) Ltd v Fedor Khoroshilov [2020] EWHC 1164 (Comm), [96-97].

There has been some debate as to what the requirement of "exceptional" or "special circumstances" means, but it has generally been interpreted as requiring some factor sufficient to constitute good reason, notwithstanding the significance which is to be attached to the Article 10 HSC reservation (see for example Koza Limited v Akeil [2018] EWHC 384 (Ch), [45-49], Richard Spearman QC).

However, it is clear that there are circumstances in which an order for alternative service will be appropriate in HSC cases (or to put matters another way, in which good reason for making such an order can be established notwithstanding the HSC factor).

9. *It is this last question which is the principal issue in this application. Before turning to the facts of the case, it is helpful to consider the types of factors which have been held sufficient to justify an order for alternative service in a HSC case. They include:*

(i) *Cases in which an attempt is being made to join a new party to existing proceedings, where the effect of delay in effecting service on the new party under the HSC will be either substantially to interfere with directions for the existing trial, or require claims which there is good reason to hear together to be heard separately…..*

(ii) *Cases where the proceedings have been begun with a without notice injunction application, which is to be served immediately or in short order on the respondent…..*

(iii) *Cases where an expedited trial is appropriate and the order for alternative service is necessary to achieve the required expedition….*

(iv) *It has also been suggested that an order for alternative service might be appropriate when the order sought arises out of a hearing which has already taken place, and delay in service under the HSC might lead to the issues being determined a prolonged period after the fact-finding has been undertaken…. or in cases in which the financial consequences of requiring service under the HSC might make pursuit of a low value claim financially unviable….*

10. *In addition, orders for alternative service are routinely made in the Commercial Court, even in HSC cases, in claims for relief under the Arbitration Act 1996. In Kyrgyz Republic v Finrep GmbH [2006] 2 CLC 402, Tomlinson J noted at [29]:*

> *"….in relation to arbitration applications concerning arbitrations which have their seat within the jurisdiction it is the almost invariable practice of the court to permit service upon a party's solicitor who has acted for that party in the arbitration, provided that that solicitor does not appear to have been disinstructed or absent other special circumstances. This practice is reflected in paragraph 3.1 of Arbitration Practice Direction 62.4 which provides, under the rubric 'Arbitration Claim Form Service': '3.1 Service. The court may exercise its powers under Rule 6.8 to permit service of an arbitration claim form at the address of a party's solicitor or representative acting for him in the arbitration'."*[Emphasis added]

11. *He explained the basis for this practice at [38]:*

> *"The discretion given to the Court by CPR 6.8(1) is dependent on there appearing to be good reason to authorise service by an alternative method. In the context of an arbitration which has its seat in England or Wales and where the party thereto sought to be served with an arbitration application relating to that arbitration has an agent within the jurisdiction who acts or acted for him in the arbitration and whose authority does not appear to have been determined there will in my judgment very often, and perhaps ordinarily, be good reason to permit service to be made upon that agent rather than requiring service to be effected out of the jurisdiction. In such circumstances an application to serve upon the agent is not motivated by a mere desire for speed in effecting service. It is inherently desirable and in the interests of all parties that if arbitration applications are made in relation to either pending or otherwise completed arbitrations they are determined by the court as soon as reasonably practicable consistent with their being dealt with justly. Such disposal contributes to the achievement of finality of the arbitral process. Moreover, in the ordinary case where an overseas party to an English arbitration has or has had solicitors in England acting for him in that arbitration, service of the application and associated documents upon the English solicitors is the most reliable method whereby those documents will be brought expeditiously to the attention of the responsible persons within the relevant entity sought to be served. It will also usually be the most economical method of achieving that result." [Foxton J's emphasis]*

12. *Those considerations have been held sufficient to outweigh the HSC factor in alternative service cases: Cruz City 1 Mauritius Holdings v Unitech [2013] EWHC 1323 (Comm), Field J at [18-19] and Flota Petrolera Ecuatoriana v Petroleos de Venezuela SA [2017] EWHC 3630 (Comm), Leggatt J at [22]. The approach of the Commercial Court has been approved in the Court of Appeal: Joint Stock Asset Management Co Ingosstrakh-Investments v BNP Paribas [2012] EWCA Civ 644, [75].*

13. *While these arbitration claims have generally involved applications relating to pending arbitrations or challenges to arbitral awards, the policy of 'speedy finality' which they reflect is, in my opinion, equally applicable to applications brought with a view to assisting the*

> *enforcement of arbitral awards. Indeed, in that context, the position might be thought to be even more compelling:*
>
> *(i) given the strong policy of English law favouring the enforcement of arbitration awards generally and awards under the 1996 Act in particular (IPCO (Nigeria) Limited v Nigerian National [2005] 1 CLC 613, [24] (Gross J)); and*
>
> *(ii) the fact that alternative service is not being effected to commence the determination of the party's dispute, but after the party's substantive dispute has already been determined by a tribunal whose jurisdiction is no longer open to challenge, sitting in this jurisdiction under the auspices of the 1996 Act.*
>
> *14. It is not necessary in this case to consider whether the similar considerations in play might make the court more ready to order alternative service of applications against judgment debtors for the purpose of assisting the enforcement of judgments which would otherwise be subject to long delay, although the force of that argument is obvious."*

42. Having noted that the evidence before the Commercial Court was that it usually took at least 12 months to effect service in Egypt under the Hague Convention and having considered various factors as set out in [16] of his judgment, including the need for speedy finality in the case of the enforcement of an arbitration award and the fact that N had fully engaged in the arbitration process giving rise to the award, the judge went on to refuse to set aside the order of Cockerill J despite the Article 10 Hague Convention reservation on the part of Egypt; in other words he was satisfied that there were *'special'* or '*exceptional'* circumstances.

43. As can be seen from the observations of Foxton J and of Tomlinson J in the passage from *Kyrgyz Republic* quoted in *M v N*, orders for alternative service by serving on the solicitors who acted in the arbitration are *'routinely'* or *'almost invariably'* made in claims relating to domestic arbitrations (including completed arbitrations) even where the Hague Convention is applicable. Nevertheless, it is clear that a judge must in each case consider

whether there is good reason to depart from the method of service envisaged by the Hague Convention. Foxton J undertook this process at [16] of his judgment.

44. Mr Potts emphasised that the approach of the Commercial Court referred to by Foxton J and Tomlinson J was specifically stated as applying to domestic arbitrations; see Tomlinson J at [29] and [38] of *Kyrgyz Republic* and Foxton J at [10] and [13(ii)] of *M v N*. That was for good reason, he suggested. The parties had chosen England and Wales to be the seat of the arbitration and could therefore properly be taken to have appreciated that any application to a court in connection with the arbitration would be made to the Commercial Court. The parties had thereby implicitly agreed to submit to the jurisdiction of that court. It was not therefore surprising that the Commercial Court would normally order service on the solicitors acting in the arbitration as being the quickest and surest way of ensuring that documents to be served came to the attention of the relevant party. Furthermore, such solicitors would be subject to the discipline of the English courts and could therefore be relied upon to inform their clients of the documents served upon them. These features were not present in the case of a foreign award.

45. Mr Chapman (who did not appear below), on the other hand, submitted that the reasons for *'speedy finality'* articulated by Foxton J were just as applicable to enforcement of foreign arbitrations as they were to enforcement of domestic arbitrations.

46. I accept that *M v N* and the cases cited upon by Foxton J concerned domestic arbitrations and the observations in those cases were made in that context; they were not considering the topic of enforcement of foreign arbitral awards. Nevertheless, in my judgment, the general approach set out by Foxton J in *M v N* is, in this jurisdiction, equally applicable to applications to enforce foreign (i.e. non-Cayman) arbitral awards. I would summarise my reasons for reaching that conclusion as follows:

(i) Having set out the general considerations in respect of Hague Convention cases at [8] and then in relation to applications concerning arbitrations at [10], (with its reference to orders for service on the arbitration lawyers being *'routinely'* made)

Foxton J goes on at [13] to say that the policy of *'speedy finality'* reflected in the approach to arbitration cases might be thought to be *'even more compelling'* in connection with applications for enforcement of awards. That was because of (i) the strong policy of English law favouring the enforcement of arbitration awards generally and (ii) the fact that alternative service was not being effected to commence the determination of the parties' dispute, but after the parties' substantive dispute had already been determined by a tribunal whose jurisdiction was no longer open to challenge.

(ii) I appreciate that he also made specific reference to the Arbitration Act 1996 of England and Wales (the "1996 Act"), but in my judgment, the two points are equally applicable to the enforcement of foreign arbitration awards and are equally applicable in this jurisdiction.

(iii) Thus the policy of Cayman law is very much in favour of enforcing arbitration awards (whether domestic or foreign) in the same way as English law. In the context of Convention awards, section 7(1) of the Act (the wording of which is similar to that of the 1996 Act) provides that *"Enforcement of a Convention award shall not be refused except in the cases mentioned in sub-sections (2) and (3)"*. Sub-section (2) sets out six specific grounds and sub-section (3) sets out a public policy ground. But in the absence of any such grounds (none of which have been put forward by the defendants in the present case) enforcement of a Convention award *'shall not be refused'*. As Lord Hamblen and Lord Leggatt, speaking for the Privy Council, said on appeal from this court (and therefore as a matter of Cayman law) in *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21 at [23]:

> *"It is well established that the grounds for refusing recognition and enforcement set out in article V should be construed narrowly in the light of the New York Convention's object and purpose of facilitating the recognition and enforcement of foreign arbitral awards: see e.g. Cukurova Holdings AS v Sonera Holdings BV [2014] UKPC 15; [2015] 2 All ER 1061, para 34."*

(iv) Accordingly the first factor relied upon by Foxton J is, in my view, equally applicable to the enforcement of foreign arbitral awards in this jurisdiction.

(v) The second specific ground referred to by Foxton J is also equally applicable in my view. The parties have chosen a method of resolving any dispute between them and that chosen method of resolution has produced a result in favour of the plaintiff. Thus the defendants owe the plaintiff the sum given by the Award. The parties chose an arbitration centre (Hong Kong) which is party to the New York Convention. They must be taken therefore to have understood that the Award would be capable of enforcement in a summary way in any jurisdiction which was also party to the New York Convention and enforcement would be granted in such jurisdiction unless any of the specific grounds allowed for by the Convention (as reflected in section 7 of the Act) applied. It seems to me that it is clearly in the interests of legal certainty, the rule of law and the effective fulfilment of the objectives of the New York Convention that such awards can be enforced speedily, without long delay caused by the need for service under the Hague Convention. As Foxton J said, the need for speedy finality could be said to be even greater where the parties' substantial dispute has already been resolved than where proceedings are simply being started in order to resolve a dispute.

(vi) Furthermore, at [14], Foxton J proffered the obiter view that there was considerable force in the argument that similar considerations might make the court more ready to order service outside the Hague Convention for the purpose of assisting the enforcement of judgments, (which in context must mean foreign judgments). If similar considerations would apply to the enforcement of foreign judgments, they must equally apply to the enforcement of foreign arbitral awards.

(vii) The emphasised wording from [38] of the judgment of Tomlinson J in *Kygrz Republic* (quoted at para 40 above and which is specifically stated by Tomlinson J as applying to completed as well as pending arbitrations) is, in my judgment, equally relevant to applications to enforce an award. If the losing party to an arbitral award

does not pay, the remedy of the winning party is to seek enforcement of the award as a judgment in whichever jurisdiction is appropriate in order to obtain the services of the judicial system for recovering sums due under a judgment. Swift enforcement of an award is essential to the effectiveness of arbitration as a means of resolving disputes and to the speedy achievement of finality of the arbitral process. An award without an effective means of enforcement is of no use if the losing party does not pay. Speedy enforcement by means of a judgment is therefore of real importance to the arbitral process.

(viii) The factors articulated by Foxton J and Tomlinson J are particularly significant for this jurisdiction, which is an international finance centre where substantial sums are placed for investment. It would be contrary to the public interest and very much against the Cayman Islands' policy of upholding international standards if enforcement of arbitral awards in this jurisdiction were to become a slow and long drawn-out process because service had to be effected through Hague Convention channels.

(ix) I do not consider Mr Potts' argument that, in a domestic arbitration, the solicitors acting in the arbitration are subject to the court's inherent jurisdiction whereas foreign lawyers are not, supports his submission that different considerations apply to enforcement of foreign arbitral awards. In this context, I note that in *Kygrz Republic*, Tomlinson J said at [39]:

> *"I do not regard anything said by the Court of Appeal in the Knauf case as either preventing or indeed discouraging this Court from continuing to adopt this approach which underlines the practice of the court to which I have referred earlier [i.e. the practice of ordinarily serving on the solicitors in the arbitration]. I should add that in a proper case there will often in my judgment be a good reason to permit service in such circumstances to be made on overseas lawyers rather than upon their clients, as where, for example, as often occurs, a party to a London arbitration is represented in that arbitration by a firm of New York attorneys. Everything must depend upon the circumstances."*

(x) Indeed, Tomlinson J said at [30] that in the case before him he would have authorised service on the New York attorneys acting in the domestic arbitration by fax at their offices in New York. The real issue, it seems to me, is whether a judge is satisfied that, if he makes an order for service on the lawyers who acted in the arbitration, those lawyers can be relied upon to bring the relevant order to the attention of the party who needs to be informed of the order.

47. Turning to the terms of r.31(6) itself, I agree with the judge's point at [21]-[22] that the wording in r.31(6) is to be distinguished from the wording of O.65, r.4 dealing with substituted service. In the latter, the court may only make an order where personal service is required and where it is '*impracticable'* to effect personal service. There is no such restrictive wording in r.31(6). The words are general and permit service in any case *'in such other manner as the court may direct'*. These are words which confer a wide discretion on the court. As the judge said, it is not appropriate to read in words which are not there. The wording differs from CPR 62.18(7) as discussed at para 38 above.

48. Mr Potts also submitted that the judge had misconstrued r.31(6). He pointed out that the provision follows immediately after r.31(5)(b) which requires an applicant's supporting affidavit to state the name and usual last known place of residence or business of the person against whom it is sought to enforce the award. R.31(6) itself states that the order must be served *'on the respondent'* by one of the three specified methods. He submitted therefore that the effect of the provision was that service needed to be effected on the respondent (not on some other person), whether that takes places personally on the respondent, or by sending documents to the relevant respondent's place of business, registered office or principal address, or (provided that this final alternative method could be properly justified on discretionary grounds on the facts of the case) in such other manner as the court may direct, including electronically. However this last aspect still had to be by way of service on the respondent. I understood him to be contending that this last alternative was to cover such things as service by email or other electronic means rather than by delivery or by post.

49. In my judgment, this is an unduly restrictive reading of r.31(6) and does not accord with the natural meaning of the words. Where, for example, substituted service is ordered, it is still in order to effect service on the respondent for the purposes of proceedings, albeit by means of serving the documents on someone else; but it takes effect as service on the respondent. In my judgment it is the same here. Service has to be on the respondent but it can be by such means as the court thinks fit in order to draw the existence of the order to the attention of the respondent and includes sending the documents to some other person which will take effect as service on the respondent. If Mr Potts' interpretation is correct, it is hard to see how any form of substituted service could ever be ordered unless the court first directed personal service, as substituted service in this jurisdiction (unlike alternative service in England and Wales) is only possible where personal service is impracticable; yet it is clear from r.31(6) that personal service is not required.

50. The question then is how the court should exercise the wide discretion conferred on it by r.31(6). It is at this stage that the provisions of the Hague Convention must be considered as service of an ex parte order (such as the Order in this case) is clearly a *'judicial document'* for the purposes of the Hague Convention.

51. As the English authorities make clear, the Hague Convention cannot simply be ignored. There has to be good reason to order service by some method other than through the Central Authority of the relevant country as provided in Article 3 of the Convention; see for example *Knauf UK GmbH v British Gypsum Limited* [2001] EWCA Civ 1570 concerning the need not to subvert the principles as to service as set out in the Hague Convention.

52. On this aspect there was common ground. Mr Chapman and Mr Potts agreed that there had to be 'good reason' for a court to order service in a manner which departs from that envisaged under the Hague Convention.

53. Mr Chapman further accepted, correctly in my view, that, in order for a court to be in a position to consider whether there is such good reason, an applicant must adduce evidence of the practicalities of serving the order in question in the relevant country in accordance

with the Hague Convention; in particular how long would such service be expected to take and how reliable is it? If service other than service personally or by ordinary service on the respondent is desired, the application must also explain the need for urgency and why the third alternative in r.31(6) is said to be appropriate. The applicant must also spell out whether the relevant country has made an objection under Article 10 as the court would then need to consider whether 'exceptional' or 'special' circumstances exist so as to justify some other form of service. The application must of course also explain any need for urgency and which of the factors described by Foxton J and endorsed above are in play so as to justify the court departing from the Hague Convention method of service.

54. However, if an application contains all the necessary information and if the matter is then considered by the court in the light of the specific facts of the case, I see no reason why, as set out in *M v N*, the court should not, for the reasons described by Foxton J and endorsed above, 'usually' or 'routinely' decide that good reason or exceptional circumstances, as the case may be, are made out so as to justify an order for service other than through the relevant Central Authority. This might involve the court still ordering personal service or ordinary service but directly rather than through the official channel or it might involve the third option in r.31(6) of ordering some other method of service, such as service directly on the relevant party electronically or, as in this case, service on the lawyers who have acted in the arbitration. It is this last option which is 'usually' or 'routinely' applied in the Commercial Court and I see no reason why this should not also be the case in this jurisdiction in relation to service of ex parte orders enforcing a foreign arbitral award as a judgment provided that the Grand Court applies its mind to the issue in relation to the facts of the case before it.

55. In short, I see no reason why the practice of the Commercial Court in relation to domestic arbitral awards as outlined in *M v N* and *Kyrgyz Republic* should not be applied by the Grand Court in connection with applications to enforce foreign arbitral awards, provided that the court is provided by the applicant with the necessary information as described above and applies its mind to whether departure from service in accordance with Hague

Convention is justified, including whether there are 'special' or 'exceptional' circumstances where a state has made an Article 10 objection.

(c) Application to the facts

56. It follows from the foregoing that this court needs to consider whether the procedure and approach described above has occurred in this case and, if it has not, whether the matter can be dealt with simply as an irregularity under GCR O.2, r.1 (with service being treated as effective) or whether para 2 of the Order must be set aside.

57. Mr Chapman submits that, at any rate by the time of the hearing to set aside the Order, the judge had all the necessary information before him. However, I cannot accept that submission. There was no evidence before the judge or before this court as to how long service via the Central Authority would take in either Hong Kong or China, so the judge was not in a position to consider whether the requirements of speedy finality, on the facts of the case, justified a departure from the Hague Convention service method. Furthermore, there was nothing in Wong 1 or the skeleton arguments as to whether there was urgency such as to justify departure from the Hague Convention. Accordingly, the judge was simply not put in a position to apply the appropriate test as articulated above. In the absence of such information, the judge proceeded simply in the manner which appeared to him most likely to bring the Order to the attention of the defendants quickly and economically.

58. Mr Chapman submits that despite this, the omission described above should be treated as an irregularity under O.2, r.1 which does not require para 2 of the Order to be set aside or the court to declare that the defendants have not been properly served. He points out that the judge's objective of bringing the existence of the Order to the attention of the defendants by serving it on the Hong Kong solicitors has been fulfilled and the defendants have been made aware of the Order and have duly applied to the court in good time. Furthermore, there was no suggestion in any of the material before the judge that any ground existed under section 7 of the Act to set aside the Order insofar as it gave leave to enforce the Award as a judgment. Thus the objection on the part of the defendants was

entirely technical; no prejudice would be suffered by them if the matter was treated merely as an irregularity and para 2 of the Order was not set aside.

59. Mr Potts, on the other hand, submits that the courts have repeatedly emphasised that procedural rules as to service must be duly observed. For example, in *General Dynamics United Kingdom Limited v Libya* [2022] AC 318, Lord Lloyd-Jones, speaking for the majority of the Supreme Court, said at [44]:

> *"....As Lord Sumption JSC explained in a different context in Barton v Wright Hassall LLP [2018] 1 WLR 119 (at para 16), although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in which this is done is also important. Rules must identify the precise point from which time runs for the purpose of taking further steps."*

60. Furthermore, in *Wright Hassall* (supra), Lord Sumption emphasised that the fact that a defendant has become aware of the proceedings is not sufficient of itself to justify treating any unauthorised service merely as an irregularity. Thus at [16] he said as follows:

> *"The first point to be made is that it cannot be enough that Mr Barton's mode of service successfully brought the claim form to the attention of Berrymans..... For these reasons it has never been enough that the defendant should be aware of the contents of an originating document such as a claim form. Otherwise any unauthorised mode of service would be acceptable, notwithstanding that it fulfilled none of the other purposes of serving originating process."*

61. The reason the judge gave leave to appeal was so that this court could clarify the correct approach when considering matters of service under r.31(6). The court has endeavoured to provide this clarification at paras 40-54 above. It needs to be clearly understood that, this clarification having now been obtained, failure by any applicant or by a judge to follow the approach summarised above on a future occasion is likely to result in any service being treated as ineffective.

62. However, such clarification was not available when para 2 of the Order was made. Furthermore, not only have the defendants become aware of the Order and participated in the proceedings – I accept that this of itself is insufficient as Lord Sumption states – but no

prejudice has been identified on the part of the defendants other than an acceleration of the timetable for enforcement of the Award as compared with the position if service had been ordered through the Central Authority. However, it was not suggested by the defendants that there is any ground under section 7 of the Act for resisting enforcement of the Award, nor was any ground for resisting enforcement suggested to the Hong Kong Court on the application before it for a stay of the Hong Kong Enforcement Order. In those circumstances, I do not consider that speedier enforcement of the Award than would have been the case if service had been ordered via Hague Convention channels is a form of prejudice to which a court should give much weight. This is particularly so in this case where the parties agreed in the arbitration agreement in the Settlement Agreement to the expedited procedure under the HKIAC Rules, so must be taken to have intended a speedy resolution of any dispute and prompt payment by the losing party. Thus, the only effect of setting aside para 2 of the Order would be to delay the ability of the plaintiff to enforce payment of a sum which the tribunal chosen by the parties has found to be due and in respect of which it is not contended that there is any defence to enforcement of the Award. Requiring the plaintiff to start again and apply for an order under r.31(6) would be an entirely technical process with no intrinsic merit. The situation is therefore rather different from that envisaged in the observations of Lord Sumption and Lord Lloyd-Jones quoted above.

63. In this respect, I would refer to the Commentary in the Supreme Court Practice (1999 edition) on the equivalent provision to O.2, r.(1) in the Rules of the Supreme Court where it states:

> *"The authorities, taken as a whole, show that O.2, r.(1) should be applied liberally in order, so far as is reasonable and proper, to prevent injustice being caused to one party by mindless adherence to technicalities in the rules of procedure…."*

64. In this case there is the additional factor that, although not pursuant to any order of the court, as described as para 21 above the plaintiff has already served the first defendant personally by delivery to its registered office and has also served the second defendant by delivery to its registered office in China. Accordingly, if para 2 of the Order were to be set

aside and if, as may be anticipated, a judge hearing a fresh application were nevertheless to order either that service be on the Hong Kong solicitors or that service be by delivery to the registered office of the first and second defendants respectively, nothing would be achieved which has not already occurred; and all this in circumstances where no defence to enforcement as a judgment has been raised in this jurisdiction or before the Hong Kong Court on the application for a stay and where, by choosing the expedited procedure for the arbitration, the parties evinced an intention that any dispute between them should be resolved promptly. Conversely, if such judge were to order service via the Hague Convention, delay would follow before the plaintiff could enforce an award which both the Grand Court and the Hong Kong Court have said should be enforceable as a judgment.

65. In my view, setting aside para 2 of the Order in these circumstances would be a triumph of form over substance and accordingly, in these unusual circumstances and where the appropriate procedure to be followed in relation to r.31(6) had not previously been clarified, I would treat the service point as an irregularity and regard the defendants as having been properly served with the Order. I would accordingly dismiss this ground of appeal. I would repeat, however, that, clarification having now been provided, it may be anticipated that failure in future to comply with the guidance which I have sought to give is likely to result in an order being set aside.

(ii) Full and frank disclosure

66. Before the judge, the defendants submitted that the plaintiff had failed to comply with its duty to make full and frank disclosure on an ex parte application. In their skeleton argument before the judge, the defendants quoted from the decision of Moulder J in *A v B* [2020] EWHC 952 (Comm) as a convenient statement of the duty where she said at [23]:

> *"In my view it is incumbent upon the applicant making an ex parte application on the papers to ensure that all relevant points are drawn to the attention of the judge, and to assume that the judge will scrutinise the papers to identify mistakes on the part of the applicant misunderstands the nature of an application on the papers."*

67. The defendants submitted that the plaintiff should have disclosed three matters which were not included in Wong 1, namely:

(a) that the defendants had applied on 28 August 2023 to the Hong Kong High Court for a stay (incorrectly described by the judge as an application to set aside) of the Hong Kong Enforcement Order;

(b) that there were pending arbitration proceedings between the first defendant and the plaintiff and Carrefour SA (the Second HKIAC Arbitration) which, if successful, could provide a basis for a complete or partial defence, set-off or counterclaim; and

(c) that the plaintiff would be applying to be substituted as petitioner in the winding-up proceedings that had been commenced against the first defendant in Hong Kong.

68. The judge held (at [25]-[28]) that the above three matters, which were undoubtedly not disclosed, were not material to the ex parte application before him, namely an application for an order that the Award be enforced as a judgment in this jurisdiction. He held that the only matters which it would have been material for the plaintiff to disclose would have been any matter potentially supporting a ground for refusing enforcement under section 7 of the Act.

69. On appeal, the defendants renewed their submission in relation to the above three matters but added two further alleged matters of non-disclosure, namely (i) that the plaintiff's skeleton argument in relation to the ex parte application had mis-stated the relevant law on service outside the jurisdiction and (ii) the plaintiff had not provided the required information on the issue of interest.

70. I can dispose shortly of the two additional matters, which were not pursued orally by Mr Potts. They are not properly categorised as a failure to make full and frank disclosure. They fall to be considered under the substantive heading of the service point or the interest point (as the case may be) in order to see whether the judge fell into error as a result of any erroneous submissions in law.

71. As to the three matters raised before the judge, Mr Potts accepted in his skeleton argument that they were now less relevant due to the passage of time and subsequent developments. In my view, it was undoubtedly open to the judge to conclude that they were not material to the issue which he had to decide. He was being asked to make an ex parte order giving leave to enforce the Award as a judgment. What was material therefore was whether the plaintiffs were aware of any defences which the defendants might raise in connection with grounds for refusing leave to enforce under section 7 of the Act. The three matters are not relevant to whether there may be a defence under section 7; they are only relevant, if at all, to the issue of whether an order for enforcement should be stayed beyond the periods set out in r.31(8) until the outcome of the three matters was known. That issue would only arise once the Order was served if the defendants sought a further stay; it was not relevant to whether the Order should be made in the first place. Whilst out of an abundance of caution some applicants might well have disclosed some or all of the three matters, the judge's decision that there had been no breach of the duty of full and frank disclosure cannot be said to be outside the band of decisions reasonably open to him. I would dismiss this ground of appeal.

(iii) The interest point

72. GCR O.73, r.32 provides as follows:

> "*Interest on awards*
>
> *32.(1) Where an applicant seeks to enforce an award of interest, the whole or any part of which relates to a period after the date of the award, the applicant shall file an affidavit giving the following particulars:*
>
> *(a) whether simple or compound interest was awarded;*
> *(b) the date from which interest was awarded;*
> *(c) the rate of interest awarded; and*
> *(d) a calculation showing the total amount claimed up to the date of the affidavit and any sum which will become due thereafter on a per diem basis.*
>
> *(2) The affidavit under paragraph (1) must be filed whenever the amount of interest has to be quantified for the purpose of obtaining a judgment or order under….section 5 of the 1975 Act, or for the*

purposes of enforcing such a judgment or order by one of the means mentioned in O.45, r.1."

73. Wong 1 did not comply with r.32; it stated the information required in (a)-(c) of r.32(1) but did not contain the calculation required pursuant to (d). The defendants argued before the judge that the Order should be set aside on account of this failure. Wong 2 (filed for the inter partes hearing before the judge) purported to quantify the interest to the date of Wong 1 so as to comply with rule 32(1)(d) but it was expressed in US dollars whereas the Award (and therefore the interest payable thereunder) was expressed in RMB.

74. The judge agreed that r.32 had not been complied with. He said (incorrectly it is accepted) that the failure was not advanced as a freestanding ground for setting aside the Order and went on to hold that the failure could be remedied by amendment, as contemplated by O.2 r.1(2) as it had caused no prejudice to the defendants who were *"not impatiently waiting to write a cheque in settlement of the [Award]"*.

75. O. 2 provides, so far as relevant, as follows:

"Non-compliance with rules (O.2, r.1)

1(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) ....”

76. On appeal, the defendants submit that r.32 is in mandatory terms and that the plaintiff's non-compliance should result in the Order being set aside. The judge's decision to allow an amendment (although he did not specify what was to be amended) when there was no application to amend before him was not a proper application of O.2, r.1(2).

77. Following the judge's decision, the parties agreed the calculation of the amount of interest due and the order drawn up to reflect the judge's decision contained details of the amount of interest payable in RMB up to 12 April 2024 and then specified the daily rate from then until date of payment in accordance with r.32; in other words, the position ultimately complied with the objective of r.32(1) and the amount of interest was quantified.

78. In my judgment, this was a classic case for application of O.2, r.1 whether by way of amendment under r.1(2), as the judge chose, or by way simply of treating the failure as an irregularity which required no further action. There was no requirement for a formal application to amend to be lodged in order for the judge to proceed in the way which he did.

79. This was very much a discretionary decision for the judge and it cannot possibly be said that his decision was plainly wrong; on the contrary, a decision to set aside the Order because of the failure to comply with r.32(1)(d) would have been wholly disproportionate.

80. I would reject this ground of appeal.

(4) The stay application

81. The defendants applied to the judge for an order staying the Order (i.e. enforcement of the Award) pending the latest to occur of:

(i) the outcome of the Second HKIAC Arbitration;

(ii) the outcome of the application to the Hong Kong Court to stay the Hong Kong Enforcement Order; and

(iii) final determination of the winding up petition in Hong Kong.

82. At the time of the hearing before the judge on 21 February 2024, a date in January 2025 had been fixed for the hearing of the Second HKIAC Arbitration and argument had been heard before the Hong Kong Court in relation to the application to stay the Hong Kong Enforcement Order, but no decision had been delivered.

83. The judge accepted that there seemed to be pragmatic force to the argument that it made no sense to permit the plaintiff to fully enforce the Award when the defendants might obtain commensurate financial relief through the Second HKIAC Arbitration. However, he refused a stay. He agreed with the submission of the plaintiff that there was no jurisdiction to adjourn under section 7(5) of the Act as no application had been made in Hong Kong to set aside or suspend the Award. It was therefore a question of the court's inherent jurisdiction. He considered that to grant a stay, even for a comparatively short period until the decision of the Hong Kong Court whether to stay the Hong Kong Enforcement Order was known, would be to undermine the streamlined process for enforcement of foreign arbitral awards in the Cayman Islands and would be effectively to act contrary to section 7(1) of the Act, which provided that enforcement of a Convention Award should not be refused except in the cases mentioned in sub-sections (2) and (3), none of which were said to apply. He did however accept the possibility of the defendants applying to stay any specific execution steps which the plaintiff might elect to pursue in terms of enforcement of the judgment giving effect to the Award.

84. As stated above at para 14, since the judge's decision the Hong Kong Court has dismissed the defendants' application to stay the Hong Kong Enforcement Order pending the outcome of the Second HKIAC Arbitration. It did so on the basis that there was an anti-set-off provision in the Settlement Agreement which the Award had found to be valid and that staying enforcement of the Award so that, if successful, the defendants could set-off

any amounts awarded in the Second HKIAC Arbitration against the amount owed under the Award would be to act contrary to the agreed terms of the Settlement Agreement.

85. The defendants accept that the judge's decision not to stay the Order was a discretionary decision and that this court can only intervene if it holds that the judge was plainly wrong. They submit that he was. He clearly recognised the pragmatic force of the argument that it would not be sensible to permit full enforcement of the Award when the Second HKIAC Arbitration might award the first defendant a greater sum than was owed under the Award. Indeed, they submit, the judge gave effect to this by envisaging a possible application for a stay of any specific enforcement measures which the plaintiff might subsequently take.

86. In my judgment, it cannot possibly be said that the judge's decision was plainly wrong. He paid full regard to the pro-enforcement policy in respect of Convention Awards and to the fact that to stay enforcement would be to refuse (for a while) enforcement through the backdoor contrary to section 7. The fact that the judge may have envisaged a possible stay at a later stage does not in any way invalidate his conclusion that a stay should not be granted at this stage.

87. The defendants' submission that the judge was plainly wrong transforms from weak to virtually unarguable in the light of the subsequent decision of the Hong Kong Court, as the supervisory court in the seat of arbitration, in a closely reasoned judgment to refuse a stay of enforcement of the Award in Hong Kong. The reasons which the court gave in that judgment are convincing and are equally applicable in this jurisdiction.

88. In the circumstances, I would reject this ground of appeal.

Conclusion

89. For the reasons I have given, I would dismiss the defendants' appeal in respect of all four issues.

Sir Jack Beatson, JA

90. I agree.

Sir Richard Field, JA

91. I also agree.