FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others
[2014] SGHCR 12

Suit No:	Suit No 915 of 2013 (Summons No 5657 of 2013)
Decision Date:	19 June 2014
Court:	High Court
Coram:	Shaun Leong Li Shiong AR
Counsel:	Joana Teo (Harry Elias Partnership LLP) for the plaintiff; Sarbrinder Singh (Kertar & Co) for the first defendant.

Subject Area / Catchwords

Arbitration – International Arbitration Act (Cap. 143A, 2002 Rev Ed) - Applicable standard to determine the validity of an international arbitration agreement for the purposes of a stay pursuant to section 6 of the International Arbitration Act (Cap. 143A, 2002 Rev Ed)

Arbitration – Determining the implied proper law of an international arbitration agreement – Whether the implied proper law should be the substantive law or the law of the arbitral seat

Arbitration – Whether an international arbitration agreement which is not governed by national laws can be enforced

19 June 2014

Judgment reserved.

Shaun Leong Li Shiong AR:

Introduction

1 It is not uncommon that commercial parties omit to include in their contracts an express choice of law governing their international arbitration agreements. These “midnight clauses” may be included in the main contract very late in the day along with other standard terms just before the contract is signed, understandably so as most parties would be enthusiastic about concluding the negotiations on the contractual obligations, while failing to direct their minds to a possible breakdown of the commercial relationship and the attendant specifics of the dispute resolution process. The central question raised in the present case concerns how the court would

determine the proper law governing an international arbitration agreement as impliedly chosen by parties in the absence of an express choice.

Background

2 The plaintiff is a public company incorporated in Singapore in the principal business activity of investment holding. The first defendant is a limited private company incorporated in Singapore in the business of online payment services for global merchants and consumers. The second defendant is a company incorporated in Singapore in the business of developing software for electronic commerce applications. The third defendant is allegedly the major beneficial owner and managing director of the first and second defendants.

3 The plaintiff registered itself on the first defendant's website as a member to use the first defendant's online payment services on 4 January 2012. By this registration, the plaintiff has agreed to be bound by the plaintiff's online user agreement ("the main contract"). The plaintiff deposited a sum of monies into the online payment account, which, according to the first defendant, was to be used for its online payment services. According to the first defendant, instead of using the online payment account kept with the first defendant for online purchases, the plaintiff used the account to make a personal payment of $83,820.60 to its own managing director Ling Yew Kong on 17 February 2012. This was allegedly in contravention of the terms of the main contract, and the first defendant suspended the online payment account pending investigation of the transaction. The plaintiff's profile was consequently exhibited in the first defendant's website as a suspended member. The plaintiff on the other hand claims that it had plans to enter into an investment with the defendants, and that the sum of monies it deposited into the online account was for "proof of funds" and to conduct a "due diligence" exercise into the business of the first defendant to test the robustness of the first defendant's online payment system. The plaintiff then claims that the outstanding monies remaining in the online payment account was a loan to all three defendants. It commenced a court action against all defendants on 8 October 2013 for what it claims is a loan amount in the sum of S$1,010,000.

4 The first defendant (hereinafter referred to as "the defendant") applied for a stay of the court proceedings based on the following arbitration agreement in the main contract ("the arbitration agreement"):

> Any claim will be adjudicated by Arbitration Institute of the Stockholm Chamber of Commerce. You and GTPayment agree to submit to the jurisdiction of the Arbitration Institute of the Stockholm Chamber of Commerce. Both parties expressly agree not to bring the disputes to any other court jurisdictions, except as agreed here to the Arbitration Institute of the Stockholm Chamber of Commerce[.]

5 The defendant sought leave to correct a typographical error in the summons of the stay application so as to clarify that the stay is sought under the International Arbitration Act (Cap. 143A, 2002 Rev Ed) ("the IAA") and not the Arbitration Act (Cap. 143). The plaintiff consented to this amendment application on 10 January 2014 subject to the question of costs. Both parties therefore agree that the question before me is whether a stay of court proceedings should be granted in favour of arbitration under section 6 of the IAA. The plaintiff submits that the clause is invalid as it is null and void, inoperative or incapable of being performed. Before I proceed to consider the arguments made as to why the arbitration agreement is said invalid, it is important to first ascertain the applicable standard for determining the validity of an arbitration agreement.

My decision

The applicable standard to determine the validity of an international arbitration agreement for the purposes of a stay of court proceedings

6 It was decided in *The "Titan Unity"* [2013] SGHCR 28 ("*The 'Titan Unity'*") that an applicant for a stay of court proceedings pursuant to section 6(1) of the IAA must satisfy on a *prima facie* basis the pre-condition of showing the ***existence*** of an arbitration agreement, without which the court would have no jurisdiction to grant a stay. Where this jurisdiction is invoked, the court must grant a stay unless the agreement is shown to be "null and void, inoperative or incapable of being performed". This parallels the criteria used in Art II(3) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), which has been commented to encompass a variety of methods of showing the ***invalidity*** of an arbitration agreement (Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer International Law 2014) at p 77 ("*Gary Born*"):

> … Article II(3)'s "null and void" formula is expansive and encompasses all claims that an agreement is not valid and binding, including claims that an agreement was not validly concluded by reason of defects in the validity of consent. This conclusion is supported by the fact that the Convention was intended for global application and categorization of contract law defenses inevitably varies between jurisdictions. It is also supported by the fact that claims of lack of capacity, uncertainty, duress, lack of notice and the like cannot be distinguished, in a principled manner, from claims of mistake or fraud. Accordingly, the better view is that all challenges to the validity of an arbitration agreement should fall within Article II(3)'s "null and void" category. As a consequence, all such claims should be for the party challenging the validity of the arbitration agreement to prove, under generally-applicable rules of contract law, under standards of proof requiring a clear showing of invalidity.

7 The precise words used in s 6(2) of the IAA, in particular, that a stay shall be made "***unless***" the court is satisfied that the arbitration agreement is invalid, strongly suggests the *presumptive validity* of an arbitration agreement. Once an arbitration agreement is shown to exist in that the applicant is a party to the arbitration agreement under s 6(1) of the IAA, the agreement is presumed to be valid unless proved to be otherwise under s 6(2). In this regard, the following considerations expounded in *The "Titan Unity"* would apply here with even greater force and it would consequently be sufficient for the purposes of a stay application that the court be satisfied of the agreement's validity on a *prima facie* basis without having to descend to a full review:

(a) First, the *prima facie* threshold gives effect to the intention of the drafters of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), to confer the requisite primacy to the doctrine of *Kompetenz-Kompetenz* enshrined in Art 16 of the Model Law, which is given the force of law via s 3 of the IAA. In particular, the drafters' decision to delete Art 17 found in the Working Group's Fourth draft dated 29 November 1983 (A/CN.9/WG.II/WP.48) (H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 303 (2013) at p 500 ("*Holtzmann & Neuhaus*")), which expressly provided a party the recourse of seeking a court ruling on whether there is a valid arbitration agreement, was rationalised by the drafters in the Fifth working group report dated 6 March 1984 (A/CN.9/246) that this provision was not in harmony with the principle underlying Art 16 of the Model Law that it was initially and primarily for the arbitral tribunal to decide upon its own jurisdiction, subject to ultimate court control (see *The "Titan Unity"* at [14] – [18]).

(b) Second, the *prima facie* threshold is consistent with the carefully considered approach adopted in fellow common law jurisdictions which subscribes to the Model Law, including Hong Kong (*Pacific International Lines (Pte) Ltd v Tsinlien Metals and Minerals Co Ltd*, XVIII Y.B. Comm. Arb. 180 (H.K. S.Ct. 1992) (1993); *PCCW Global Ltd v Interactive Communications Service Ltd* [2006] HKCA 434; and *In Private Company 'Triple V' Inc v Star (Universal) Co Ltd and Anor* [1995] 3 HKC 129); Canada (*Gulf Canada Resources Ltd v Arochem Int'l Ltd* 66 B.C.L.R.2d 113; *Rio Algom Ltd v Sami Steel Co Ltd*, XVIII Y.B.Comm.Arb. 166 (1993); *Agrawest Investments Ltd v BMA Nederland BV* [2005] PEIJ No 48; *Morran v Carbone* [2005] OJ No 409; *ETR Concession Co v Ontario (Minister of Transportation)* [2004] OJ No 4516; and *Cooper v Deggan* [2003] BCJ No 1638); and India (*Shin-Etsu Chemical Co. Ltd v Aksh Optifibre Ltd* (2005) 3 Arb LR 1) (see *The "Titan Unity"* at [22] – [26]).

(c) Third, the position emanates from the judicial policy of consolidating the court's review of international arbitration disputes at the end of the arbitral life cycle, so that the court's fullest jurisdiction to determine the validity of an arbitration agreement remain with the same courts having jurisdiction to conduct a full review of an arbitral award under the limited grounds provided in Art V of the New York Convention (Emmauel Gaillard and Yas Banifatemi, *Negative effect of Competence-Competence: the Rule of Priority in Favour of the arbitrators*, in Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice 257-258 (Gaillard and Di Pietro, eds., 2008)) (see *The "Titan Unity"* at [29]).

(d) Finally, this is reinforced by the statutory framework of the IAA. In particular, section 10(2) of the IAA defers the decision on the arbitral tribunal's jurisdiction to the arbitral tribunal itself, where it is the *first* (although not the only) arbiter of its own jurisdiction, and the deeming mechanism of section 2A(6) of the IAA strongly suggests that the enquiry into the existence of a valid arbitration agreement is meant to be a quick and summary process (see *The "Titan Unity"* at [31] – [33]).

8 The party resisting the stay application in the present case made only a weak objection to this threshold question. The plaintiff did not assert that the court has to conduct a full review of the validity of the agreement but instead submitted without explanation that the applicable threshold is that of an "arguable case" (see written submissions dated 6 June 2014), and relied in support of this submission the material in Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (2009) at page 24, which based its opinion on case English authorities. The reasons why authorities from England (where the Model Law does not have the force of law) are unhelpful in this context have been highlighted in the decision of *The "Titan Unity"* at [16] – [21]. Having ascertained the applicable threshold to determine the validity of an arbitration agreement for the purposes of a stay of court proceedings, I now proceed to consider the arguments raised by the plaintiff.

Departure from SulAmérica - determining the implied choice of law governing an international arbitration agreement

9 There is no express law governing the arbitration agreement in the present case. However, parties have expressly indicated the law governing the main contract (hereinafter referred to as "the substantive law") as follows:

16. General.

> This Agreement is governed by and interpreted under the laws of Arbitration Institute of the Stockholm Chamber of Commerce as such laws are applied to agreements entered into and to be performed entirely within Stockholm.

10 This is undoubtedly an unusual choice, for the substantive law expressly chosen by commercial parties are in practice national laws, whereas the rules of an international arbitral institution are commonly selected to complement the curial law or *lex arbitri* governing the procedure of an arbitration. There is therefore an obvious curiosity as to how the parties' substantive obligations can be governed by the rules of an arbitral institution, but this is not in and of itself an issue in the present case given that the validity of the main contract is not in question before this court. The arbitration agreement is, at the moment, shielded by the doctrine of separability. The choice of substantive law is however important here because the plaintiff takes the position that the same choice applies to the arbitration agreement, and submits that the agreement is consequently null and void, inoperative or incapable of being performed given that the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter referred to as "the SCC") only provides a framework of rules applicable to govern the procedure of an arbitration (see plaintiff's written submissions of 12 May and 6 June 2014). Counsel for the plaintiff argues that the agreement is invalid and unenforceable as "it does not make sense" for an arbitration agreement to be governed by the "laws" of an international arbitral institute such as the SCC (see notes of evidence for hearing on 14 May 2014). Counsel for the defendant on the other hand submits that the substantive law was only chosen to govern the main contract and not the arbitration agreement (see notes of evidence for hearing on 14 May 2014).

11 The general methodology to determine the law governing an arbitration agreement (hereinafter referred to as "the proper law") was pronounced in the leading decision of the English Court of Appeal in *SulAmérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A.* [2012] 1 Lloyd's Rep 671 ("*SulAmérica*") as a three-stage enquiry into (i) the express choice; (ii) the implied choice in the absence of an express choice; and (iii) where the parties had not made any choice, the proper law would be the law which the arbitration agreement has its closest and most real connection with. It was held that as a matter of principle, each stage ought to be embarked on separately and in that order, in view that any choice made by parties must be respected. This methodology mirrors the three-stage enquiry which the Singapore Court of Appeal has used to determine the substantive law governing commercial contracts (see *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 at [36], and *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [79]). Given the Singapore Court of Appeal's observation in *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 at [30] ("*Insigma*") that an arbitration agreement should be construed like any other form of commercial contracts, the *general* methodology pronounced in *SulAmérica* would be welcomed in Singapore's jurisprudence for determining the proper law of an arbitration agreement. The *precise application* of the methodology in *SulAmérica* may however require further consideration. In particular, with regard to stage two of

the enquiry where there is no express proper law such as the situation in the present case, the English Court of Appeal essentially created a *rebuttable* presumption that the express substantive law of the contract would be taken as the parties' implied choice of the proper law governing the arbitration agreement (at [26]):

> In the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate. A search for an implied choice of proper law to govern the arbitration agreement is therefore likely … to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion. These may include the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract[.]

12 This was accepted in *Asranovia Ltd & Ors v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), and in *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm). In the latter decision, the English Commercial Court at [101] interpreted *SulAmérica* as prescribing that the choice of the seat of arbitration is likely to be overwhelmingly significant in a situation where no substantive law is expressed in the main contract; but where the substantive law is expressed in the main contract, this is a "strong indication" in relation to the parties' intention as to the proper law governing the arbitration agreement, so much so that parties' choice of the seat may not in itself be sufficient to displace the indication of choice implicit in the express choice of substantive law. The purport of this line of authorities essentially boils down to the following principle: - in a competition between the chosen substantive law and the law of the chosen seat of arbitration, all other facts being equal (in a situation where there are no sufficiently strong indications to the contrary), the law will make an inference that the parties have impliedly chosen the substantive law to be the proper law applicable to the arbitration agreement. The English Court of Appeal rationalised this by the fact that commercial parties would ordinarily intend to have the whole of their relationship governed by the same system of law (see *SulAmérica*, in particular at [11]):

> It has long been recognized that in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole, but it is probably fair to start from the assumption that, in the absence of any indication to the contrary, ***the parties intended the whole of their relationship to be governed by the same system of law.*** It is common for parties to make an express choice of law to govern their contract, but unusual for them to make an express choice

> of the law to govern any arbitration agreement contained within it; and where they have not done so, the ***natural inference*** is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate. [emphasis added]

13 Notwithstanding so, this court takes the view that it cannot always be assumed that commercial parties want the same system of law to govern their relationship of performing the substantive obligations under the contract, and the quite separate (and often unhappy) relationship of resolving disputes when problems arise. In fact, the more commercially sensible viewpoint would be that the latter relationship often only comes into play when the former relationship has already broken down irretrievably. There can therefore be no natural inference that commercial parties would want the same system of law to govern these two distinct relationships. The natural inference would instead be to the contrary. When commercial relationships break down and parties descend into the realm of dispute resolution, parties' *desire for neutrality* comes to the fore; the law governing the performance of substantive contractual obligations prior to the breakdown of the relationship takes a backseat at this moment (it would take the main role subsequently when the time comes to determine the merits of the dispute), and primacy is accorded to the neutral law selected by parties to govern the proceedings of dispute resolution. In this regard, I find more guidance from the House of Lords' decision in *Premium Nafta Products Limited and others v Fili Shipping Company Limited and others* [2007] UKHL 40 that the construction of an arbitration agreement should start from the assumption that parties to a contract who have entered into an arbitration agreement intend that any dispute arising out of their relationship should be decided in accordance with the dispute resolution procedure chosen by parties.

14 In the province of international arbitration, the arbitral seat is the juridical centre of gravity which gives life and effect to an arbitration agreement, without which the seed of an agreement would not grow into a full-fledged arbitration resulting in the fruit of an enforceable award. As emphasized in a decision prior to *SulAmérica*, and without descending the analysis here from stage 2 to stage 3 of the general methodology, the English Commercial Court of Appeal in *C v D* [2007] EWCA Civ 1282 held that it would be "*rare*" for the proper law to be different from the law of the seat, the reason being that an arbitration agreement has a closer and more real connection with the place where the parties have chosen to arbitrate rather than with the place of the law of the main contract. The significance of the seat is recognized by more than 140 countries; Art V(1)(a) of the New York Convention renders an arbitration award unenforceable if the arbitration agreement is not valid under the law of the country where the award was made in the absence of a selected proper law (see also Art 36(1)(a)(i) of the Model Law, where the seat subscribes to the Model Law). In addition, an award may be set aside if the arbitration agreement is invalid under the law of the seat pursuant to Art 34(2)(a)(i) of the Model Law. Given that rational businessmen *must* commonly intend the awards to be binding and enforceable (putting aside the subjective ex

post facto views of the losing party), their attention with regard to the validity of their arbitration agreements would *primarily* be focused on the law of the seat (as, in this context, opposed to the substantive law). Seen from this light, the very choice of an arbitral seat presupposes parties' intention to have the law of that seat recognise and enforce the arbitration agreement. This must necessarily be so because parties would not intend to have an arbitration agreement be valid under other laws, including the chosen substantive law, only for if to be declared invalid under the law of the seat, for that would run a serious risk of creating an unenforceable award. In other words, parties would not have intended a specific place to be the arbitral seat if there is a serious risk that the law of the seat would invalidate the agreement, or if they had not intended the laws of that seat to give life to the agreement in the first place. I should add here parenthetically that the choice of a seat may very well be implied in the circumstances. Until and unless a delocalised arbitration is internationally recognised, there will necessarily be a seat, expressly or impliedly chosen; and the determination of this choice would in turn require a nuanced exercise in construction (see for example, the case of *Braes of Doune Wind Farm v Alfred McAlpine* [2008] EWHC 426 (TCC) where parties expressly stated that the seat of the arbitration shall be in Glasgow, Scotland, but the court determined that parties had intended England to be the seat instead, based on, *inter alia*, the express reference to arbitration under the English Arbitration Act 1996 and the fact that the proper law of the arbitration agreement was English law; and the case of *Naviera Amazonia Peruma SA v Compania International de Seguros de Peru* [1988] 1 Lloyd's Rep 116 where the seat of an arbitration located in Peru but subject to the *lex arbitri* of England was determined to be in England).

15 In addition, parties' selection of the neutral seat would invariably come with the implicit acceptance of the *lex arbitri* of that chosen seat to govern their arbitration. This also means that parties have implicitly selected the *lex arbitri* of the seat to govern matters including the supervisory court's powers to determine a jurisdictional dispute in relation to the validity of an arbitration agreement (see, for example, Art 16(3) of the Model Law where the seat subscribes to the Model Law). It is therefore entirely conceivable that parties would demand to have this same system of law to govern the validity of the arbitration agreement to ensure *consistency* between the *law and the procedure* of determining the validity of the arbitration agreement. This is reinforced by the fact that commercial parties would not, in my view, select a place to be the seat if they do not at least have the notional confidence that the supervisory court would recognise and give effect to the arbitration agreement in the first place.

16 In the absence of indications to the contrary, the reasons above would ordinarily compel the law to find that parties have impliedly chosen the law of the seat as the proper law to govern the arbitration agreement, in a direct competition between the chosen substantive law and the law of the chosen seat of arbitration. All things being equal, the mere fact of an express substantive law in the main contract would not in and of itself be sufficient to displace parties' intention to have the law of the seat be the proper law of the arbitration agreement.

Nevertheless, I must caution that the determination of the implied proper law ultimately remains a question of construction; each case will have to turn on its own facts. I will at this juncture direct my attention to the facts of the present case.

17 The parties' intention to arbitrate is clear in the present case given that they have deliberately agreed to refer all their disputes to a specific international arbitration institution. In the face of defects afflicting arbitration clauses, the law should give the fullest effect to this clear intention such that an interpretation which confers validity to the arbitration agreement should be preferred to other interpretations which would invalidate the agreement (see *Insigma* at [31] and *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) (Emmanuel Gaillard & John Savage eds) ("*Fouchard*") at p 258). The specific reference of disputes to the SCC in the present case, in the absence of any express clause prescribing a different place in which the arbitration proceedings will be conducted, evinces an objective intention to elect the *lex arbitri* of Sweden as the curial law applicable to the arbitration, because section 46 of the Swedish Arbitration Act (1999) ("the Act") states that the Act shall apply to arbitral proceedings which take place in Sweden notwithstanding that the dispute has an international connection. In the absence of factors pointing to the contrary, it follows naturally that parties have selected Sweden as the seat of arbitration. Applying the analysis above at [13] – [16], parties have impliedly selected the law of Sweden as the proper law applicable to the arbitration agreement, unless the plaintiff can prove otherwise. This is reinforced to some extent by the position in the *lex arbitri* of Sweden, where section 48 of the Act provides that in the absence of parties' agreement on a proper law, an arbitration agreement shall be governed by the law of the country in which the proceedings shall take place; and this would, in the absence of any express clause to the contrary, be in the Sweden where the SCC. In addition, there are no contrary indications in the main contract to show that parties intend to have some law other than the law of Sweden govern the arbitration agreement. Indeed, the choice of the substantive law here, unusual as it may be, reinforces parties' intention to have the law of Sweden govern the arbitration agreement. Having determined parties' implied choice of the proper law, it would not be necessary to proceed to the third stage of the inquiry to determine which law has the closest and most real connection with the agreement. It was not submitted that the arbitration agreement is invalid under the laws of Sweden. In the circumstances, the plaintiff has failed to show that the arbitration agreement is invalid.

Whether an international arbitration agreement governed by the rules of an international arbitral institution instead of a national law can be enforced

18 In any event, taking the plaintiff's case at its best; assuming *arguendo* if the arbitration agreement is governed by the "laws" of the SCC as opposed to any national law, this does not necessarily demand a conclusion that the agreement is invalid and consequently unenforceable for the purposes of a stay application.

While there should be no excuse for poor drafting, it would be safe to assume that not all commercial men and women (or lawyers for that matter) are avid students of jurisprudence with an acute philosophical understanding of what "law" is. It follows that, in so far as parties' intentions are to be given effect to, the reference to "law" need not necessarily be read as "law" in the conventional Hartian, Dworkinian or Razian sense. At least in the realm of international arbitration, it is not entirely inconceivable that a dispute over the validity of an arbitration agreement may be resolved by *rules of law* as opposed to national laws. Article 28(1) of the Model Law, which has the force of law in Singapore, allows an arbitral tribunal to determine a dispute in accordance with such *rules of law* chosen by parties as applicable to the substance of the dispute. There is commentary that this may be interpreted to allow for the application of *non-national* rules of law (*Gary Born* at p 2661), such as *lex mercatoria* or transnational principles of commercial law found, for example, in the UNIDRIOT principles of international commercial contracts 2010. If the rules of law chosen by parties can be applied to determine the substance of the dispute, it is questionable why the position should be different for the determination of the validity of an arbitration agreement. Indeed, this is reminiscent of the case of *Municipalité de Khoms El Mergeb v Société Dalico* (Judgment of 20 December, 1994 Rev. arb. 166 (French Cour de Cassation civ. 13)) ("*Dalico*") where the French Cour de Cassation famously pronounced that the validity of an international arbitration agreement can be determined by the direct determination of parties' common intention without reference to any national laws:

> by virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law.

19 There are serious questions to be asked about the viability of such a position. Such a principle surely cannot escape from the fact that this remains ultimately an application of *French private international law*, which in and of itself provides no normative impetus for other countries to adopt. There is in addition the very real "*fori* bias". The direct determination of "parties' common intention" would necessarily be made by a court of law, and it may artificial to think that such an exercise can be fully shielded from the fori's legal conceptions of contractual validity. The less compelling criticisms assert that there surely *must be a law* to determine if an arbitration agreement is void for lack of capacity or lack of consent (Pierre Mayer, *L'autonomie de l'arbitre international dans l'appréciation de sa propre compétence*, in collected courses of the Hague Academy of International Law, Vol 217, Year 1989, Part V; B. Oppetit, note following CA Paris, Dec. 13, 1975, *Menicucci v. Mahieux*, 104 J.D.I. 106 (1977); referred to in *Fouchard* at para 438). Yet the true difficulty is not that *no law exists* in which to answer these questions – there exists such a law – this would, according to *Dalico*, be the body of substantive international law on the formation of international arbitration agreements; the real issue here is that there is as yet

no recognised body of international substantive rules ***which can provide the certainty*** the commercial world requires to determine the validity of an international arbitration agreement (*Gary Born* at p 554). This however does not mean that such a recognised body of international substantive rules applicable to international arbitration agreement will *never* be formed. For a start, there is much to be said of the fact that countries of different legal traditions have agreed upon a *common* international standard of determining the substantive validity of international arbitration agreements as not being "null and void, inoperable or incapable of being performed" under Art II(3) of the New York Convention, which may be considered a self-executing provision which prescribes *substantive rules of international law* applicable to the formation and validity of international arbitration agreement. (*Gary Born* at p 550). In this regard, a court seized of an application to enforce an international arbitration agreement should, when determining its validity, defer parochial notions to internationally harmonious and uniform conceptions of validity, so as to give effect to the *internationalized* form of dispute resolution process selected by parties. The US court of appeals said as much in *Ledee v Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982), that Art II(3) must be interpreted to encompass only contractual notions of validity which can be "applied neutrally on an international scale … such as fraud, mistake, duress and waiver"; and in *Rohne Mediterranee v Lauro*, 712 F. 2d 50 (3d Cir. 1983):

> [under Art II(3) of the New York Convention], an agreement to arbitrate is "null and void" only (1) when it is subject to an internationally recognised defense such as duress, mistake, fraud or waiver, (2) when it contravenes fundamental policies of the forum state. The "null and void" language must be read narrowly, for the signatory nations have jointly declared general policy of enforceability of agreements to arbitrate. …
>
> …signatory nations have effectively declared a joint policy that presumes the enforceability of agreements to arbitrate. Neither the parochial interests of the forum state, nor those of states having more significant relationships with the dispute, should be permitted to supersede that presumption. The policy of the Convention is best served by an approach which leads to upholding agreements to arbitrate. The rule of one state as to the required number of arbitrators does not implicate the fundamental concerns of either the international system of [judicial enforcement] forum, and hence the agreement is not void.

20 In so far as an international arbitration agreement may *in theory* be governed by a substantive body of international law instead of a national law, and to the extent where the rules and principles of an international arbitral institution reflect the legal principles and best practices found in this body of international law, a good

argument can be made that there should be no conceptual limit on parties' autonomy in the present case to decide that the validity of their arbitration agreement should be determined by a clear system of rules and body of principles of the SCC. It may be beneficial in this regard to have a brief consideration of the SCC's rules and cases (for a fuller discourse, see David Ramsjö and Siri Strömberg, *Manifest Lack of Jurisdiction? A selection of decisions of the Arbitration Institute of the Stockholm Chamber of Commerce concerning the* prima facie *existence of an arbitration agreement*; and Annette Magnusson and Hanna Larsson, *Recent practice of the Arbitration Institute of the Stockholm Chamber of Commerce*, prima facie *decisions on jurisdiction and challenges of arbitrators*). Art 9(i) of the SCC rules gives the SCC Board the power to decide whether the SCC manifestly lacks jurisdiction over the dispute; and Art 10 gives the SCC Board the power to dismiss a case, in whole or in part if the SCC manifestly lacks jurisdiction over the dispute. The cases suggest that the jurisdictional disputes would be decided in an objective manner, and certainly shows that contrary to what many believe about arbitral institutions, they need not necessarily be too zealous about finding itself to have the requisite jurisdiction. This is despite commentary that the SCC Board's decisions reveal a "pro-arbitration" approach (Felipe Mutis Tellez, Prima Facie *decisions on jurisdiction of the Arbitration Institute of the Stockholm Chamber of Commerce: Towards consolidation of a "pro-arbitration" approach*). For example, in the case of SCC Arbitration V (002/005), the respondent to an agreement which prescribes that the dispute be decided "without recourse to the ordinary courts by a court of arbitration in Stockholm consisting of three arbitrators to be appointed" objected to the SCC's jurisdiction on the basis that there was no express reference to the SCC Rules. The SCC Board decided that the SCC manifestly lacks jurisdiction over the dispute despite the fact that the arbitration agreement expressly conferred upon the "Chamber of Commerce in Stockholm" the power to appoint arbitrators. Likewise, In Arbitration case F 086/2010, the SCC Board found that it manifestly lacks jurisdiction over the dispute even though the agreement refers disputes to a "Court of Arbitration in Stockholm" and expressed that Swedish law will apply to the arbitration proceedings. On the other hand, seemingly parochial notions of validity are rejected by the SCC Board, consistent with international norms of contractual validity. This is seen in the case of SCC Arbitration V (010/2005), where the Austrian claimant commenced arbitration proceedings against the Egyptian respondent over the alleged mis-delivery of construction equipment. The respondent contended that the Egyptian courts would consider an agreement to arbitrate in Sweden a dispute such as this to be null and void, but the SCC decided that it was not evident that the SCC lacks jurisdiction over the dispute.

21 Notwithstanding the above, the SCC itself (and not this court) would be best placed to decide if it does indeed have a consistent and clear body of rules and principles to determine the validity of an international arbitration agreement. In view that it has already been decided above that the proper law of the arbitration agreement is the law of Sweden, there is no need to determine the question of whether an arbitration agreement governed by the "laws" of the SCC can be enforced, suffice to say that there does appear to be a clear system of

rules and consistent application of principles of the SCC which would guide arbitrants in determining the validity of an arbitration agreement, and which may persuade a court to find that, *at least on the prima facie threshold*, such an arbitration agreement would be valid, but only for the specific purpose of staying court proceedings, which does not preclude a full jurisdictional challenge before the arbitral tribunal, or a complete review of the question by the enforcement court.

Other arguments made by the plaintiff

22 The plaintiff made several other arguments in its attempt to prevent a stay of court proceedings. It should be emphasized at the outset that these arguments could arguably be dismissed *in liminie* given that the plaintiff failed to show how, and to assert that, any of the following arguments would invalidate the arbitration agreement under the laws of Sweden.

23 First, the plaintiff tried to find fault with a separate clause titled "Arbitration" in the main contract (clause 15.1) which provides for arbitration with the "Stockholm International Arbitration Centre", and asserts that this clause is defective as there is no such institution. This is irrelevant as the defendant is not seeking to rely on this clause, which is only applicable where the total claim sought is less than US$10,000. The plaintiff then draws this court's attention to another clause (clause 15.3) which states that all claims between the parties must be resolved using the dispute resolution mechanism selected in accordance with "this Section" by the party first to assert a claim, either through a court filing or commencement of arbitration. Given that there are only two parts in this "Section", being clause 15.1 and the arbitration agreement in question (clause 15.2), the reference to "a court filing" must necessarily refer to the arbitration agreement in question. This is reinforced by the header of the arbitration agreement in question which is erroneously titled as "Court", and the statement in the arbitration agreement that parties agree not to "bring the disputes to any other court jurisdictions, except as agreed here to the Arbitration Institute of the Stockholm Chamber of Commerce". This essentially means that the only form of dispute resolution contemplated by the parties is by way of international arbitration. Where the claim is less than US$10,000, clause 15.1 applies. The arbitration agreement in question is applicable for claims of a higher amount, which is the situation in the present case.

24 The plaintiff further argued that the dispute falls outside the scope of the arbitration agreement. After hearing submissions at the first hearing, this court was initially minded to agree with the plaintiff and this was communicated to both parties in a subsequent hearing. Despite the fact that this position was against the defendant, and already in the plaintiff's favour, *the plaintiff* applied to make further arguments to argue, *inter alia*, that the dispute does not fall within the scope of the arbitration agreement, after parties were asked to consider if they wished to make further arguments (see plaintiff's written submissions dated 12 May 2014 at [3(d)] and [35] – [45], and notes of evidence for hearing on 14 May 2014). It should be emphasized that both parties *accepted* that

further arguments could be heard. On hearing further arguments as applied by the plaintiff, it became evident that the plaintiff's case cannot be accepted. The plaintiff contends that the dispute falls outside the arbitration agreement in view that the main contract is not applicable, as the plaintiff had not in fact agreed to use the first defendant's user online payment services. This argument is disingenuous because to agree with the plaintiff would be in effect to wholly determine the merits of the dispute which the plaintiff seeks to resolve with its action in the first place. The question of whether the registration to use the first defendant's online services was meant for investment purposes is the very central question which relates to the merits of the dispute to be determined by the arbitral tribunal. What is significant to this court is that it is not disputed that the plaintiff had registered itself as a user of the first defendant's online payment services, and by doing so, made a deliberate act to formally accept the terms of the main contract. There is also no explanation as to why the alleged "proof of funds" for the purposes of an alleged investment must be done by registering itself as a user of the first defendant's online payment services and also by way of a deposit with the first defendant's payment system, when this could have been easily done via other simpler means; nor was there any explanation given by the plaintiff to explain why such a huge sum of monies needs to be deposited in the first defendant's account merely for "due diligence" purposes. In addition, there are indications that the plaintiff did sign on to use the first defendant's online services, such as the multiple withdrawals from the online account, and the fact that the plaintiff inserted a special remark on the online registration page that for any transaction above $5,000, or if there are more than three transactions a day, the user should contact the managing director of the plaintiff, Ling Yew Kong. This court is, in this regard, guided by the decision of *Tjong Very Sumito and other v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 where the Court of Appeal held that it is only in the clearest of cases where the dispute did not fall within the arbitration agreement that the court would not have jurisdiction to grant a stay, and if it was at least arguable that the matter is the subject of the arbitration agreement, then a stay of proceedings should be ordered. In view of the above factors, there is a substantial dispute over the question of whether the plaintiff had registered itself as a user of the first defendant's online payment services for investment purposes, and it consequently cannot be said that the dispute clearly falls outside of the arbitration agreement.

25 Last, the plaintiff sought to adduce evidence of a competing version of a main contract which does not have an arbitration agreement. This appears to be quite a convenient argument given that the only apparent differences between the two contracts are the dispute resolution clauses. The plaintiff asserts that the defendant, who has "a propensity to adopt falsehoods whenever it suits them", has "altered" the terms of the main contract "as an afterthought to support its application to stay these proceedings" (see affidavit of Ling Yew Kong dated 18 November 2013 at [16]). Given that the plaintiff is essentially claiming that the defendant has committed perjury and produced a forged document, it has to do better than to make a bare assertion that it had entered into a competing version of the contract without an arbitration agreement (see affidavit of Ling Yew Kong dated 18

November 2013 at [15]). This appears to be a question which would be properly resolved via the necessary examination of witnesses instead of mere affidavits, and the plaintiff may bring this challenge before the arbitral tribunal if it wishes to do so.

Conclusion

26 In the circumstances, the plaintiff's action against the first defendant is stayed in favour of arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce. I will hear parties on costs.