I. Supreme Court of Singapore - High Court

II. P. T. Tri-M.G. Intra Asia Airlines v Norse Air Charter Limited - [2009] SGHC 13 (12 January 2009)

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[2009] SGHC 13

Suit No:	Suit 574/2008, SUM 3972/2008
Decision Date:	12 Jan 2009
Court:	High Court
Coram:	Darius Chan AR
Counsel:	Ooi Oon Tat (Salem Ibrahim & Partners) for the plaintiff, Shanna Rani Ghose (T S Oon & Bazul) for the defendant

Subject Area / Catchwords

Arbitration

Judgment

12 January 2009 — Judgment reserved.

Darius Chan AR:

Introduction

1 The defendant in this application seeks a stay of proceedings pursuant to s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). What distinguishes this from a typical stay application is that the contract between parties contains, *ex facie* , an arbitration clause as well as a jurisdiction clause. This presents an important practice point

especially in international commercial contracts where such clauses feature significantly and impact considerably on how risks are managed by the parties.

Background

2 Under an agreement dated 17 January 2007, P. T. Tri-M.G. Intra Asia Airlines ("Tri-M.G."), incorporated in Indonesia, leased a Boeing B737-210QC aircraft to Norse Air Charter Limited ("Norse"), a Mauritian company. That agreement was titled Aircraft Lease Agreement Contract No. B737/0010/2007 ("the Agreement"). The term of the lease was from 1 February 2007 to 31 January 2008. During that period, the relationship between the parties broke down. Tri-M.G. filed a suit against Norse on 18 August 2008, seeking US$324,485.42 allegedly due and owing under the terms of the Agreement and a further US$$420,000 for Norse's purported early termination of the Agreement effective from 25 July 2007. In response, Norse filed the present application to stay the proceedings in favour of arbitration.

3 Both parties are not in dispute that the applicable law is s 6 of the IAA. A detailed treatment of s 6 of the IAA is unnecessary since that has been ably done in *Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd* [2008] SGHC 229 . I proceed to outline the two issues canvassed in this application; the first is peculiar, whilst the second is prevalent in such applications:

(a) Whether a stay under s 6 of the IAA ought to be granted when the Agreement *ex facie* contains an arbitration clause as well as a jurisdiction clause; and

(b) Whether a dispute exists between the parties.

4 Due to the novelty of the first issue which both counsel unfortunately could not address during the hearing adequately, at the end of the hearing I directed them to furnish written submissions. I now deal with each issue *seriatim*

Presence of two dispute resolution clauses in the Agreement

5 As mentioned, the unique feature of this stay application is the presence of two *ex facie* distinct dispute resolution clauses in the Agreement. At this stage, it is necessary for me to reproduce those two clauses. Clause 15 of the Agreement reads:

15 **ARBITRATION**

All disputes under this Agreement shall be submitted for resolution by arbitration pursuant to the Rules of conciliation and Arbitration of the International Chamber of Commerce in effect as of the date any dispute arose.

6 Clause 22 states:

22 **GOVERNING LAW AND JURISDICTION**

22.1 This Agreement shall be governed and construed in accordance with the laws of The Republic of Singapore.

22.2 Each of the parties to this Agreement agrees for the exclusive benefit of the others (*sic*) that the courts of The Republic of Singapore shall have jurisdiction to hear and determine any suit, action or proceedings and to settle any disputes which may arise out of or in connection with any *Governing Document* (respectively "Proceedings" and "Disputes") and, for such purposes irrevocably submits to the jurisdiction of such courts.

22.3 …

[emphasis added]

Although the phrase "Governing Document" in cl 22.2 above appeared in title case, I discovered, after a thorough examination, that it is not defined or mentioned anywhere else in the Agreement. Both counsel however were content to assume that the Agreement fell within the rubric of "Governing Document" and did not address me on this point. The Agreement also contains several other phrases that are in title case but which are not defined, *eg* , "Bankers Guarantee" in cl 4.1 and "Operative Document" in cl 8.2. I shall therefore proceed on the basis that the phrase "Governing Document" did not carry any special definition and would bear its plain literal meaning to include the Agreement which governs the contractual relationship between the parties. Let me outline the competing arguments.

Norse's case

7 Counsel for Norse, Ms Shanna Ghose, unsurprisingly submitted that the dispute in the present case ought to be referred to arbitration. In her written submissions, she raised four arguments in support. First, she cited Robert Merkin, *Arbitration Law* (LLP, Service Issue No 50, 1 September 2008) ("Merkin") at [5.13] – [5.14] for the proposition that when there is an inconsistency in a contract in relation to the dispute resolution mechanism, as a matter of policy, the courts will give priority to the obligation to arbitrate.

8 Ms Ghose's second argument rested on *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 (" *Paul Smith* ") where the contract between the parties had two similarly distinct dispute resolution clauses. The learned Steyn J construed the contract and held that the jurisdiction clause was to be interpreted as a reference to the law governing the arbitration, *ie* , the curial law or the *lex arbitri* . Read in that light, the jurisdiction clause was not an impediment to him granting a stay of proceedings in favour of arbitration. This approach in *Paul Smith* was cited by the learned Moore-Bick J in *Shell International Petroleum Co Ltd v Coral Oil Co Ltd* [1999] 1 Lloyd's Rep 72 (" *Shell* ").

9 Ms Ghose submitted that a similar construction ought to be applied to cll 15 and 22.2 of the Agreement. She argued that such a construction would be consistent with parties' intention, which in her submission, was that all disputes would be referred to arbitration. She pointed out that when parties were trying to resolve the dispute, Tri-M.G. itself had made repeated requests to amend the arbitration agreement from a International Chamber of Commerce ("ICC") arbitration to one conducted under the auspices of the Singapore International Arbitration Centre ("SIAC") by a single arbitrator in Singapore. These requests are evidenced in the correspondence between parties exhibited in the affidavit of Mohd Yunos Bin Mohd Ishak ("Yunos"), Executive Chairman of Tri-M.G [note: 1]

10 The third argument advanced by Ms Ghose foreshadowed Tri-M.G.'s case. She contended that cll 15 and 22.2 of the Agreement should not be construed as giving the parties an option

to elect between arbitration and litigation. This was in response to the principle espoused in David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (23 rd Ed, Sweet & Maxwell, 2007) ("Russell") at [2-018], which states that where a dispute resolution provision contains an arbitration agreement but also provides one party with an option to litigate, that provision will be upheld provided it is clear and unequivocal. Russell cites *Law Debenture Trust Corp Plc v Elektrim Finance BV* [2005] EWHC 1412 (" *Law Debenture* ") in support. Locally, the learned Goh Joon Seng J in "*The Dai Yun Shan*" [1992] 2 SLR 508 had recognised that an arbitration agreement could give either party a choice between arbitration and litigation. Ms Ghose sought to distinguish those two cases by confining them to the specific language of their dispute resolution provisions.

11 The final argument of Ms Ghose was based on the canon of construction whereby when there are two inconsistent clauses in a contract, the later clause is to be rejected as repugnant and the earlier clause prevails. However, if the court can read the later clause as qualifying rather than destroying the effect of the earlier clause, then the two are to be read together and effect given to both: see Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 2007) at [9.08]. Ms Ghose observed that this canon of construction had been cited locally in argument in *AL Stainless Industries Pte Ltd v Wei Sin Construction Pte Ltd* [2001] SGHC 243 . She urged the court to excise cl 22.2 of the Agreement pursuant to this canon.

Tri-M.G.'s case

12 The written submissions of counsel for Tri-M.G., Mr Ooi Oon Tat, sought to persuade the court that on a proper construction of the Agreement, cll 15 and 22.2 gave parties an option to proceed with either arbitration or litigation. He distinguished *Paul Smith* ([8] *supra*) on two grounds. First, he emphasised that the wording of the jurisdiction clause in *Paul Smith* is different from cl 22.2 of the Agreement and that the phraseology employed in cl 22.2 would be inconsistent with a finding that that clause referred to the Singapore courts having mere supervisory jurisdiction over the arbitration. I propose to scrutinise the case law later in this judgment. At this juncture it would be appropriate to record the court's appreciation to Mr Ooi's candour in raising the *Paul Smith* -line of authorities which was *prima facie* adverse to his case and which was not cited by Ms Ghose during the hearing.

13 The second ground on which Mr Ooi attempted to distinguish *Paul Smith* ([8] *supra*) was by submitting that it was decided before the enactment of the Arbitration Act 1996 (UK) when the judicial climate in England was more interventionist. He went on to argue that interpreting a submission to the Singapore court's jurisdiction as merely allowing the courts supervisory jurisdiction over the arbitration is contrary to the doctrine of party autonomy. That doctrine recognises that parties are at liberty to choose for themselves the procedures and legal rules applicable to their contractual relationship: see Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4 th Ed, Sweet & Maxwell, 2004) at [2-34].

14 The written submissions on this point were regrettably difficult to follow but it appears Mr Ooi's argument essentially was that the adoption of the construction in *Paul Smith* ([8] *supra*) would impose a curial law upon the parties that deprives parties of their liberty of that choice. My response is that it is axiomatic that the entire exercise of construction is precisely to ascertain what the parties had agreed to in the first place. If the court finds, upon a proper construction exercise, that parties had indeed made a choice of seat of arbitration or curial

law in their Agreement, that exercise serves to give effect to, and not derogate from, the doctrine of party autonomy.

15 The next contention of Mr Ooi was that Norse had committed a repudiatory breach of the arbitration agreement which resulted in Tri-M.G.'s termination of the same. To elaborate on the factual matrix mentioned (at [9] *supra*), Yunos deposed in his affidavit that before this suit was initiated, parties had a meeting through the same set of solicitors in an attempt to resolve the matter amicably. After that meeting, Mr Ooi wrote a letter on behalf of Tri-M.G. seeking the formal consent of Norse to a variation of cl 15 of the Agreement, whereby it was proposed that instead of arbitration under the ICC, the arbitration was to be held in Singapore before a single named arbitrator under the SIAC or such rules as may be agreed between the parties ("the proposed variation"). The proposed arbitrator was to be the same arbitrator who had been appointed to hear a dispute in Singapore under the SIAC rules between Executive Jet (Charters) Pte Ltd ("EJA") and Norse Leasing Limited ("NLL"). NLL was a company under Norse's group of companies. Yunos, on the other hand, was a shareholder and non-executive director of EJA.

16 In that letter, Mr Ooi imposed a deadline of seven days from the date of the letter on Norse to provide a written acceptance of to the proposed variation. Ms Ghose's firm replied that they were taking instructions from Norse but it appears that there was no subsequent reply forthcoming from Norse or its solicitors.

17 Mr Ooi submitted that time was made of the essence when he imposed the deadline of seven days and the failure of Norse to respond constitutes a repudiatory breach which entitles Tri-M.G. to terminate the arbitration agreement. Mr Ooi anchored his submission on the principle that where time was not originally of the essence of the contract, but one party has been guilty of undue delay, the other party may give notice requiring the contract to be performed within a reasonable time: see *Chitty on Contracts* (29 th Ed, Sweet & Maxwell, 2004) at [21-014]. He further submits that once proper notice making time of the essence is served, breach of that notice allows the innocent party to terminate the contract.

18 I have no hesitation in rejecting this argument *in limine* for being misconceived in law. The only effect of the lack of response by Norse was the lapsing of the offer of the proposed variation. Any undue delay on the part of Norse was in its response to the proposed variation and not in its performance of its obligations under the arbitration agreement. Accordingly, any delay would not affect the arbitration agreement.

19 Further, as Ms Ghose pointed out during the hearing, Tri-M.G. cannot unilaterally vary the arbitration agreement such that it is now a condition that Norse had to respond to the proposed variation by the deadline imposed. I accept Mr Ooi's *general* proposition that a party may, under certain circumstances, commit a repudiatory breach of an arbitration agreement thereby permitting the innocent party to bring the arbitration agreement to an end: see David Joseph QC, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell, 2005) ("Joseph QC") at [4.23]; *John Downing v Al Tameer Establishment and anor* [2002] EWCA Civ 721 at [25].

20 However, the *specific* argument advanced by Mr Ooi in relation to the present facts is, with respect, misplaced. Chitty ([17] *supra*) states at [21-014]:

Where time was not originally of the essence of the contract, but one party has been guilty of undue delay, the other party may give notice requiring the contract to be performed within a reasonable time. … Notice making time of the essence of the contract can be given in relation to any term of the contract: entitlement to give notice is not confined to essential terms of the contract. … Once notice has been given, both parties are bound by it so that, if the party giving the notice is not ready to perform on the expiry of the notice, the other party *may* be entitled to terminate. [emphasis added]

Chitty at [21-017] elucidates on the last sentence of the extract above:

Where, however, notice is given by one party purporting to make "time of the essence" in respect of a breach of a non-essential term of the contract, the consequences are altogether different. Such a notice does not serve to make time of the essence so far as the obligations in the original contract are concerned, because one party cannot unilaterally vary the terms of a contract by turning what was previously a non-essential term of the contract into an essential term: the notice "has in law no contractual import."… Given that the notice cannot have the effect of turning the non-essential term of the contract into a condition, the party giving the notice can only terminate where the failure of the other party to comply with the terms of the notice goes to the root of the contract so as to deprive that party of a substantial part of the benefit to which he was entitled under the terms of the contract. Failure to comply with the terms of the notice can therefore only be used as evidence of a repudiatory breach; it is not a repudiatory breach *per se*

21 For Mr Ooi's argument to succeed, it must first be a term of the arbitration agreement that Norse was obligated to respond to the proposed variation by the imposed deadline. On the basis of the evidence before me, I cannot see how Norse had agreed to such an obligation. Even assuming *arguendo* that there is such an obligation, it does not mean that Norse's failure to comply with the terms of the notice is a repudiatory breach of the arbitration agreement *per se* . At no time was Tri-M.G. deprived of the substantial part of the benefit of the arbitration agreement, *viz* for the dispute to be referred to arbitration. This is in fact well recognised by Tri-M.G. itself. After Norse had failed to reply to Tri-M.G. by the imposed deadline, Tri-M.G. sent a letter through Mr Ooi dated 12 May 2008. [note: 2] Mr Ooi wrote that if Norse failed to reply by that same day, Tri-M.G. "would have made the request to arbitration under the ICC this evening". That closing remark speaks volumes.

22 The final argument raised by Mr Ooi was in response to the canon of construction advanced by Ms Ghose (see [11] *supra*). Mr Ooi cited Gerard McMeel, *The Construction of Contracts* (2007, Oxford University Press) ("McMeel") at [4.18] – [4.21] which states that the traditional rule that where two clauses are repugnant the former prevailed and the latter rejected is thought to be "a mere rule of thumb and to be used only as a last resort". McMeel submits that "such a rule no longer represents good English law" and explains that:

The modern principle is that the court will treat as repugnant a clause which is inconsistent with the main purpose of the contract, or with the intentions of the parties objectively ascertained from the whole of the contract in its relevant contextual setting.

23 On this topic of canons of construction, I queried counsel during the hearing which party bore the responsibility for drafting the Agreement, having in mind the applicability of the *contra proferentum* rule. Unfortunately both counsel had no instructions and therefore I could place no reliance on that rule.

Analysis of case law

24 Having crystallised the parties' submissions, it is clear that I have to construe the Agreement, an exercise which both counsel did not disagree that I should undertake. Since there appears to have been no reported local authority on this point, I propose to evaluate case law from other jurisdictions to consider their applicability to the instant case. I commence with the cases cited by counsel.

25 *Paul Smith* ([8] *supra*) concerned a licensing agreement whereby the plaintiff granted the defendant a licence to manufacture, promote, distribute and sell in North, Central and South America sports clothing designed by the plaintiff. The arbitration clause in that agreement was cl 13 entitled "Settlement of Disputes". It read as follows:

If any dispute or difference shall arise between the parties concerning the construction of this Agreement or the rights or liabilities of either party hereunder the parties shall strive to settle the same amicably but if they are unable to do so, the dispute or difference shall be adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with those rules.

There was *ex facie* an exclusive jurisdiction clause in that agreement which was cl 14 entitled "Language and Law". It provided as follows:

This Agreement is written in the English language and shall be interpreted according to English law.

The courts of England shall have *exclusive jurisdiction over it* to which jurisdiction the parties hereby submit. [emphasis added]

Steyn J recognised that even though the phrase "over it" in the clause above was, strictly speaking, referring to the agreement between the parties, that clause should be construed as referring to the curial law instead. That was because, in his view, treating the arbitration clause to be *pro non scripto* (*ie* , as if it were not written) was unattractive in the context of an international commercial contract. He rejected an interpretation that would entail reading the phrase "subject to clause 13" into the latter clause because of "the linguistic manipulation required and the unbusinesslike spectre of some disputes going to court and some to arbitration". It is also pertinent to note that in this case the Court of Arbitration of the ICC had confirmed London as the place of arbitration.

26 Mr Ooi urged the court not to adopt the construction employed in *Paul Smith* ([8] *supra*) because it would be incompatible with the clear language of cl 22.2 of the Agreement. He argued that the language used in cl 22.2 of the Agreement was of a wider and more definite nature than the relatively sparsely worded jurisdiction clause in *Paul Smith*

27 *Paul Smith* ([8] *supra*) was cited subsequently in *Shell* ([8] *supra*). *Shell* involved, *inter alia* , a services agreement that was entered into by the plaintiff to provide assistance to the defendant to enable the defendant to blend and produce lubricating oils for sale in Lebanon and the Middle East. The services agreement contained *ex facie* a jurisdiction clause entitled "Applicable law" in the following terms:

This Agreement, its interpretation and the relationship of the parties hereto shall be governed and construed in accordance with English law and any dispute under this provision shall be referred to the jurisdiction of the English Courts.

The next clause was the arbitration clause entitled “Arbitration” which provided as follows:

Any dispute which may arise either in contract or at law of or in connection with this Agreement shall be finally and exclusively settled by arbitration by three arbitrators in London, England in accordance with the Rules of the London Court of International Arbitration at the date hereof.

Moore-Bick J held that the two clauses above could be reconciled by requiring any dispute on the proper law of the contract to be referred to the English court and that all other disputes would be referred to arbitration. Whilst the language of the two clauses in *Shell* could be distinguished from the instant case, what is most germane is the observation by Moore-Bick J that in his judgment the parties did intend substantive disputes to be referred to arbitration. Merkin ([7] *supra*) at [5.13] opined that the court “felt that the existence of an arbitration clause was strongly indicative of the parties’ intentions and that the construction adopted made sense of each of the provisions”.

28 I now turn to analyse other relevant cases that were not raised by counsel. In *The Nerano* [1994] 2 Lloyd’s Rep 50, a bill of lading contained words sufficient to incorporate an arbitration clause in the underlying voyage charterparty that read as follows:

That should any dispute arise between the Owners and Charterers the matter in dispute shall be determined in London, England, according to the Arbitration Acts, 1975 to 1979 and any amendments or modifications thereto and English law to govern.

However, the bill of lading also contained a clause that stated that “English law and jurisdiction applies”. In deciding whether the arbitration clause had been successfully incorporated in the bill of lading, the learned Clarke J held (at 55) that the two clauses were reconcilable and the reference to English jurisdiction was not inconsistent with a submission to arbitration; it simply meant that the English court was to retain supervisory jurisdiction over the arbitration since under the arbitration clause, the arbitration was to take place in England. This reasoning was approved on appeal by the learned Saville LJ in *The Nerano* [1996] 1 Lloyd’s Rep 1 at 4 with whom the learned Aldous LJ and Glidewell LJ concurred.

29 A more recent case is *Axa Re v Ace Global Markets Limited* [2006] EWHC 216 (Comm) (“ *Axa Re* ”), where there was an arbitration clause in an reinsurance contract which provided as follows:

15 ARBITRATION

15.1 The parties agree that prior recourse to courts of law any dispute between them concerning the provisions of this contract shall first be the subject of arbitration.

…

15.9 The seat of the arbitration shall be in London and the arbitration tribunal shall apply the laws of England as the proper law of this contract unless indicated in section L to the schedule.

…

There was also *ex facie* a jurisdiction clause which read as follows:

This Contract shall be subject to English Law and Jurisdiction.

The learned Gloster J applied *Paul Smith* ([8] *supra*) and held (at [34]) that the reference to English jurisdiction fixed the supervisory court of the arbitration.

30 In arriving at her holding, Gloster J had to deal with *Indian Oil Corporation v Vanol Inc* [1991] 2 Lloyd's Rep 634 (" *Indian Oil* ") which was raised in argument. In that case which involved a sale of kerosene oil CIF Yanbu, there was an incorporated arbitration clause in standard terms which read as follows:

Article XI: Governing Law and Arbitration.

(a) The contract shall be governed by the laws of India.

(b) In the event of any dispute arising between the two parties relating to the various terms and conditions set forth in the contract the two parties undertake to resolve the differences by mutual consultation. In the event of their inability to resolve the dispute, the parties herein undertake to refer such disputes to an arbitrator: the arbitration shall take place in India."

However, parties had also agreed to a clause as follows:

Law: the validity construction and performance of the agreement shall be governed by English law and all disputes arising thereunder shall be submitted to the jurisdiction of the English Courts.

The learned Webster J in *Indian Oil* held that the terms of the written document, which contained the specifically agreed clause as to English law, took precedence over the arbitration clause, which had been incorporated merely by reference to the plaintiff's general terms and conditions for import of products. Webster J concluded that when there were two incompatible clauses, the specifically agreed clause was to be preferred over the incorporated standard clause. There was a subsequent appeal which did not affect this particular holding: see *Indian Oil Corporation v Vanol Inc* [1992] 2 Lloyd's Rep 563.

31 Gloster J in *Axa Re* ([29] *supra*) distinguished *Indian Oil* ([30] *supra*) on two grounds (at [37]): (i) that case involved an arbitration clause that was incorporated as part of the standard terms and a jurisdiction clause that was specifically agreed to; and (ii) in his view the two clauses in *Indian Oil* were "clearly mutually inconsistent". Merkin ([7] *supra*) at footnote 7 to [5.13] is of the view that in light of " *Axa Re* and the earlier decisions… it might be thought that *Indian Oil* is now of little if any weight".

32 Besides *Indian Oil* ([30] *supra*), I encountered another decision, *MH Alshaya Company WLL v Retek Information Systems Inc* [2001] Masons C.L.R. 99 (" *MH Alshaya* "), which did

not give effect to the arbitration clause when faced with two *ex facie* competing dispute resolution clauses.

33 In that case, parties had concluded a software licence agreement with a jurisdiction clause nominating the English courts as well as an arbitration clause. In addition, parties entered into a maintenance agreement that had a jurisdiction clause nominating the English courts, an entire agreement provision, but no arbitration clause. When disputes arose, one party sought to initiate arbitration proceedings in London but the other party sought an injunction before Garland J opposing the arbitration. Garland J granted the injunction by holding that the arbitration clause in the licence agreement was ineffective. He acknowledged that it was a difficult decision but was motivated by the particular circumstances of that case and the relationship of the parties, where there may well be disputes which overlapped between the two contracts and disputes which may be discrete. He was of the view that it was preferable to construe both contracts consistently to provide one dispute resolution mechanism for disputes arising out of both contracts and since the maintenance agreement had an entire agreement provision, it was not open to him to write the arbitration clause into the maintenance agreement.

34 *MH Alshaya* ([32] *supra*) has come under criticism by two learned authors, Merkin ([7] *supra*) at [5.14] and Joseph QC ([19] *supra*) at [4.74]. Both of them proffer the same solution to this case. They suggest that Garland J ought to have held that on a proper construction of the license agreement, substantive disputes had to be referred to arbitration with the English courts having supervisory jurisdiction over the arbitration. Disputes under the maintenance agreement however would be referred to the English courts. In so far as the disputes under the maintenance agreement overlapped with those under the licence agreement, the English court would have been entitled, pursuant to its inherent jurisdiction, to stay those proceedings and accept the conclusion of the arbitral tribunal on those issues by way of issue estoppel.

35 To my mind, *Indian Oil* ([30] *supra*) and *MH Alshaya* ([32] *supra*) are unhelpful to the instant case because those decisions essentially turned on their unique factual matrices. *Indian Oil* concerned an *incorporated term* for arbitration by reference to the *general* terms and conditions of one party on the one hand and an *express* jurisdiction clause on the other. *MH Alshaya* involved two contracts where the paramount concern of the judge was the consistency of results for disputes arising under the two closely connected contracts. Those special features are absent from the instant case. In any event, whilst it is unnecessary for me to render any conclusive views, I have set out how the correctness of both decisions has been questioned by learned writers: see *supra* [31] and [34].

36 Returning to the trilogy of *Paul Smith* ([8] *supra*), *Shell* ([8] *supra*) and *Axa Re* ([29] *supra*), all three cases were cited and applied in *McConnell Dowell Constructors (Aust) Pty Ltd v National Grid Gas plc* [2006] EWHC 2551 (TCC) (“ *McConnell* ”) by the learned Jackson J. *McConnell* involved a contract for the construction of a gas pipeline in Lancashire, England by the Australian plaintiff. That contract contained *ex facie* a jurisdiction clause which provided as follows:

5. The *Contract* shall be governed by and construed in accordance with English Law and in the event of any dispute relating thereto the parties hereby submit to the jurisdiction of the Courts of England.

The contract also included detailed provisions on how disputes are first to be referred to the project manager, then to adjudication if still unresolved and finally to arbitration if parties are dissatisfied with the decision of the adjudicator. The relevant portions of the arbitration agreement read:

1 …the *Adjudicator* is to be agreed between the parties…

…

9 Disputes and determination

- The person who will choose a new adjudicator if the Parties cannot agree a choice is the - President for the time being of the Institution of Civil Engineers

- The tribunal is arbitration.

10 Optional statements

- The arbitration procedure is the Institution of Civil Engineers Arbitration Procedure (England and Wales) 1997…

Jackson J was of the view (at [58]) that the reconciliation of the dispute resolution provisions according to the approach in *Paul Smith* ([8] *supra*) made good commercial sense and was in accordance with the expressed intention of the parties.

37 The final English authority to be considered which involves a variation of the present factual scenario is the very recent decision of the learned Christopher Clarke J in *Ace Capital Ltd v CMS Energy Corporation* [2008] EWHC 1843 (Comm) (" *Ace Capital* "). That case concerned an insurance policy between the insured Michigan corporation and its underwriters. The policy contained an arbitration clause specifying arbitration at the London Court of International Arbitration in London for the resolution of all disputes. It also contained a clause entitled "Service of Suit Clause" by which the underwriters agreed to submit to the jurisdiction of any court of competent jurisdiction in the United States in the event the underwriters failed to pay any monetary claims of the insured. The insured had commenced proceedings in the United States and the underwriters sought an injunction before Christopher Clarke J to restrain those proceedings. It was not open to the judge to hold that the United States courts had supervisory jurisdiction over the arbitration since London had been expressly designated as the seat of the arbitration.

38 Counsel for the insured in that case pressed for a construction whereby monetary claims may be tried in the United States at the option of the insured, but if there is a non-monetary claim (*eg* , a claim for a declaration of liability or non liability where there is as yet no monetary claim) then it must be arbitrated. Christopher Clarke J rejected such an argument and held, upon a construction of the policy, that the arbitration clause ought to be accorded primacy and the "Service of Suit Clause" was only concerned with ensuring that the underwriters were amenable to United States jurisdiction in proceedings to enforce any arbitration award. Such a holding also has, as the judge observed, the support of strong judicial opinion in the United States.

39 Whilst Christopher Clarke J canvassed four factors in reaching his decision, the bulwark of his holding was the House of Lords' decision in *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] EWCA Civ 1329; [2007] 4 All ER 951. The House of Lords in that case held that the courts would be slow to attribute to reasonable parties an intention that there should be in any foreseeable eventuality two sets of proceedings, *viz* arbitration and litigation: see also Yeo Tiong Min, "The Effective Reach of Choice of Law Agreements" [2008] 20 SAcLJ 723 at [40] – [41] . In the instant case, Mr Ooi has rightly not pressed for an interpretation that may lead to a situation where some disputes would go to arbitration and some to litigation. Nevertheless one would do well to bear this in mind when approaching this exercise of construction.

40 In his review of authorities on both sides of the Atlantic, Christopher Clarke J also referred to the trilogy of *Paul Smith* ([8] *supra*), *Shell* ([8] *supra*) and *Axa Re* ([29] *supra*). What is pertinent for our purposes is that he understood those cases to demonstrate the principle that the contract must be read as a whole and every effort should be made to give effect to all clauses in a contract: see [70]. He also acknowledged that in reaching the ultimate construction of the policy, infelicity in language may invariably have to be endured, especially when the consequence of not doing so would be to regard the arbitration clause, in so far as it relates to monetary claims by the insured as being, at the insured's option, *pro non scripto* . Further, the judge emphasised the language of the arbitration clause as being a mandatory "all disputes" arbitration clause: see [95] – [96].

41 Moving from the United Kingdom to the Orient, there is an analogous Hong Kong authority in *Arta Properties Limited v Li Fu Yat Tso and ors* [1998] HKCU 721 . The learned Findlay J was faced with an arbitration clause which read:

In case any dispute or difference should arise between the parties hereto touching or relating to the said development or any other matter or thing arising under this deed/contract the same shall be referred to as (sic) 'single arbitrator' in accordance with the provisions of the Arbitration Ordinance in Hong Kong or any statutory modification or re-enactment of it for the time being in force.

However the next clause read:

This deed shall be governed by and construed in all respects under the laws of Hong Kong and each party shall submit to the jurisdiction of the Hong Kong courts in case there are any disputes.

42 Findlay J held, without citing any of the English cases canvassed thus far, that the reference to the jurisdiction of the Hong Kong courts referred to the supervisory jurisdiction of the courts over the arbitration and accordingly ordered a stay of proceedings and referred the matter to arbitration. He opined thus:

The parties have entered into this agreement seriously. It's a formal agreement. It's not a home-made agreement written by the parties on a piece of restaurant napkin. They've obviously had advice and it's been drawn up and sealed in a formal way.

One must assume that the parties expected what they agreed in this agreement to be effective and to be workable. The court should not strive to frustrate the parties' wish to implement

every clause of this agreement if it is reasonably and sensibly possible to construe the two clauses so that they can sit together.

43 These views above find resonance in the judgment of the learned Lord Goff in *Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd* [1989] 2 HKLR 639 (PC) at 645: see also Lewison ([11] *supra*) at [9.13] and McMeel ([22] *supra*) at [4.11] – [4.13]. Lord Goff suggested that (at 645):

But where the document has been drafted as a coherent whole, repugnancy is extremely unlikely to occur. The contract has, after all, to be read as a whole; and the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by the ordinary processes of construction.

I saw pragmatic commercial sense in the judicial acumen of Findlay J and Lord Goff and respectfully adopt their advice for this exercise of construction.

44 Taking into account the international flavour of international commercial contracts such as the Agreement in the instant case, it may be apposite to focus our comparative lenses on jurisprudence beyond the Commonwealth before I proffer my views. In this regard I can do no better than set out verbatim the observations of Emmanuel Gaillard and John Savage in *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) at [390]:

[W]hen faced with an apparent contradiction between an arbitration clause and a clause providing for the jurisdiction of courts, the French courts have systematically attempted to ensure that the former prevails over the latter. As the Paris Tribunal of First Instance held in 1979

an ambiguous arbitration clause should be interpreted by considering that if parties had not wished to submit their disputes to arbitration, they would simply have refrained from mentioning the possibility of doing so;… by including an arbitration clause in their contract, they demonstrated that it would be necessary to submit any disputes arising from their contract to [the arbitral tribunal to which they referred].

In 1991, the Paris Court of Appeal reached a similar conclusion in a case arising from contracts containing a clause attributing jurisdiction “in the event of a dispute” to “the Paris courts” and a clause conferring “jurisdiction on arbitrators in the event of a dispute concerning the interpretation or performance of the present contracts.” The Court held that the first of these clauses “can only be interpreted as an attribution of territorial jurisdiction, subordinate to the arbitration agreement, to cover the eventuality that the arbitral tribunal is unable to rule.” In a decision of November 26, 1997, in a case concerning a French domestic arbitration, the *Cour de cassation* upheld a decision of a Court of Appeals which, when faced with a contract containing both an arbitration clause and a clause providing for the jurisdiction of the courts, had held that the latter clause played only a subsidiary role and had therefore declined jurisdiction in favour of the arbitral tribunal. Courts in other jurisdictions often display the same tendency to salvage the arbitration clause whenever possible. In a case where the parties had incorporated, in two successive articles of their contract, an ICC arbitration clause and a clause providing for the exclusive jurisdiction of the English courts, the High Court saved the arbitration clause by ruling that the reference to English courts

applied only to incidents arising during the conduct of the arbitration. A similar approach has been adopted by United States courts.

My views

45 Whilst the comments of the Paris Tribunal of First Instance reproduced in the extract above may apply fully in a domestic context, its force is somewhat reduced in an international commercial contract because the same reasoning can apply to jurisdiction clauses that designate a neutral forum, *eg* , in the instant case parties are incorporated in Mauritius and Indonesia respectively but specifically selected Singapore in cl 22.2 of the Agreement. Nonetheless, the extract above neatly encapsulates how different courts around the world, whilst diverse in legal cultures, have approached this very issue with a very similar technique of construction to best give effect to parties' intentions.

46 Upon a careful consideration on the suitability and applicability of the case law reviewed thus far, I am inclined to apply the technique of construction in *Paul Smith* ([8] *supra*) locally and find that the cll 15 and 22.2 can be reconciled by reading cl 22.2 as a submission to the Singapore court's supervisory jurisdiction over the arbitration. I acknowledge that a literal reading of the language used in cl 22.2 of the Agreement may not, at first blush, commend itself to such a construction, but the same could be said for *Paul Smith* , *McConnell* ([36] *supra*), *Arta Properties* ([41] *supra*) and *Ace Capital* ([37] *supra*). I do not think that the degree of infelicity in the language of cl 22.2 warrants a different conclusion. If the language used in the Agreement had been perfect, this issue would not have arisen in the first place.

47 Ultimately I am persuaded by the views of the learned judges in the cases reviewed that such a construction would best give effect to the expressed intentions of the parties in the context of an international commercial contract. The Agreement was a formal contract presumably concluded at arms' length under advice. Bearing in mind how courts should generally approach issues of inconsistencies (see [43] *supra*), I do not think that cll 15 and 22.2 are so irreconcilable such as to deprive either clause of its effect in the overall scheme of the Agreement. More importantly, I am not persuaded by Mr Ooi that the Agreement gave either party an option between arbitration and litigation. The language of cl 15 is in the form of an unqualified mandatory "all disputes" arbitration agreement which is inimical to the construction advanced by Mr Ooi. None of the cases reviewed above have taken that approach. A review of the relevant case law that have found such an option came about only from clear and unequivocal language used by the parties.

48 Although Mr Ooi did not cite any cases that had conferred an option to arbitrate on either or one party in support of his contention, it may be in good order for me to raise the key authorities in this area to illustrate my point. In *The Dai Yun Shan* ([10] *supra*), the relevant clause read:

Jurisdiction: All disputes arising under or in connection with this bill of lading shall be determined by Chinese law in the courts of, *or by arbitration* in, the People's Republic of Singapore. [emphasis added]

In *William Co v Chu Kong Agency Co Ltd & Anor* [1993] HKCFI 215; [1993] 2 HKC 377 , the relevant clause read:

All disputes arising out of or in connection with this bill of lading shall, in accordance with Chinese law, be resolved in the courts of the People's Republic of China *or be arbitrated* in the People's Republic of China. [emphasis added]

In *The Messiniaki Bergen* [1983] 1 Lloyd's Rep 424, the relevant clause read:

40 (a) This charter shall be construed and the relations between the parties determined in accordance with the law of England.

(b) Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties agree . . . *Provided that either party may elect* to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act, 1950 . .

In the *Stena Pacifica* [1990] 2 Lloyd's Rep 234, the relevant clause read:

…

(b) Any dispute arising under the charter shall be decided by the English Courts to whose jurisdiction the parties hereby agree.

(c) Notwithstanding the foregoing, but without prejudice to any party's right to arrest or maintain the arrest of any maritime property, *either party may* , by giving written notice of election to the other party, *elect* to have any such dispute referred to the arbitration of a single arbitrator in London …

In the *Law Debenture* ([10] *supra*), the relevant clauses provided as follows (at [3]):

29.2 Any dispute arising out of or in connection with these present … may be submitted by any party to arbitration for final settlement under … (the UNCITRAL Arbitration Rules), which rules are deemed to be incorporated by reference into this Clause 29.2

…

29.4 The place of any such arbitration shall be London, and the language of the arbitration shall be English. The decision and award of the arbitrators shall be final and binding and shall be enforceable in any court of competent jurisdiction.

…

29.7 *Notwithstanding Clause 29.2* , for the exclusive benefit of the Trustee and each of the Bondholders, [EFBV] and [ESA] hereby agree that the Trustee and each of the Bondholders shall have the exclusive right, at their *option* , to apply to the courts of England, who shall have non-exclusive jurisdiction to settle any disputes which may arise out of or in connection with these presents …. and that accordingly any suit, action or proceedings (together referred to as "Proceedings") arising out of or in connection with any of the above may be brought in such courts… [emphasis added]

49 By way of observation, that the Agreement had provided such an option was not raised or discussed by either party at *any* stage prior to the filing of the suit. In the exchange of letters

between 27 November 2007 and 12 May 2008 [note: 3] , Tri-M.G.'s categorical stand repeated in their correspondence was that the dispute would be referred to arbitration. In fact Tri-M.G.'s letter of 12 May 2008 stated that if it did not receive any confirmation to the proposed variation, it would be proceeding with ICC arbitration: see [21] *supra* . No slightest mention was made that it had the option of commencing proceedings in the Singapore courts. These facts made the construction advanced by Tri-M.G. appear like an afterthought and did not help its case.

50 The concluding point to make in relation to this issue is that I am acutely aware that in *The Nerano* ([28] *supra*) and *Axa Re* ([29] *supra*), the seat or the place of the arbitration was expressly designated to be England in the arbitration agreement, and in *Paul Smith* ([8] *supra*) by the Court of Arbitration of the ICC. This is not so in the instant case. However I do not think that that distinction ought to prevent me from applying the same construction adopted by those English cases. Such an approach would *not* have been possible if parties had, in their arbitration agreement, expressly stipulated a third country as the seat or place of arbitration. But that had not been done and upon a proper construction of cl 22.2 of the Agreement, parties have, in effect, stipulated Singapore to be the seat of arbitration by submitting to the Singapore court's supervisory jurisdiction over the arbitration. This is not incongruous with the rest of the Agreement since parties have expressly chosen Singapore law as the proper law of the contract (in cl 22.1 of the Agreement); the arbitral tribunal is not placed in an unenviable situation of having to manage various systems of laws. For the avoidance of doubt, the stipulation of Singapore as the seat of arbitration does not pre-determine the ultimate venue of the arbitral hearings: see *P.T. Garuda Indonesia v Birgen Air* [2002] 1 SLR 393 at [23] – [24].

A possible alternative construction

51 A possible alternative construction of the Agreement is to interpret cl 22.2 of the Agreement as a jurisdiction clause that applies to disputes arising out of all other governing documents except the Agreement itself. In other words, disputes under the Agreement would be referred to arbitration under cl 15 but disputes arising under any other governing documents from that relationship would be referred to litigation under the Singapore courts pursuant to cl 22.2. To recapitulate, cl 22.2 reads:

22.2 Each of the parties to *this Agreement* agrees for the exclusive benefit of the others (*sic*) that the courts of The Republic of Singapore shall have jurisdiction to hear and determine any suit, action or proceedings and to settle any disputes which may arise out of or in connection with *any Governing Document* (respectively "Proceedings" and "Disputes") and, for such purposes irrevocably submits to the jurisdiction of such courts. [emphasis added]

52 This is a possible construction because cl 22.2, in contrast with the rest of the clauses in the Agreement, is the only clause in the Agreement that uses the specific phrase " *any Governing Document* " when it could easily have read "disputes which may arise out of … *this Agreement* " instead. That there may well be a distinction between the two phrases is further bolstered by how the drafter had in that same clause used the starting phrase "Each of the parties to *this Agreement…* " but went on to use the phrase "any Governing Document" later in the same clause. This nuanced but critical distinction in language suggests that the ambit of cl 22.2 may well be different from that of cl 15. This construction would admittedly have been more consistent with the language used in cl 22.2 and eliminates the apparent inconsistency between the two clauses.

53 However this alternative construction is not without difficulties. I can well envisage complications that may arise if those governing documents captured under cl 22.2 contained their own dispute resolution mechanism. Further, the court is chary of a construction that may lead to a bifurcation of disputes between litigation and arbitration: see [39] *supra* . Be that as it may, both counsel did not attach any significance on the phrase "Governing Document" and did not suggest any other possible documents which may be captured under that phrase. In the absence of arguments, it would not lie for me to pursue this alternative construction, elegant though it may be.

Whether a dispute exists

54 The second issue in this application is whether there exists a dispute between the parties. Arguments by counsel can be simply put. Mr Ooi contended that Norse had failed to make a positive assertion that it was disputing the claim. Mr Ooi further invited me to peruse certain exhibits in Yunos' affidavit which, according to Mr Ooi, showed that Norse had in fact admitted the claim.

55 Ms Ghose argued that Norse had made a positive assertion of a dispute at [13] – [14] of the affidavit filed by Dave Avnit, the CEO of Norse, on 25 November 2008 and that the law did not require Norse to further adduce evidence of the dispute. She submits that even if the law did require so, it can be seen from certain exhibits of Yunos' affidavit dated 5 December 2008 that Norse had disputed the claim. The rest of the exhibits in Yunos' affidavit that Mr Ooi sought to adduce in relation to this issue, was in her submission, generally protected by "without prejudice" privilege and she had set out during the hearing which portions of those exhibits ought not to be adduced.

56 In this connection, I am guided by the law set out concisely in *Tjong Very Sumito and ors v Antig Investments Pte Ltd* [2008] SGHC 202 by the learned Choo Han Teck J, who had cited the earlier decision of the learned Woo Bih Li J in *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] SGHC 161; [2005] 4 SLR 646 (" *Dalian* ").

57 It is irrefragable from both authorities above that the court is not to consider whether there is in fact a dispute or whether there is a genuine dispute. This means that the quality of the defence is not a matter for the courts: see Robert Merkin and Louis Flannery, *Arbitration Act 1996* (Informa Law, 2008) at 40 ("Merkin and Flannery"). Mr Ooi has rightly not invited me to assess the merits of the defence but asserts that Norse had made certain binding admissions.

58 In a scenario involving admissions by the defendant, I found valuable guidance from an extract of *Getwick Engineers Ltd v Pilecon Engineering Ltd* (2002) 1020 HKCU 1 (" *Getwick* ") which was cited by Woo J in *Dalian* ([56] *supra*) at [41]. The learned Ma J in *Getwick* stated the approach a court should take (at [23]):

(3) The existence or non-existence of a dispute or difference as envisaged under the relevant arbitration agreement between the parties is crucial to the granting of a stay. For this purpose, a dispute will exist unless there has been a clear and unequivocal admission not only of liability but also quantum: see *Louis Dreyfus v. Bonarich International (Group) Limited* [1997] HKCFI 312; [1997] 3 HKC 597 ; *Tai Hing Cotton Mill Limited v. Glencore Grain Rotterdam BV* [1995] HKCA 626; [1996] 1 HKC 363 , at 375A-B. In the absence of admissions as to both these aspects, a mere denial of liability or of the quantum claimed, even

in circumstances where no defence exists, will be sufficient to found a dispute for the purposes of section 6 of the Ordinance (and Article 8 UNCITRAL Model Law). Thus, finding out whether a dispute (as defined in this way) exists, is the only exercise that the court carries out in a stay application (apart of course from construing the arbitration agreement to discover its full ambit): it does not involve itself in evaluating the merits of the claim.

That there must be an admission as to both liability and quantum before a dispute ceases to be a dispute has also been recognised in *Glencore Grain Ltd v Agros Trading Co* [1999] 2 Lloyd's Rep 410: see Merkin and Flannery ([57] *supra*) at 41. Joseph QC ([19] *supra*) summarises it pithily (at [11.16]): "unless a claim has been admitted in full, a dispute will exist."

59 Was there a clear and unequivocal admission of both liability and quantum in this case? In Yunos' affidavit dated 5 November 2008 at [25] – [27], he set out and exhibited the e-mail correspondence he was relying on as evidence that there had been clear and unequivocal admissions of both liability and quantum. Despite Norse's claim of "without prejudice" privilege over most of those correspondence, I am justified in examining the particular e-mails relied upon to see if there had been an admission of liability. That is because "without prejudice" privilege only serves to protect admissions of interest made in the course of settlement negotiations so as to promote out-of-court settlement of disputes. That is to be distinguished from admissions of liability where the privilege does not attach: see *Greenline-Onyx Envirotech Phils, Inc v Otto Systems Singapore Pte Ltd* [2007] 3 SLR 40 at [16] – [19] and *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR 433 at [41] and [45] (" *Sin Lian Heng* ").

60 The relevant correspondence, in chronological order, are:

(a) an email from Mike Benfield of Norse to Suja of Tri-M.G. dated 9 July 2007 [note: 4] ;

(b) an email from Dave Avnit to Yunos dated 7 August 2007 [note: 5] ;

(c) an email from Dave Avnit to Yunos dated 24 August 2007 [note: 6] ;

(d) an email signed off by Yunos sent from Suja's e-mail address addressed to Dave Avnit dated 25 August 2007 [note: 7] ; and

(e) an email from Dave Avnit to Yunos dated 27 August 2007 [note: 8] ; and

(f) an email from Suja to Dave Avnit dated 3 September 2007 [note: 9]

61 Before I study those e-mails, it is beneficial to recapitulate the two distinct claims made by Tri-M.G. in this suit. First, Tri-M.G. is claiming US$$420,000 for Norse's purported repudiation of the lease. The second claim is for US$324,485.42 due and owing from Norse arising from ACMI (aircraft, crew, maintenance and insurance) charges, crew air tickets, loss of pallets, insurance coverage and crew salary that had accrued prior to the purported repudiation.

62 In so far as the US$420,000 claim for purported repudiation is concerned, I am wholly satisfied that far from admitting liability for this claim, Norse had vehemently denied such liability. This is manifest from Dave Avnit's email of 7 August 2007 where he had set out

two reasons why Norse should not be liable in this regard. Since Ms Ghose unsurprisingly did not object to those two reasons being adduced in evidence, I am at liberty to state that one of the reasons given was that there had been an event of *force majeure* . Accordingly, there was no admission of liability in relation to this claim.

63 I move on to the second claim. It is sufficient for me to dispose of the second claim on the amounts due and owing under the Agreement by holding that there is a dispute as to the quantum. Since privilege has been claimed, I do not propose to set out the contents of the emails. I find that the contents of Dave Avnit's email of 7 August 2007 (excluding the two reasons referred to above), Dave Avnit's email of 24 August 2007, Yunos' entire email of 25 August 2007, Dave Avnit's email of 27 August 2007 and Suja's email of 3 September 2007 contain negotiations on quantum which would be protected by "without prejudice" privilege. Such privilege attaches to negotiations to settle genuine disputes over quantum even if there had been an admission as to liability: see *Sin Lian Heng* ([0] *supra*) at [48] – [58]. I am satisfied that those emails were exchanged in the context of negotiations on settlement and that to allow the adduction of such evidence would patently undermine the policy of encouraging out-of-court settlements. It is therefore not open to me to find that there had been an admission as to quantum. For the avoidance of doubt, none of the correspondence I have referred to in the preceding part of this judgment (at [5] – [50] *supra*) was objected to by Ms Ghose on the ground of privilege.

64 In the absence of an admission of both liability and quantum in relation to both claims, a mere denial of liability will suffice to constitute a dispute: see [58] *supra* and *Dalian* ([56] *supra*) at [75]. In the instant case, I am satisfied that Norse had made such an assertion at [14] of Dave Avnit's affidavit dated 25 November 2008. It follows that a dispute exists and the consequence is that a stay ought to be granted.

Imposition of conditions on the stay of court proceedings

65 The final matter to consider in this application is Mr Ooi's submission that if I should grant a stay, that the stay be granted on the condition that Norse furnish security for costs. Mr Ooi argued that Norse had delayed rightful payment due and owing to Tri-M.G. by claiming a set-off with the sums owing under a contract between two other unrelated companies, EJA and NLL (see [15] *supra*). Such conduct, according to Mr Ooi, amounted to *mala fides*

66 I am fully cognisant of the guidance set out by the learned Andrew Ang J in *The Duden* [2008] SGHC 149; [2008] 4 SLR 984 at [14] highlighting that the discretion to impose conditions on a stay of court proceedings must be exercised judiciously. After careful reflection on where the justice of this case lies, I express some sympathy for Tri-M.G.'s position in so far as a letter of demand had been sent to Norse as early as 13 November 2007. [note: 10] However I am ultimately not persuaded to exercise my discretion in imposing any conditions on the stay because even on Tri-M.G.'s own construction of the Agreement, Tri-M.G. could well have instituted arbitration proceedings on its own initiative after the dispute arose if it was of the view that Norse was no longer negotiating in good faith; this Tri-M.G. fully recognised when Mr Ooi wrote in his letter dated 12 May 2008 that "unless your confirmation is received now, we would have made the request to arbitration under the ICC this evening.": see [21] *supra*

Conclusion

67 In the final analysis, I find that upon a proper construction of the Agreement, cl 15 of the Agreement contains a valid arbitration agreement and cl 22.2 of the Agreement refers to the supervisory jurisdiction of the Singapore courts over the arbitration. There has been no admission of both liability and quantum in relation to both claims brought by Tri-M.G. and Norse had made a positive assertion of a dispute. These proceedings must therefore be stayed in favour of arbitration pursuant to s 6 of the IAA. I am further of the view that the justice of this case does not warrant the imposition of any condition on the stay.

68 I hereby allow Norse's application. I remain grateful to counsel for their submissions and invite them to address me on costs.

[note: 1] Exhibited at pp 14, 19 and 20 of Yunos' affidavit dated 5 November 2008.

[note: 2] Exhibited at p 22 of Yunos' affidavit dated 5 November 2008.

[note: 3] Exhibited at pp 14 – 22 of Yunos' affidavit dated 5 November 2008.

[note: 4] Exhibited at p 28 of Yunos' affidavit dated 5 November 2008.

[note: 5] Exhibited at pp 45 – 46 of Yunos' affidavit dated 5 November 2008.

[note: 6] Exhibited at pp 43 – 44 of Yunos' affidavit dated 5 November 2008.

[note: 7] Exhibited at p 43 of Yunos' affidavit dated 5 November 2008.

[note: 8] Exhibited at p 46A of Yunos' affidavit dated 5 November 2008.

[note: 9] Exhibited at p 46A of Yunos' affidavit dated 5 November 2008.

[note: 10] Exhibited at p 14 of Yunos' affidavit dated 5 November 2008.