Coop International Pte Ltd v Ebel SA

HIGH COURT — SUIT NO 40 OF 1997 (REGISTRAR'S APPEAL NOS 420 AND 421 OF 1997)
CHAN SENG ONN JC
27 JANUARY, 4 MARCH 1998

Arbitration — Agreement — International arbitration agreement — Application of International Arbitration Act (Cap 143A, 1995 Ed) to foreign arbitration clause in agreement — International Arbitration Act and Model Law not applicable to domestic arbitrations unless parties agreed — International Arbitration Act and Model Law applicable to international arbitrations unless parties opted out — International Arbitration Act (Cap 143A, 1995 Ed)

Arbitration — Arbitration clause — Whether arbitration clause in one agreement could be construed to cover disputes in subsequent agreement — Requirement of appropriate words in either agreement or conduct to indicate such intention — No presumption or implication that parties agreed to refer disputes arising under subsequent agreement to arbitration

Arbitration — Stay of proceedings — Referral of disputes to arbitration — Distributorship agreement with arbitration clause superseded by subsequent settlement agreement without arbitration clause — Whether dispute arising out of subsequent agreement covered by arbitration clause such that proceedings should be stayed for referral to arbitration — Whether granting of stay mandatory or discretionary

Civil Procedure — Stay of proceedings — Referral of disputes to arbitration — Applicability of International Arbitration Act (Cap 143A, 1995 Ed) — Effect given to International Arbitration Act by Singapore courts when faced with arbitration agreements providing for arbitration outside Singapore — Mandatory stay of proceedings — International Arbitration Act (Cap 143A, 1995 Ed)

Contract — Compromise agreement — Distributorship agreement terminated by execution of another agreement between parties — Effect of subsequent agreement to compromise rights under earlier agreement

Contract — Terms — Parol evidence rule — Allegation by respondents that written agreement did not incorporate oral agreement to fix exchange rate — Attempt by respondents to admit oral evidence to vary or contradict agreed written terms — Whether respondents precluded from raising allegation — Evidence Act (Cap 97, 1990 Ed) s 94

Contract — Terms — Construction — Arbitration clause — Whether arbitration clause in one agreement could be construed to cover disputes in subsequent agreement — Whether subsequent agreement merely supplemental to or in variation of first agreement — Whether subsequent agreement wholly separate and independent of first agreement — Requirement of indication of intention that arbitration clause in first agreement to cover disputes arising under subsequent agreement — No presumption or implication that parties agreed to refer disputes arising under subsequent agreement to arbitration

Contract — Terms — Incorporation of terms — Singapore dollars stipulated as currency for debt to be payable in — Whether creditor entitled to demand debt be satisfied in stipulated currency

Facts

Coop International Pte Ltd (the appellants) entered into a distributorship agreement with Ebel SA (the respondents) on 1 April 1995 which provided vide cl 12.2 for arbitration in Switzerland according to Swiss rules as a means to resolve their disputes. In July 1996, both parties terminated the distributorship agreement. Instead of adhering to the termination clause in the distributorship agreement, they entered into a separate termination agreement dated 2 July 1996 with terms different from that provided in the distributorship agreement. The termination agreement did not provide for an arbitration clause and stated that the distributorship agreement would lapse after the respondents had appointed a new distributor. There was no dispute relating to the distributorship agreement, which was superseded by the termination agreement.

On 4 September 1996, the parties reached a third agreement (4 September agreement) which was in the nature of a settlement agreement. By the time this agreement was signed, the distributorship agreement had lapsed.

The 4 September agreement provided for the payment of a fixed sum of S$3,911,596.65 net of all charges by the respondents to the appellants by 4 October 1996, failing which a daily interest charge of 8% per annum based on 360 days would be imposed on the amount unpaid. On or about 10 October 1996, the respondents remitted Swiss francs 3,100,000 to pay for the amount owed to the appellants under the 4 September agreement. That amount when converted at the prevailing rate of 1.1225 (as at 10 October 1996) came to only S$3,489,050 leaving a short fall of S$422,546.65.

The appellants claimed for this shortfall including 8% per annum contractual interest on the outstanding amount and applied for summary judgment. The respondents applied to stay the proceedings.

The respondents claimed that the amount paid on the 10 October 1996 should not have been converted at the prevailing rate of 1.225. They contended that there was an oral agreement on 4 September that the exchange rate had been fixed at 1.18 (the rate used in the 4 September Agreement) for payment of the settlement sum. The respondents claimed that this dispute was connected with the distributorship agreement and had to be referred to arbitration under cl 12.2 of the agreement, hence their application to stay the proceedings.

The appellants opposed the respondents' application on the grounds that there was no dispute arising out of or in connection with the distributorship agreement, the distributorship agreement had been terminated, the parties' respective rights had been compromised under a fresh agreement and there was no dispute to be referred to arbitration.

The respondents' application was allowed by the assistant registrar who made no order on the appellants' application for summary judgment and stayed all further proceedings pursuant to s 6 International Arbitration Act (Cap 143A, 1995 Ed) (IAA). The appellants appealed against this order.

Held, allowing the appeal:

(1) It was not necessary to look at the distributorship agreement and termination agreement between the parties to understand [illegible] the

present dispute. The parties had compromised their rights by the 4 September agreement in which no arbitration clause had been provided for (see ¶ 12).

(2) The amounts payable by the respondents to the appellants were finalised in Singapore dollars to avoid future disagreements including fluctuations in currency exchange rates. The parties agreed to use the latest ex-factory price in Swiss francs to value stocks as it was too time consuming to obtain the actual purchase price of each item because of the large amounts of stocks purchased at various times. It was agreed, to account for freight, insurance, banking, interest and other charges that the appellants would be compensated by a better exchange rate. The numerous issues that had been settled could be seen from the extensive calculations with allowances being made for the currency conversion rate. This supported the appellants' contentions that final settlement figures were to be denominated entirely in Singapore dollars (see ¶ 15–19).

(3) The arbitration clause in the distributorship agreement was of very wide import but was not unlimited in its scope. The issues in dispute had to have arisen out of or been reasonably connected with it. If the dispute concerned a breach of the agreement itself or the interpretation of its terms then the arbitration clause would have covered it. If the dispute concerned a transaction entirely unrelated to the distributorship agreement, then the arbitration clause could not have applied. The parties had further agreed that the distribution agreement, including the arbitration clause, would lapse. They could not resurrect the lapsed agreement and subject the 4 September agreement to it (see ¶ 24–28).

(4) The issue was whether the new agreement was merely supplemental to or in variation of the first agreement, or if it was one which was wholly separate and independent of the first agreement. Whether the arbitration clause could have been construed to cover both agreements was also a question of construction. Where two agreements could be regarded substantially as one agreement rather than two separate agreements, then it was likely that the arbitration clause in one agreement would also govern disputes arising out of the other agreement. If in reality the two agreements were distinct and separate agreements which could not be viewed properly as one agreement with varied or additional terms, it would be less likely for an arbitration clause in one agreement to be applicable in the other without some appropriate words in either agreement indicating such intention. There was no presumption that the parties agreed to refer disputes arising in all subsequent agreements to arbitration. The 4 September agreement made no reference either to the distributorship agreement or to any of its terms and was not expressed as a supplemental agreement to vary or add to the distributorship agreement. It was a wholly independent agreement (see ¶ 30–36); *Wade-Gery v Morrison* (1877) 37 LT 270, *Faghirzadeh v Rudolf Wolff (SA) (Pty) Ltd* [1977] 1 Lloyd's Rep 630, *Overseas Union Insurance v AA Mutual Insurance* [1988] 2 Lloyd's

Rep 63 and *Batshita International (Pte) Ltd v Lim Eng Hock Peter* [1997] 1 SLR 241 distinguished.

(5) The respondents' allegation that the 4 September agreement had not incorporated the oral agreement to fix the exchange rate and wrongly stipulated Singapore dollars as the currency of payment when it should have been Swiss Francs ran foul of s 94 Evidence Act (97, 1990 Ed). The respondents were attempting to admit oral evidence of prior negotiations to vary or contradict the agreed and written terms, which were signed by the parties. The respondents were precluded from raising these allegations. When such evidence was excluded, there was really nothing much left in the respondents' application for a stay of proceedings (see ¶ 43–44).

(6) The question whether the arbitration clause in the distributorship agreement governed the dispute arising out of the subsequent compromise agreement of 4 September, being purely a question of construction, depended on the peculiar facts and circumstances particularly the nature of the dispute, relevant agreements and ambit of the arbitration clause relied upon. Wholly new rights and obligations were substituted in place of those under the distributorship agreement. It did not occur to the parties to consider how disputes under the compromise agreement would be resolved. It could not be assumed that they intended to have resolution by arbitration. There had to be an express choice of arbitration if intended. Otherwise the court's jurisdiction was not ousted. Implication of contractual terms into a written agreement, particularly foreign arbitration clauses or foreign jurisdiction clauses could not be readily implied (see ¶ 54–55, 58, 61).

(7) The 4 September agreement was signed in Singapore after extensive negotiations and stock checking in Singapore. Nothing in the agreement stated that the laws of Switzerland governed the agreement. Clearly, in the absence of anything else the agreement had to be governed by Singapore law and the Singapore courts would have jurisdiction to try any dispute arising under it. There was no question of staying the proceedings (see ¶ 65–66).

(8) The parties were clear about the currency of Singapore dollars. The respondents attempted to withhold moneys, but did not dispute liability to make payment under the 4 September agreement. The respondents admitted the exchange rate of 1.18 used for calculations, then unilaterally used this when it was time to make payment. They ignored the 4 September agreement. If parties agreed that the payment of a debt was to be in a particular currency the debtor had to pay in that currency or in another currency, which when converted at the prevailing exchange rate, would give the same amount in the stipulated currency. The creditor was entitled to demand that the debt be satisfied in that stipulated currency (see ¶ 78); *Barclays Bank International Ltd v Levin Brothers (Bradford) Ltd* [1977] QB 270, *Wadley Ltd v Tunku Adnan* [1991] 3 MLJ 366; [1991] SLR 271 and *Tengku Aishah v Wardley Ltd* [1993] 1 SLR 337 followed.

(9) The respondents did not dispute the appellants' assertion that there was no agreement to have the exchange rate fixed at 1.18 at whichever date of remittance and whatever the prevailing exchange rate. There was no agreement that 1.18 was to be used as the fixed exchange rate. There could be no assumption of this exchange rate. The respondents were also precluded by s 94 of the Evidence Act from adducing oral evidence on a clear unambiguous document (see ¶ 85–90); *Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164 and *Wong Kai Chung v Automobile Association of Singapore* [1993] 2 SLR 577 followed. That the respondents had not succeeded in raising any arguable or triable issue with respect to their alleged oral agreement (see ¶ 91).

(10) There were extensive submissions concerning the applicability of the IAA to the arbitration clause in the distributorship agreement. This issue was no longer material as it was found as a matter of construction that the clause did not extend to the 4 September agreement. If however such construction was wrong then the proceedings had to be stayed as the court had no discretion in the matter having regard to s 6(2) IAA. The fact that there were no triable issues was irrelevant so long as there was a dispute (see ¶ 97–99); *The Dai Yun Shan* [1992] 2 SLR 508 and *Hayter v Nelson Home Insurance Co* [1990] 2 Lloyd's Rep 265 followed.

(11) If the granting of the stay was discretionary and not mandatory then the court would have exercised its discretion to give due weight to the arbitration clause making Swiss Law the proper law. This was not within the category of clear and unarguable cases where there was in reality no dispute between parties to be referred for arbitration. The proceedings would have been stayed thereby to give effect to the arbitration clause. The principles used in summary judgment proceedings were not an exhaustive means of weighing claims. Read together with s 7 of the Arbitration Act (Cap 10), applications for a stay related to the larger issue of jurisdiction (see ¶ 100–103); *Kwan Im Tong Chinese Temple & Anor v Fong Choon Hung Construction Pte Ltd* [1998] 2 SLR 137 and *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1993] 1 SLR 826 followed.

(12) Clause 12.2 of the distributorship agreement was an international arbitration agreement because the respondents had their place of business outside Singapore. One requirement of s 5(2) IAA for an arbitration agreement to be considered international in nature was satisfied thereby. The IAA and Model Law did not apply to domestic arbitration unless parties agreed in writing that it applied. The IAA and Model Law applied to international arbitration unless the parties opted out. The question was what the parties had to do if they intended to opt out of the IAA and Model Law and how clearly this was to be expressed, bearing in mind that the IAA was mainly to implement the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration on an 'opt-out' basis (see ¶106–108).

(13) It was necessary to look at the Arbitration (Foreign Awards) Act (Cap 10A) (AFFA) which was repealed when the IAA was enacted to see how the IAA operated. Under the repealed AFFA there was no opting out provision similar to s 15 IAA. A stay of proceedings was mandatory when the arbitration agreement provided for arbitration in a foreign state. There was no need to cater for opting out of AFFA when the arbitration was to be conducted outside Singapore which would then fall entirely under the jurisdiction of the foreign state. The legislature intended all along since enactment of AFFA that a stay was mandatory when the arbitration clause called for arbitration in a foreign state. There was no reason why after the IAA was enacted and AFFA repealed, a Swiss party as in the present case, who had agreed with a Singapore party to arbitrate their dispute in Geneva under Geneva Rules would be subject to a discretionary stay regime, but had it been under AFFA, it would have been mandatory (see ¶ 122–127).

(14) The IAA incorporated most of the comprehensive rules of UNCITRAL Model Law. There was the need to allow parties to opt out of the Model Law so that parties had the widest possible flexibility if they chose arbitration in Singapore. This was the background against which s 15 IAA had to be construed. The IAA could not have any extraterritorial reach if parties chose to arbitrate in a foreign state so that parties had to opt out of it. Section 15 IAA only applied if parties chose to arbitrate in Singapore as parties would be subject to the Model Law procedures unless they took advantage of s15 IAA to opt out entirely of the Model Law and Part II IAA. This was part of the Government's policy to encourage the growth of arbitration in Singapore by not unnecessarily constraining parties to any fixed set of procedures (see ¶ 128–129).

(15) The scheme of the IAA was intended only to apply to arbitrations in Singapore. When parties chose another place of arbitration in a foreign country Parliament never intended the IAA and Model Law to apply to that foreign arbitration such that parties had to expressly opt out of those procedures pursuant to s 15. Comity of nations and reciprocity dictated that a foreign country's own substantive laws and procedures governed the conduct of arbitration within their own territory and had to be respected for this reason. Section 15 could not be invoked for the purpose of depriving s 6 IAA of its efficacy when arbitration was to take place outside Singapore. The construction was supported by art 1(2) Model Law where it was clear that none of the articles in the Model Law except arts 8, 9, 35 and 36 applied when the place of arbitration was not Singapore. The Model Law was irrelevant when arbitration was outside Singapore. This construction of s 15 was also supported by the commentary in paras 12, 13, 16, 21 and 22 of the 'Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration' (see ¶ 130–134, 139–141).

(16) By choosing procedures alien and contrary to the mandatory provisions in the Model Law or Part II of the IAA for arbitration in Singapore, parties would have opted out by implication. Section 2 AA was very wide and would cover all arbitration agreements whether domestic or

international. When Part II and the Model Law in the IAA applied, the AA was not applicable. When Part II and the Model Law were inapplicable, the AA would apply. There would be no lacunae in the law (see ¶ 146–147).

(17) If the AA applied then the stay under s 7 AA was discretionary. Parliament legislated that within Singapore, international arbitrations (including non-international arbitration) following the Model Law procedures would come under the IAA for which a stay was mandatory, whilst those that did not apply the Model Law would come under the AA for which a stay was discretionary. For arbitration agreements to arbitrate outside Singapore, the stay would invariably be mandatory whether or not parties agreed to follow the Model Law for arbitration (see ¶ 149); *Kwan Im Tong Chinese Temple & Anor v Fong Choon Hung Construction Pte Ltd* [1998] 2 SLR 137 followed.

[*Editorial Note*: The respondents' appeal to the Court of Appeal vide CA 38/98 was heard on 4 August 1998 (Yong Pung How CJ, Karthigesu and LP Thean JJA) and dismissed.]

Case(s) referred to

Barclays Bank International Ltd v Levin Brothers (Bradford) Ltd [1977] QB 270 (folld)

Batshita International (Pte) Ltd v Lim Eng Hock Peter [1997] 1 SLR 241 (distd)

Dai-Yun Shan, The [1992] 2 SLR 508 (folld)

Faghirzadeh v Rudolph Wolff (SA) (Pty) Ltd [1977] 1 Lloyd's Rep 630 (distd)

Hayter v Nelson Home Insurance Co [1990] 2 Lloyd's Rep 265 (folld)

Kianta Osakeyhtio v Britain and Overseas Trading Co Ltd [1954] 1 Lloyd's Rep 247 (folld)

Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors [1989] 3 MLJ 164 (folld)

Kwan Im Tong Chinese Temple & Anor v Fong Choon Hung Construction Pte Ltd [1998] 2 SLR 137 (folld)

Overseas Union Insurance v AA Mutual Insurance [1988] 2 Lloyd's Rep 63 (distd)

Taylor v Warden Insurance Co (1933) 45 Lloyd LR 218 (folld)

Tengku Aishah v Wardley Ltd [1993] 1 SLR 337 (folld)

Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd [1993] 1 SLR 876 (folld)

Wade-Gery v Morrison (1877) 37 LT 270 (distd)

Wardley Ltd v Tunku Adnan [1991] 3 MLJ 366; [1991] SLR 271 (folld)

Wong Kai Chung v Automobile Association of Singapore [1993] 2 SLR 577 (folld)

Legislation referred to

Arbitration Act (Cap 10) ss 2, 7

Arbitration (Foreign Awards) Act (Cap 10A)

Evidence Act (Cap 97, 1990 Ed) s 94

A International Arbitration Act (Cap 143A, 1995 Ed) ss 3(1), 5, 6, 15, 26
Arbitration Act [Switzerland] art 176(2)
Arbitration Act 1950 [UK] s 37(2)(c)
International Arbitration Act 1974 [Australia] s 21

B **Lawyers**
Andrew Ong (Rajah & Tann) for the appellants.
Jason Chan (Allen & Gledhill) for the respondents.

Chan Seng Onn JC: This is an appeal against the decision of the learned assistant registrar making no order on the plaintiffs' application for summary judgment and C staying all further proceedings pursuant to s 6 of the International Arbitration Act (Cap 143A, 1995 Ed) (IAA).

2 I allowed the appeal and I now give my reasons.

Brief facts

D 3 The appellants, a Singapore registered company, entered into an exclusive distributorship agreement with the respondents, a Swiss company having its principal place of business in Switzerland, to distribute the respondents' Ebel watches in Singapore, Malaysia, Indonesia, Brunei and Thailand for a period of five years with effect from 1 April 1995.

E 4 In the distributorship agreement, the parties provided for arbitration as a means to resolve their disputes. Clause 12 of the agreement provides as follows:

> 12 Applicable Law and Arbitration
>
> 12.1 The present agreement shall be governed by the laws of Switzerland.
>
> 12.2 Any disputes arising out of or in connection with the present agreement shall be F finally settled by one arbitrator in accordance with the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva, Switzerland, in particular its art 31 providing for an expedited procedure. The arbitral tribunal shall have its seat in Geneva, but may choose to hold its session at any other place.

5 Sometime in July 1996, both parties decided to terminate the distributorship G agreement. The reasons for termination need not concern us here. The termination clause in the distributorship agreement was not adhered to. Instead, they entered into a separate termination agreement dated 2 July 1996 with terms different from that provided in the distributorship agreement for termination. This new termination agreement had provisions relating to advertising and promotion responsibilities, collection of outstanding debts, prices and payment terms for H stocks and payment for the remuneration of the general manager of Ebel Division. However, no arbitration clause was provided for.

6 The termination agreement further stated that the distributorship agreement would lapse after the respondents had appointed a new distributor. On the facts of this case, there clearly was no dispute relating to any of the terms of the I distributorship agreement. So there was nothing to be referred to arbitration under cl 12.2 of the distributorship agreement. The termination agreement thereafter superseded the distributorship agreement.

7 About two months later on 4 September 1996, the parties reached a third agreement (hereinafter referred to as the '4 September agreement') as follows:

> Further to our final discussion held on 4 September 1996, the following amounts as listed below has been agreed;
>
> | | | | S$ |
> |---|---|---|---|
> | (A) | Stocks | | 4,098,233.21 |
> | (B) | Spare Parts | | 200,000.00 |
> | (C) | Payment to Christian Cornut | | 25,000.00 |
> | (D) | Movement Overhaul | | 521.40 |
> | (E) | A & P | — Contribution from Ebel | 51,999.61 |
> | (F) | | — July's expenses to be reimbursed | 68,951.42 |
> | | | — Aug's expenses to be reimbursed | 28,563.68 |
> | (G) | Tools and Equipment | | 23,157.50 |
> | (H) | Bracelets replaced by Coop free of charge | | 23,143.34 |
> | (I) | Outstanding owing to Ebel SA | | (730,920.51) |
> | | Total due from Ebel SA | | 3,788,649.66 |
> | | Add 3% GST on (A) only | | 122,947.00 |
> | | Total (inclusive of GST before A/C receivables) | | 3,911,596.65 |
>
> This amount of S$3,911,596.65 nett of all charges is to be paid by Ebel SA to Coop by 4 October 1996 latest, otherwise a daily late payment charge of 8% pa based on 360 days will be imposed.
>
> | | S$ |
> |---|---|
> | A/C receivables (refer to attachment A & B) | 360,509.74 |
>
> The above will reimbursed to Coop by Siber Hegner (SEA) Pte Ltd.
>
> Ebel SA undertakes
>
> (1) to settle all A&P payments not included in this statement even if the invoices are addressed to Coop International.
> (2) to pay Coop any amount over and above the amount listed under (B) above upon confirmation by Ebel SA of the actual value of spares returned.
>
> We will endeavour to return the spare parts and relevant Ebel documents to Ebel SA by 4 October 1996.

8 This 4 September agreement was in the nature of a settlement agreement. By the time this agreement was signed, the distributorship agreement had lapsed. The 4 September agreement provided, interalia, for the payment of a fixed sum of S$3,911,596.65 net of all charges by the respondents to the appellants by 4 October 1996, failing which a daily interest charge of 8% per annum based on 360 days would be imposed on the amount unpaid. It may reasonably be inferred that the interest charges, if payable, would also be in Singapore dollars.

9 On or about 10 October 1996, the respondents remitted Swiss Francs 3,100,000 to pay for the amount owed to the appellants under the 4 September agreement. That amount when converted at the prevailing exchange rate of 1.1225 (as at 10 October 1996) came to only S$3,489,050 leaving a shortfall of S$422,546.65.

10 The appellants claimed for this shortfall including 8% per annum contractual interest on the outstanding amount and applied for summary judgment. The respondents on the other hand applied to stay the proceedings.

11 The appellants opposed the respondents' application on the following grounds, each of which they contended, would be sufficient for a refusal of stay:

(a) There was no dispute arising out of or in connection with the distributorship agreement.

(b) The distributorship agreement had been terminated and the parties' respective rights had been compromised under a fresh agreement.

(c) There was no dispute to be referred to arbitration.

Application for summary judgment

12 I shall deal with the appellants' application for summary judgment first. The appellants rely solely on the 4 September agreement. Quite rightly, nothing turns on the distributorship agreement or the termination agreement. It is not necessary to look at these two earlier agreements to understand or resolve the present dispute. The parties had compromised their respective rights under a fresh agreement in which no arbitration clause had been provided for.

13 I will now set out briefly the circumstances that led to the compromise agreement. According to the appellants, the respondents sent their representative Mr Jean Michel Bonjour to Singapore to finalise outstanding issues between them. The inventory stocklist, prices of inventory and the mechanics of handing over the stock to the new distributor were discussed on 2 September 1996. On the next day, Mr Bonjour inspected the spare parts which were to be delivered to the respondents. Discussions on the third day concerned the valuation of these spare parts and the price at which the respondents had to reimburse the appellants.

14 The book value of those spare parts were estimated by the appellants at about S$280,000. However, Mr Bonjour offered a price of only S$200,000, which the parties subsequently agreed to after some negotiations. The appellants said that Mr Bonjour had given his 'gentleman's word' during the negotiations that if the valuation exceeded S$200,000, the respondents would pay the higher sum. This promise was incorporated as an undertaking in the 4 September agreement. The parties eventually settled the outstanding issues between them and concluded the 4 September agreement.

15 The appellants said that the amounts were finalised in Singapore dollars to avoid future disagreement including unexpected fluctuations in currency exchange rates. The parties agreed to use the latest ex-factory price in Swiss Francs to value the stocks as it was too time consuming to obtain the actual purchase price of each item because of the large amount of stocks purchased at various times. There was no other realistic option since the respondents wanted the stocks to be transferred to their new distributor immediately.

16 The appellants required the respondents to reimburse them for the freight, insurance, administrative charges and the carrying costs for the stocks. To reflect these costs borne by the appellants, an additional 5% on top of the price for the

stocks was suggested. After some discussion, it was finally agreed that the appellants would be compensated by a better exchange rate of S$1.18 to one Swiss Franc (ie 1.18) for the stocks. This was 0.03 higher than the prevailing exchange on that day of 1.15.

17 Since the appellants had further incurred banking and interest charges, the parties settled on a 4.5% mark up on the total cost of the stocks. The parties agreed that S$4,098,233.21(and not Swiss Francs) was finally payable to the appellants and this was clearly set out in the 4 September agreement. At para 18 of the appellants' first affidavit, it was stated that 'throughout the meeting on 4 September ... with Mr Bonjour, it was repeatedly emphasised that the amount payable under the settlement agreement was to be in Singapore dollars.' The respondents in their affidavit avoided denying this fact.

18 Calculation sheets exhibited by the appellants at CSC-4 showed the handwritten words 'Settlement as agreed for your approval' and 'payment by 4 October 1996'. It can reasonably be inferred from these contemporaneous documents that the parties had intended the 4 September 1996 to be a settlement agreement, which conclusively resolved all the outstanding issues between them.

19 The numerous issues that had to be settled can be seen from the extensive calculations with allowances being made for the 1.18 currency conversion rate, 4.5% mark-up and 3% GST. The calculations also showed that conversion of Malaysian ringgit and US dollars to Singapore dollars was also involved besides Swiss Francs. This lent support to the appellants' contention that they wanted the final settlement figures to be denominated entirely in Singapore dollars to avoid currency fluctuations and future disputes.

20 Further, account receivables, date of return of documents and spare parts to the respondents, 'A & P payments' and interest on late payment had to be settled. Agreement was subsequently reached on these issues. It would therefore not be inaccurate in my opinion to view the 4 September agreement as an agreement, which stood independently of the earlier two agreements viz. the distributorship agreement and the termination agreement.

21 The respondents on the other hand contended that there was an oral agreement on 4 September that the exchange rate had been fixed at 1.18 for *payment* of the settlement sum (assuming for the time being that such evidence was admissible). The appellants denied the existence of such an oral agreement. The respondents said that this dispute was connected with the distributorship agreement and hence, must be referred to arbitration under cl 12.2.

22 However, I could find no clauses in the distributorship agreement dealing with the issue of the currency of payment or the exchange rate. The respondents could not point to any particular clause dealing with the matters they had raised. As was correctly pointed out by counsel for the appellants in his written skeletal arguments, there was no dispute whatsoever as to and I briefly quote:

(a) The parties' respective rights and liabilities under the distributorship agreement; or
(b) The performance of both parties' duties and/or obligations under the distributorship agreement; or

A (c) Whether the distributorship agreement has been validly terminated — both parties agreed to terminate the distributorship agreement; or

(d) Any issue as to the value of the stock to be handed over to the respondents — this was agreed; or

(e) Any issue of any termination fees or indemnity from customers — there is no such claim; or

B (f) Any dispute as to the advertising and promotional expenses payable to the appellants — this has been agreed.

23 Fundamental to the respondents' argument for stay is that the arbitration clause 12.2 in the distributorship agreement extended to disputes arising out of the 4 September agreement. Their argument appeared attractive at first because of the widely worded arbitration clause. But on closer look at the actual facts and C circumstances of the case, it was not to be. I shall now deal in some detail with the submissions of respondents' counsel on this point.

Is the 4 September agreement wholly independent of the distributorship agreement?

D 24 Counsel for the respondents submitted that the dispute in question fell within the scope of the arbitration clause 12.2 as it was worded in very wide terms covering 'any disputes arising out of or in connection with' the distributorship agreement.

E 25 Certainly the words of the clause are of wide import but its scope is not unlimited. The issues in dispute must still have arisen out of or be reasonably connected with the distributorship agreement. If the dispute concerns a breach of the agreement itself or the proper interpretation of the terms of the distributorship agreement, then the arbitration clause would cover it.

F 26 However, if the parties subsequently enter a new agreement or a series of new agreements which do not have any arbitration clauses, and the dispute concerns these new agreements and not the original distributorship agreement, it becomes much less clear (a) whether the dispute in fact has any connection at all with the original agreement; and (b) whether the arbitration clause contained in the original agreement is applicable at all to the later agreements.

G 27 Hence, if a dispute concerns a transaction entirely unrelated to the distributorship agreement, I do not think that the arbitration clause 12.2 as drafted is capable of governing that dispute. Where the present dispute does not arise from the terms of the distributorship agreement or from the execution of that agreement itself, I find it difficult to see how the arbitration clause 12.2 can be applicable.

H 28 The position of the respondents is made more untenable by the fact that the parties had themselves contracted that the distributorship agreement shall lapse and that apparently included the arbitration agreement in cl 12.2. Now they seek to resurrect that lapsed agreement and subject the new 4 September agreement to it.

I I 29 The learned author Robert Merkin at p 4–12 of his book on *Arbitration Law* said:

A fine point of construction arises where a contract containing an arbitration clause is supplemented by a further contract which does not contain an arbitration clause. The question of whether the arbitration clause applies to the second agreement depends upon whether the second agreement is wholly independent of the first, or whether it is merely an extension of the first.

30 It is therefore a question of construction whether the new agreement is merely supplemental to or a variation of the first agreement, or it is one which is wholly separate and independent of the first agreement. Whether an arbitration clause present in one agreement could be construed to cover both agreements is also another question of construction.

31 Where two agreements can be regarded substantially as one agreement rather than two separate agreements, then it is likely that the arbitration clause in one agreement would also govern disputes arising out of the other agreement. However, if in reality, the two agreements are distinct and separate agreements which cannot be viewed properly as one agreement with varied or additional terms, it would be much less likely for an arbitration clause in one agreement to be construed as having been imported or incorporated into the other agreement without there being some appropriate words in either agreement indicating that there was such an intention by the parties to have it construed in that way. There is no presumption that the parties, after having agreed to refer to arbitration disputes arising out of one agreement must necessarily have agreed also to refer disputes in all subsequent agreements to arbitration.

32 Counsel for the respondents referred me to *Wade-Gery v Morrison* (1877) 37 LT 270. The dispute in this case arose out of a supplemental deed to a lease agreement. The supplemental deed had no arbitration clause. It was held that the lease and the supplemental deed had to be read and construed as one instrument and therefore, the matters in dispute came within the arbitration clause in the lease agreement. The supplemental deed itself recited the main lease and expressed in very plain terms that it was to vary the lease in the manner and to the extent expressed in the supplemental deed.

33 However, the 4 September agreement in the present case made no reference whatsoever either to the distributorship agreement or to any of its terms. It was not expressed as a supplemental agreement to vary or add to the distributorship agreement. It stood alone as an independent agreement settling all the various matters between the parties. In fact, the parties decided to dispense with the distributorship agreement totally by agreeing that it would lapse upon the appointment of a new distributor. Clearly, the facts and circumstances of our case are totally dissimilar. As such, the above case cited by counsel was of no assistance to me.

34 The next case referred to me was *Faghirzadeh v Rudolf Wolff (SA) (Pty) Ltd* [1977] 1 Lloyd's Rep 630. Briefly, the buyers entered into a contract on 10 May 1973 with the sellers for the purchase of steel reinforcing bars. Payment was to be made by irrevocable letters of credit (LC). Clause 6 provided an option for the buyers and sellers to sell the goods to third parties on no less favourable terms than that in the contract for either party but if the sellers invoked this option, they had

A to obtain the buyers' approval. An addendum signed on the same day provided that if the buyers did not open their LC for the first shipment of 3,200 tonnes by 15 May, they would pay a penalty of 10% of the value of that consignment and also forfeit all claims to the second shipment of 4,000 tonnes. The LC did not conform with the terms of the contract but the sellers allowed the buyers until 15 June to make the appropriate amendments to the LC. Negotiations B subsequently took place between 7 and 14 June. It was disputed at the hearing before the arbitrators whether the contract of 10 May was varied or cancelled altogether or some new oral agreement wholly independent of or partially dependent on the 10 May agreement had been reached and in particular, whether the arbitration provisions in the 10 May contract applied to a dispute arising under the new agreement, if indeed there was such a new agreement. The sellers alleged C that it was orally agreed that the 10 May contract and the ship bookings would be cancelled and the LCs returned by them and they would sell the 7,200 tonnes to other buyers (as they had done so) and account to the buyers for any overprice received. Obviously, this related to the aforesaid cl 6. The buyers denied the existence of such an oral agreement. Counsel for the buyers submitted that one had D to refer to the 10 May contract to ascertain what cl 6 had provided before one could understand what the oral agreement was all about. On this point, the court held, assuming that the oral agreement was validly made during the negotiations, that the negotiations and in particular the oral agreement were 'unintelligible without referring back to the contract of May 10. In one sense the agreement made ... was a new agreement, but in another sense it varied, though very radically, the E contract of May 10.' Hence, the court concluded that the arbitration clause contained in the 10 May contract was applicable also to the oral agreement, thereby giving the arbitrators jurisdiction to hear the dispute.

35 Again this case may be distinguished as the decision rested on its own set of facts. In our case, there clearly was no need to refer to any clauses in the F distributorship agreement to make sense of the dispute concerning the terms of the 4 September agreement. The 4 September agreement cannot be construed as a variation of the distributorship agreement. The parties obviously could not have intended to enter into any agreement to vary or add terms to an agreement which they had decided would lapse and had lapsed by the time they came to sign the 4 September agreement. Plainly, it did not make any sense to vary or supplement G an agreement that the parties no longer viewed as subsisting. In my judgment, any principle of law that may be derived from *Faghirzadeh*'s case would not be directly applicable to the case before me.

36 Another case cited by the respondents was *Overseas Union Insurance v AA Mutual Insurance* [1988] 2 Lloyd's Rep 63. Briefly, it concerned a reinsurance H agreement No X1001 between the reinsurers, a Singaporean company and the original insurers, an English subsidiary of a South African Company called AA Mutual Insurance Association Ltd (AAMIA). The reinsurers undertook to pay all claims paid out by the insurers in excess of £150,000 for its general business, property business and aviation business for a premium of £20,000. All disputes or differences between the parties 'in respect of this reinsurance' shall be referred to I two arbitrators under art 9 of the agreement. In turn, the reinsurers signed a back-to-back agreement on the same day with AAMIA whereby AAMIA undertook for

the same premium of £20,000 to pay the reinsurers 'all amounts paid by it in respect of reinsurance agreement No X1001 and/or to indemnify it in respect of losses arising out of such contract'. In essence, the reinsurers were intermediaries and all the risks of the insurers were passed back to its parent, AAMIA.

37 The reinsurers claimed that there was an oral agreement, not recorded in the reinsurance agreement itself, that they would not be required to pay the insurers until payment was received from AAMIA under the back-to-back agreement. The reinsurers had not received any payment from AAMIA because AAMIA was in liquidation. The reinsurers therefore refused to pay the insurers under the X1001 agreement.

38 The court held that 'the only sure guide in deciding whether a particular dispute is or is not within the scope of an arbitration clause is the intention of the parties as expressed in the clause, unless a deviation is compelled by authority in any particular case.' Later the court said that 'the question is one of construction and construction alone'. At p 70 of his judgment, Evans J said:

> The context is a reinsurance transaction which the parties have agreed to record in writing at least in part. There is no clear indication that they intended the arbitrators to have no jurisdiction outside the written terms and there are good commercial reasons, in my judgment, why they should envisage that all disputes concerning the transaction generally would be regarded as coming within the words 'in respect of this reinsurance'. This commercial consideration is strongest in a situation where the same factual dispute viz. whether there was or was not an oral agreement, not recorded in the written agreement, which either was or was not intended to be included therein, may give rise to different classifications of their legal rights. In my judgment, this clause in this context does include the appellants' ('reinsurers') disputed claims, not only that there was an implied term of the reinsurance agreement, but also, alternatively, that there was a collateral contract or that the agreement should be rectified by the addition of an express term.

39 A stark difference should be noted that the above case concerned the very reinsurance agreement which contained the arbitration clause. The issues in dispute were whether there was an implied term in the reinsurance agreement or a collateral contract to that agreement and whether the agreement itself should be rectified. I fail to see how this authority can be of relevance to the case before me, where there was no dispute over any of the terms of the distributorship agreement and where the dispute concerns an agreement totally divorced from the distributorship agreement, which had also lapsed by agreement of the parties, and where new rights and obligations had been created under the 4 September agreement which superseded those under the distributorship agreement.

40 I shall now deal with the last case cited by respondents' counsel, which was *Batshita International (Pte) Ltd v Lim Eng Hock Peter* [1997] 1 SLR 241. This authority was also relied upon by the learned assistant registrar when she ruled that the arbitration clause in the distributorship agreement was wide enough to cover the dispute.

41 In this case, the landlord was suing for arrears of rent under the agreement that contained the arbitration clause. The tenant did not deny he was five months in arrears but he alleged that there were defects of water leakage, stained walls and

A a rotting kitchen toilet door. He said that he executed the tenancy agreement with the landlord only after extracting a firm promise from the landlord that the defects would be rectified. When the landlord did not fulfil his promise, the tenant stopped paying the rent. The Court of Appeal held that the tenant had the right of 'equitable set-off of claims arising under a tenancy agreement such as unliquidated damages for a breach of the landlord's covenant to repair against accrued rent.' As the B alleged oral agreement constituted a condition precedent to the tenant's execution of the tenancy agreement, it came within one of the exceptions to s 94 of the Evidence Act (Cap 97, 1990 Ed) and hence, was admissible in evidence. The court held that the dispute as to whether there was an oral agreement constituting a condition precedent to the tenancy agreement was connected with it and hence, C was referable to arbitration pursuant to the arbitration clause in the tenancy agreement.

42 Hence, *Batshita*'s case is also distinguishable. The appellants here are not claiming on the distributorship agreement which contains the arbitration clause. They are suing on a new compromise agreement which does not contain any arbitration clause. The appellants say that the respondents had failed to perform D their obligation to pay the amount in Singapore dollars in accordance with the terms therein. The dispute concerns what had been in fact agreed in the subsequent compromise agreement and therefore had nothing whatsoever to do with the lapsed distributorship agreement. In *Batshita*'s case, the tenancy agreement containing the arbitration clause was still subsisting between the parties when the E dispute arose over the defects and the arrears of rental.

43 The dispute here does not concern any condition precedent relating either to the 4 September agreement or the distributorship agreement, for which perhaps parole evidence of the existence of such a condition precedent may be admissible. What the respondents basically allege is that the 4 September written agreement F had not incorporated the oral agreement between the parties to fix the exchange rate at 1.18 for payment. In other words, the written agreement had wrongly stipulated Singapore dollars as the currency of payment when it should have been Swiss Francs, and that the amount of Swiss Francs payable ought to have been only 3,314,912.42 (based on a fixed 1.18 conversion rate for the S$3,911,596.65). In essence, while the written agreement expressly provides for the respondents to G bear the risk of the currency fluctuation for payment to the appellants in Singapore dollars, the respondents are now saying that the agreement should have provided instead for the appellants to bear that risk and not them.

44 Plainly, this would run foul of s 94 of the Evidence Act in that the respondents would be attempting to admit oral evidence of prior negotiations to vary or H contradict the agreed terms, which had been subsequently reduced into an agreement in writing and signed by the parties. The policy reasons behind s 94 for disallowing such evidence when there is already a written agreement are obvious. When the evidence from the respondents is strictly inadmissible, the respondents should have been precluded from raising as part of their affidavit evidence those allegations which form the foundation of the alleged dispute with the appellants. I When such evidence is excluded, there is really nothing much left in the respondents' application for a stay of proceedings. At least in *Batshita*'s case, the tenant's evidence of the condition precedent to the tenancy agreement could be

placed before the court for consideration as to whether a dispute existed, which required to be referred to arbitration.

45 Counsel for the appellants cited two helpful cases to me, for which I am grateful. *Kianta Osakeyhtio v Britain and Overseas Trading Co Ltd* [1954] 1 Lloyd's Rep 247, a Court of Appeal decision, was one such case. There the appellants sold the respondents 5,000 cubic fathoms of timber under a contract dated 5 August 1937 which was to be governed by Finnish law. The arbitration clause stated that 'in case of any dispute arising out of the interpretation or the fulfilment of this contract, such dispute unless amicably settled, (was) to be referred to arbitration in Helsingfors.' However, as the price had fallen, the buyers did not take delivery of 500 fathoms presumably taking advantage of the 10% variation clause. Sellers however maintained that the buyers were in breach by not taking full delivery.

46 Some one and a half years later on 10 Feb 1939, the parties signed two further agreements (hereinafter referred to as the 'second' and 'third' agreements). The second agreement was similar to the first agreement in 1937 and it involved the sale and purchase of 2,500 fathoms with a different arbitration clause for referring disputes which 'arise out of the interpretation or fulfilment of this contract, ... to Mr John Worsoe, or any other person nominated by Messrs Churchill & Sim Ltd.' for arbitration. The third agreement arose out of an amicable settlement of the outstanding quantity of 500 fathoms under the first agreement. This third agreement, referred to as the compensation agreement, had the following terms:

> 1 The balance of ... 500 cubic fathoms ... remaining unshipped under the contract ... is hereby cancelled, and ... no further goods shall be delivered under the said contract.
>
> 2 In consideration of sellers having agreed to the cancellation of this unshipped balance, buyers agree to pay to the sellers in lieu of any other indemnity 11s per fathom on every fathom delivered under the contract for about 2,500 cubic fathoms dated 10 February 1939, in addition to the price payable by the buyers under the terms of this contract.

47 None of the 2,500 cubic fathoms was delivered as war had broken out. After the war, the sellers claimed for £1,375 being 11s multiplied by 2,500 fathoms. The buyers denied that they were liable to pay as the 2,500 fathoms had not been delivered. The meaning of the compensation agreement was in dispute as to whether the buyers were obliged to pay in any event or that obligation was contingent upon the delivery of the 2,500 fathoms under the second agreement.

48 The sellers obtained an arbitration award in their favour following arbitration under the arbitration clause in the first *1937* agreement. They sought to enforce that award in England. But under s 37(2)(c) of the Arbitration Act 1950, a foreign award was not enforceable if the award contained decisions on matters beyond the scope of the arbitration agreement.

49 In deciding whether the dispute was within the scope of the arbitration clause in the first 1937 agreement, Lord Justice Somervell said:

> ... But I think the real test is, has it substituted wholly new rights and obligations for those which existed under the original contract so that the terms of the original contract

A do not affect the dispute which had arisen and which came before the arbitrators was not a dispute arising out of the interpretation or the fulfilment of the original contract. It is agreed that fulfilment should include non-fulfilment. I think this is the right view, and the award is therefore unenforceable by reason of s 37(2)(c).

50 Lord Justice Morris in his judgment also did not regard the compensation B agreement as a variation of the first agreement. He held:

> The compensation agreement itself in one sense arose out of the 1937 contract, but the compensation agreement, as it seems to me, was a new agreement and self-contained agreement. It was an agreement which had an independent existence. The dispute which arose out of that compensation agreement concerning its meaning was not in my view a dispute arising either out of the interpretation or the fulfilment of the contract of 1937.

C

51 Lord Justice Romer concurred with the views of his learned brethren judges.

52 Although the arbitration clause in the case of *Kianta* does not use the words 'in connection with' and the factual circumstances there are slightly different, nevertheless I do find the principles expounded by the learned judges to be D applicable.

53 In another case, *Taylor v Warden Insurance Co* (1933) 45 Lloyd LR 218, the Court of Appeal had to deal with a claim brought by an assured who had compromised his claim under an insurance policy for a sum of £90. The assured had insured his horse which was killed by lightning. When the insurance company failed to pay him the agreed compromise sum of £90, the assured brought the E action. The court below granted a stay of the proceedings on the ground that there was an arbitration clause in the policy, which provided that all differences between the parties should be referred to arbitration. The Court of Appeal held that although it was correct that had it not been for the horse or the lightning, the action would not be brought. But the difference between the parties did not arise out of F the horse or the lightning nor did it arise out of the policy. The assured had not sued on the insurance policy but on the compromise agreement. The Court of Appeal therefore allowed the appeal and held that the claim was outside the arbitration clause.

54 I now return to the present case before me. The question whether the G arbitration clause 12.2 in the distributorship agreement governs the dispute arising out of the subsequent compromise agreement of 4 September, being purely a question of construction, will therefore depend on the peculiar set of facts and circumstances, and in particular, the nature of the dispute, the relevant agreements and the ambit of the arbitration clause relied upon. I have already examined the facts in some detail earlier stating the reasons why I did not think that cl 12.2 H would be applicable.

55 Before I leave this question, I have some further points to make. After several days of negotiation, the parties had settled all their differences and entered into an entirely separate compromise agreement which clearly substituted wholly new rights and obligations in place of those under the distributorship agreement.

I

56 The 4 September agreement was to determine the final set-offs and payments to be made by the respective parties. All of this was done with a view to end the

business relationship between the parties. The parties were not interested to continue with their operations under any kind of distribution agreement between them. It cannot reasonably be said therefore that the parties had intended the 4 September agreement to vary the terms of the distributorship agreement. As far as they were concerned at that point of time, the distributorship agreement was 'dead'. Both the distributorship agreement together with the arbitration agreement contained in cl 12.2 had lapsed by agreement of the parties and were regarded by them to be no longer operative.

57 If the parties had wanted disputes arising under the 4 September agreement to be decided by arbitration, the simplest thing to do is to include an arbitration clause as they had done so previously in the distributorship agreement. But they did not. Neither did they make any reference to the arbitration clause in the distributorship agreement such as to make that clause part of the 4 September agreement. The absence of an arbitration clause and the absence of any reference to cl 12.2 in the circumstances of this case indicate clearly to me that there was no such intention.

58 If indeed it did not occur to them to consider how disputes under the compromise agreement would be resolved, it cannot be assumed that they must have intended to have resolution by arbitration. There must be an express choice if arbitration is intended. Otherwise, the court's jurisdiction is not ousted.

59 Can it be said that the parties obviously intended that the arbitration agreement in cl 12.2 entered into about one and a half years before (and for that matter, also cl 12.1 of the distributorship agreement on the choice of Swiss law as the governing law) would continue to apply to this new compromise agreement had they thought about it? I think not. I must be alive to the fact that parties may change their minds and decide that arbitration to settle disputes shall not be required in the new agreement concluded between them. After one and a half years, things certainly can change.

60 In the complex distributorship agreement which was to run for five years and for which a whole host of problems could crop up, I am not surprised that the parties had chosen arbitration as the best way from their viewpoint to resolve their disputes. When the parties have resolved their problems and entered into a simple two-page agreement on 4 September 1996, I am also not surprised if the parties decided that arbitration was not going to be necessary.

61 By not including an arbitration clause in their new agreement and by not making any reference whatsoever to the arbitration clause 12.2 in the lapsed distributorship agreement, I find as a matter of construction that the parties have sufficiently evinced their intention not to refer any dispute arising out of or in connection with their new compromise agreement to any arbitration. Implication of contractual terms into a written agreement particularly foreign arbitration clauses or foreign jurisdiction clauses cannot be so readily made. In my opinion, the facts and circumstances of this case certainly do not allow such an implication to be made.

62 I find that the 4 September agreement cannot be regarded as an extension or a variation of the distributorship agreement such that a dispute with regards to any

A term in the 4 September agreement can be said to be a dispute arising out of or in connection with the distributorship agreement, which under cl 12.2 of the latter agreement would have to be referred to arbitration.

63 Further, no dispute arising out of or in connection with any of the actual terms of that distributorship agreement in fact existed. Hence, there was again nothing B to be referred to arbitration under cl 12.2.

64 Since the dispute here concerns a payment term in the 4 September agreement, it has to be resolved in accordance with the terms and the proper law governing that agreement.

C *Proper law for the 4 September agreement*

65 It must be remembered that the 4 September agreement was signed in Singapore after fairly extensive negotiations and stock checking in Singapore. It also involved substantial stocks of watches in the appellants' premises in Singapore. There is nothing in the agreement stating that the laws of Switzerland D or that of any other country governed the agreement. Clearly, in the absence of anything else, that 4 September agreement must be governed by Singapore law and the Singapore courts would have jurisdiction to try any dispute arising under it.

66 As the arbitration clause 12.2 could not be construed to govern the dispute, E there is no question of staying the proceedings. I only need to determine if the respondents have succeeded in raising any triable issues. If not, summary judgment must follow.

Non-existence of triable issues

F 67 I accept the appellants' contention that the parties' agreement was very clear that the payments (both by the respondents and the new distributor, Siber Hegner (SEA) Pte Ltd) were to be in Singapore dollars. 'S$' was underlined and put in bold print at the top of the list of final figures, and above the figure for the account receivables for emphasis. 'S$' placed in front of the amount to be paid (nett of all charges) by the respondents puts it beyond doubt that the payment was intended G to be in Singapore dollars and not any other currency.

68 The appellants in their affidavit also stated that they wanted cash payment in Singapore dollars for the final settlement before they would allow the stocks to be transferred out of their possession on 4 September 1996. But they relented on the cash requirement because of the long relationship between the parties. The H respondents did not dispute this either.

69 The appellants contended that it was for that reason that they wanted the figures to be confirmed payable in Singapore dollars and signed by both parties so that there could be no dispute in the future as to what was due to the appellants.

I 70 On 4 October 1996, the last day to effect payment without incurring interest charges, the respondents wrote to the appellants raising various issues and refused to pay the amount agreed.

71 They unilaterally withheld S$20,000 unless their 'computer key' was returned. They also raised for the first time that they had to do a complete stock taking and would withhold S$200,000 for payment of the spare parts. They also said that approximately '40 movements' parts were missing. The respondents used the 1.18 exchange rate to convert the agreed settlement figure in Singapore dollars to Swiss Francs for remittance in Swiss Francs to the appellants. 1.18 was not the prevailing exchange rate on the date they effected payment. After allowing for the amounts withheld, the respondents decided to remit only Swiss Francs 3,100,000.

72 The appellants pointed out that Mr Bonjour was present to inspect the stock and the spare parts when he was in Singapore and the amount of S$200,000 for the spare parts had been agreed to by him. There was no basis now to withhold the S$200,000 payment.

73 The appellants also complained that the remittance of Swiss Francs 3,100,000 on or about 10 October 1996 when converted to Singapore dollars at the prevailing exchange rate of 1.1255 produced only S$3,489,050. Based on the principal sum of S$3,911,596.65 payable under the 4 September agreement, there was a shortfall of S$422,546.65. The appellants immediately wrote to the respondents setting out their computations of the balance due to them after interest and other items agreed to were added in.

74 The respondents replied on 15 October 1996 confirming that they were 'ready to transfer CHF199,394.20 as a final settlement' to the appellants. Clearly, the respondents were not disputing their liability to make payment to the appellants under the terms of the 4 September agreement. No issue was raised now by the appellants regarding the S$200,000 payment for the spare parts. The respondents' computation in fact included that sum in the payment except for a deduction of S$6,970.26 for the 37 spare parts of 'missing movements'.

75 There is a significant admission at para 3 of their reply where the respondents stated:

> Since we have used the used the exchange rate of CHF 1 = SING$ 1.18 for all calculations of:
>
> — your return stock of watches
> — value of tool and equipment sent by EBEL one year ago
> — cost of bracelets replaced free of charge by you
> — amount due by Coop Singapore, CIL, Sincoop Hong Kong and Taiwan
>
> we are using the same agreed exchange rate today.

76 The respondents did not say that it had been agreed prior to entering the 4 September agreement that a fixed exchange rate of 1.18 was also to be used at the time of payment regardless of the prevailing exchange rate. The respondents admitted that '*since* we have used" the exchange rate of 1.18 for making the calculations during the negotiations, therefore 'we are using the same agreed exchange rate' again for the payment.

77 It would appear that the respondents had on their own simply decided to use the 1.18 exchange rate (and not the prevailing exchange rate) when it was time for

them to make payment. They ignored the terms of the 4 September agreement that payment was to be in S$3,911,596.65. They unilaterally decided that because 1.18 had been used before, therefore they were entitled to use 1.18 again without considering whether this would be in breach of the terms of the 4 September agreement.

78 If the parties have agreed that the payment of a debt is to be in a particular currency, the debtor must pay in that currency or in another currency, which when converted at the prevailing exchange rate will give the same amount in the stipulated currency. The creditor is entitled to demand that the debt be satisfied in that stipulated currency. The case law is clear on this (*Barclays Bank International Ltd v Levin Brothers (Bradford) Ltd* [1977] QB 270, *Wardley Ltd v Tunku Adnan* [1991] 3 MLJ 366; [1991] SLR 271, *Tengku Aishah v Wardley Ltd* [1993] 1 SLR 337).

79 It is for the paying party, having agreed to make payment in that currency, to take steps to hedge against currency fluctuation risk if he is minded to do so. If not, then he takes the loss if the exchange rate moves against him and the benefit if it moves in his favour. If the respondents had not taken steps to hedge against currency fluctuation risk which under the agreement was theirs to bear, it would not be right for them to thrust any currency loss onto the appellants.

80 Further, the words 'nett of all charges' in the 4 September agreement also suggest that the parties had agreed that the appellants were to receive after conversion of the foreign currency payment into Singapore dollars, and after deduction of bank charges and commissions for the money transfers and currency exchange, the full amount of S$3,911,596.65 and nothing less.

81 The respondents in their affidavits had never once disputed the appellants' assertion that there was no agreement to have the exchange rate for payment fixed at 1.18, whichever may be the date for remittance and whatever may have been the prevailing exchange rate. No such term can be found in the 4 September agreement.

82 At the hearing, counsel for the respondents strenuously argued that the exchange rate was agreed at 1.18 to be used throughout and he referred me to para 10 of the respondents' second affidavit which stated that the parties had 'specifically agreed on the exchange rate at 1.18'. He further referred to the respondents' fax dated 8 October 1996 in which it was stated that the respondents had transferred 'SFR3,100,000 or SIN$3,658,000 at the 1.18 agreed rate'.

83 I also note that para 6 of the respondents' second affidavit never went further than merely stating that the parties discussed and agreed on the 1.18 exchange rate 'to be used to convert the prices from Swiss francs to Singapore dollars, for the inventory as well as for items such as advertising/promotional expenditures and outstanding amounts due to Ebel SA'.

84 I cannot see how these parts of the affidavit evidence can amount to an assertion that it was agreed between the parties that 1.18 was to be used as the *fixed* exchange rate for computing the subsequent payment of S$3,911,596.65. The respondents could only assert that 1.18 was the agreed rate, which the

appellants in any event never disputed had been the rate agreed for the computations at that time. To adhere to the same exchange rate for payment is something quite different. I therefore found nothing in the affidavit evidence to support the submissions of the counsel for the respondents on this point.

85 A perusal of the affidavits will show that the respondents had carefully avoided mentioning in their affidavits whether there was a prior discussion about the exchange rate to be applied at the time of payment and whether an agreement had in fact been reached for 1.18 to be used when payment was due. I cannot help but draw the inference from their awkward silence that there was in reality no such discussion, let alone an agreement for the exchange rate of 1.18 to be fixed till the time for payment, regardless of delays in payment and fluctuations in interest rates. If there had been such an agreement, they would have no difficulty in positively asserting those facts in their affidavits, which they never did.

86 When asked at the hearing, counsel for the respondents confirmed that there was no discussion on what was going to happen at the time of payment should the exchange rate be different from 1.18. If there was no discussion on that particular point, I find it implausible that agreement on such an unusual term could have been reached.

87 It must also be remembered that the prevailing exchange rate at the time the parties negotiated the 4 September agreement was 1.15 and not 1.18. A premium was added to the prevailing exchange rate of 1.15 because the appellants wanted the respondents to reimburse them for the freight, insurance, administrative charges and the carrying costs for the stocks.

88 It would be most odd that after extensive calculations had been done to arrive at a settlement figure in Singapore dollars, which the parties themselves must have considered fair at that time, the parties should have further agreed that 1.18 was to be *assumed* as the exchange rate for payment instead of the actual rate prevailing then of 1.15. Parties will not know how the exchange rate is going to move in the future. But what they would know is that this alleged arrangement will give the respondents an instant windfall on the 4 September itself because the settlement sum of S$3,911,596.65 at the prevailing exchange rate of 1.15 gives 3,401,388.39 Swiss Francs whereas the assumed higher exchange of 1.18 gives a lower amount of 3,314,912.42 in Swiss Francs. All the respondents need do is to tender 3,314,912.42 Swiss Francs on 4 September itself to the appellants, who would then have to convert that sum at the prevailing exchange rate of 1.15 and collect only S$3,812,149.28 for themselves. The appellants would suffer an immediate shortfall of S$99,447.36. The absurdity of it all indicates that the alleged oral agreement that 1.18 was to be adopted as the fixed exchange rate for payment is most likely to be untrue.

89 Further, the alleged agreement would also mean that the respondents could decide to make payment in Swiss Francs when the prevailing exchange rate was below 1.18 but pay in Singapore dollars if the prevailing exchange rate was higher than 1.18. Whichever way the exchange rate fluctuated, it would always be in favour of the respondents. I find it hard to believe that the appellants could ever have agreed to such a one-sided term.

90 In any event, the respondents are precluded by s 94 of the Evidence Act from adducing any evidence of an alleged oral agreement which contradicts or varies

A the express terms of the 4 September written agreement. It is also settled law that where the terms of a written document are clear and unambiguous, extrinsic evidence is not admissible to introduce or add new terms to it (*Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164, *Wong Kai Chung v Automobile Association of Singapore* [1993] 2 SLR 577).

B 91 In the result, I find that the respondents had not succeeded in raising any arguable or triable issue with respect to their alleged oral agreement.

Other miscellaneous triable issues

92 The respondents sought to deduct $8,254.63 which represented the sum that
C Siber Hegner had paid out to Lloyd Martin on behalf of the appellants. On the affidavit evidence at exh JMB-9, it would appear such payment had been made. I therefore deducted that amount from the sum claimed by the appellants when I granted summary judgment.

93 The respondents also wanted to set off S$6,970.26 for the 37 pieces of
D 'missing movements'. It was clear from the affidavits that Mr Bonjour had inspected the spare parts. Counsel for the respondents could not tell me whether Mr Bonjour did or did not see those 37 pieces among the spare parts he inspected. Neither could counsel tell me whether there was any list prepared for the spare parts inspected and whether such a list had included the 37 pieces. The list filed in one of the affidavits did not appear to be a list for watch spare parts as the prices
E listed for the items were simply too high for them to be spare parts. Counsel for the appellants confirmed that the list referred to the stocks of watches and not spare parts. The appellants also maintained that the 37 pieces were not among the stock of spare parts at the inspection as they had been missing all along. The respondents were fully aware of the missing pieces and had taken them into account when they agreed to the figure of S$200,000 for the stock of spare parts.
F Further, the appellants said that the total value of the existing spare parts far exceeded the sum agreed of S$200,000. There was a gentlemen's agreement that should the actual value of spares returned exceed S$200,000, the respondents would top up the amount to be paid. Hence, the S$200,000 was the absolute base figure.

G 94 As the respondents were unable to produce any evidence that the missing 37 parts were among the items Mr Bonjour had inspected for which the agreed minimum valuation was S$200,000, I cannot see any triable issue raised such that the cost of S$6,970.26 for these 37 parts should have been set off from the appellants' claim.

H 95 The last triable issue raised by the respondents concerning the 'computer key' became a non-issue when it was ascertained at the hearing that the key had already been returned to the respondents.

Summary judgment

I 96 Accordingly, I dismissed the application for stay by the respondents and awarded judgment for the appellants in the sum of S$422,546.65 less a sum of S$8,254.03 with interest at the contractual rate of 8% p.a. from 5 October 96 to the date of payment. Costs for both the appeal and the hearing below were fixed at $10,000.

Other arguments on the International Arbitration Act (IAA) and the Model Law

97 During the hearing, extensive submissions were placed before me concerning the applicability of the IAA to the international arbitration agreement contained in cl 12.2.

98 Since the respondents have appealed against the whole of my decision, I thought I should address these submissions for the purpose of completeness although the issues are no longer material to my decision after I have found as a matter of construction that cl 12.2 did not extend to the 4 September agreement.

99 If I am wrong in my construction, then I think the proceedings have to be stayed as the court has no discretion in the matter having regard to s 6(2) of the IAA and the terms of the arbitration agreement in cl 12.2. The fact that there is in my view no triable or arguable issue is irrelevant. For this, I would respectfully adopt the principle stated by Goh Joon Seng J in *The Dai Yun Shan* [1992] 2 SLR 508 that 'so long as the claim is not admitted, a dispute exists.' The learned judge had referred to *Hayter v Nelson Home Insurance Co* [1990] 2 Lloyd's Rep 265, and I find the reasoning in the following passages of Saville J's judgment most enlightening:

> In some cases the suggestion seems to be made that if it can be shown that a claim under a contract is indisputable, ie a claim that simply cannot be resisted on either the facts or the law, then there is no dispute or difference within the meaning of the arbitration clause in that contract. ...
>
> To the extent that such observations are intended to define what is or is not a dispute or difference within the meaning of an arbitration clause of the kind under consideration, I am respectfully unable to agree with them — more importantly they seem to me to be in conflict with the decision of the Court of Appeal in *Ellerine Bothers (Pty) Ltd v Klinger* [1982] 1 WLR 1375. In my view, to treat the word 'disputes' or the word 'differences' in the context of an ordinary arbitration clause as bearing such a meaning leads not only to absurdity, but also involves giving those words a meaning which (though doubtless one the words are capable of bearing) in context is difficult to support.
>
> The proposition must be that if a claim is indisputable then it cannot form the subject of a 'dispute' or 'difference' within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration. To my mind such propositions have only to be stated to be rejected — as indeed they were rejected by Mr Justice Kerr (as he then was) in *The M Eregli* [1981] 2 Lloyd's Rep 169, in terms approved by Lords Justices Templeman and Fox in *Ellerine v Klinger* (sup). As Lord Justice Templeman put it (at p 1383):
>
> 'There is a dispute until the defendant admits that the sum is due and payable.'
>
> In my judgment in this context neither the word 'disputes' not the word 'differences' is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that

dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them.

In my view this ordinary meaning of the word 'disputes' or the word 'differences' should be given to those words in arbitration clauses.

100 Even if I am wrong again and the stay is discretionary and not mandatory, I would have exercised my discretion to stay the action to give due weight to the international arbitration agreement which the parties had freely concluded.

101 Again on the assumption that the respondents' contention is right, then cl 12.1 would also be applicable to the 4 September agreement thereby making Swiss law the proper law of the agreement. There is no presumption that Swiss law is the same as Singapore law in relation to a summary judgment application and in dealing with the disputed issues. Under the circumstances, this would not be within the category of clear and unarguable cases where there is in reality no dispute between the parties to be referred for arbitration. Hence, this is another reason why I would stay the proceedings to give effect to their arbitration agreement.

102 In *Hayter's* case, Saville J at p 269 in his judgment said:

> ... if the courts are to decide whether or not a claim is disputable, they are doing precisely what the parties have agreed should be done by the private tribunal. An arbitrator's very function is to decide whether or not there is a good defence to the claimant's claims — in other words, whether or not the claim is in truth indisputable. Again, to my mind, whatever the position in the past, when the courts tended to view arbitration clauses as tending to oust their jurisdiction, the modern view (in line with the basic principles of the English Law of freedom of contract and indeed international conventions) is that there is no good reason why the courts should strive to take matters out of the hands of the tribunal into which the parties have by agreement undertaken to place them.

103 More recently, the Singapore Court of Appeal had to deal with a question of discretionary stay under s 7 of the Arbitration Act (Cap 10) in *Kwan Im Tong Chinese Temple & Anor v Fong Choon Hung Construction Pte Ltd* [1998] 2 SLR 137. In the judgment delivered on 6 February 1998, the Court of Appeal held that the principles used in summary judgment proceedings should not be an exhaustive means of weighing the claims. Applications for stay under s 7 of the Arbitration Act relate to the larger issue of jurisdiction. The following passage at p 879 in the judgment of GP Selvam JC (as he then was) in *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1993] 1 SLR 876 was referred to with approval:

> The common form arbitration agreement provides for disputes to be decided by arbitrators. In such a case the court should, save in obvious cases, adopt a holistic and commonsense approach to see if there is a dispute. The justification for this approach is that it is important to hold a party to his agreement and avoid double and split hearing of matters. ... If the defendant, therefore, makes out a prima facie case of disputes the courts should not embark on an examination of the validity of the dispute as though it were an application for summary judgment.

104 On the facts of that case, the Court of Appeal allowed the action to be stayed.

Section 15 of the IAA

105 I shall now set out briefly the arguments at the hearing below, the conclusion by the learned assistant registrar and the submissions at the appeal before me specifically on the issue whether the appellants have successfully invoked s 15 of the IAA, assuming for the purpose of argument that the arbitration agreement in cl 12.2 covered the dispute between them.

106 It is common ground that cl 12.2 is an international arbitration agreement because the respondents has its place of business outside Singapore. One of the requirements prescribed in s 5(2) for an arbitration agreement to be considered international in nature is thus satisfied.

107 The IAA and the Model Law do not apply to *domestic* arbitration unless parties have agreed in writing that they shall apply. As for *international* arbitration, the IAA and the Model Law will apply unless parties have opted out. The question is what must the parties do if they intend to opt out of the IAA and the Model Law. How clearly must they express their intention to opt out?

108 Counsel for the respondents submitted that parties must expressly state that the IAA and the Model Law shall not apply if they intend to opt out. Otherwise, they will find themselves caught under the umbrella of the IAA and the Model Law. Counsel referred to the speech of the then Parliamentary Secretary to the Minister for Law, Associate Professor Ho Peng Kee, who stated during the second reading of the International Arbitration Bill that the bill would mainly implement the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration on an 'opt-out' basis. From this, counsel contended that there must be a clear ouster clause to bring the international arbitration agreement outside the IAA and the Model Law.

109 The issue here therefore largely concerns the interpretation of s 15 of the IAA. Section 15 provides:

> If the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be *settled or resolved otherwise than in accordance with this Part or the Model Law*, this Part and the Model Law shall not apply in relation to the settlement or resolution of that dispute. [Emphasis is mine.]

110 On this point, the learned assistant registrar said:

> ... Section 15 contains an ouster clause, which applies if appellants have provided for means of settlement 'otherwise than in accordance with this Part or the Model Law'. In this case, the crucial question is how parties may provide 'otherwise than in accordance with the Model Law'. The appellants rely on inconsistencies between the mandatory provisions of some of the articles of the Model Law and contrary provisions of the Geneva Rules. 'The Model Law' is defined in s 2, which refers to the First Schedule. But art 1(2) states that only arts 8, 9, 35 and 36 are to apply if the arbitration is not to be in Singapore. In the present case, appellants have provided for arbitration in Geneva pursuant to other rules, so only arts 8, 9, 35 and 36 of the Model Law apply. Articles 8, 9, 35 and 36 are not inconsistent with the Geneva Rules, so it cannot be said that the parties have provided 'otherwise than in accordance with the Model Law', in this particular case.

A 111 The appellants had argued at the hearing below that this literal reading of the statute may lead to an absurd result. Suppose the arbitration agreement provided for arbitration in Singapore pursuant to the Geneva Rules, then all the articles of the Model Law would apply except for arts 8, 9, 35 and 36 as provided for in art 1(2). Conflict between the Geneva Rules and parts of the Model Law would result and the appellants would have succeeded in ousting the IAA and the B Model Law. The learned assistant registrar said that this concern was a valid one but there was no necessity for her to decide the issue whether an express ouster by the parties was necessary and mere inconsistencies were insufficient to enable the parties to opt out of the scheme of the Act.

C 112 At the hearing before me, both parties took the position that if the IAA and the Model applied, s 6(2) of the IAA as well as art 8 of the Model Law requires a mandatory stay of proceedings unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. I think this position is correct. Unless the respondents admit the appellants' claim, a stay must still be ordered even though summary judgment could have been granted on the basis that in reality there was no triable or arguable issue.

D 113 Counsel for the appellants reiterated his arguments that both s 6 of the IAA and art 8 of the Model Law have no application here as parties have agreed that any dispute arising is to be settled otherwise than in accordance with the Model Law. If so, by virtue of s 15 of the IAA, both the Model Law and Part II (which contains s 6) will not apply. Since s 6 is no longer applicable, a stay of proceedings E is not mandatory and the court's jurisdiction to impose a stay must then be based on its inherent jurisdiction and the common law. Stay becomes discretionary.

114 Counsel further submitted that there is nothing in s 15 which requires parties to expressly state in their arbitration agreement words to the effect that 'this Part and the Model Law shall not apply' or that 'this Part and the Model Law shall be F excluded'. Article 176(2) in Chapter 12 of the Swiss Arbitration Act was cited as an example where specific exclusion was required before it could be effective.

115 Besides being silent on the need for specific exclusion, s 15 enables the parties to opt out by agreeing that the dispute is to be settled or resolved in a way, which is otherwise than in accordance with Part II or the Model Law. In other G words, if the parties have chosen procedures for arbitration alien to that prescribed by Part II or the Model Law, they have already agreed that the determination of their dispute would be 'otherwise than in accordance with this Part or the Model Law.' They need not go further to say that Part II and the Model Law are inapplicable. This interpretation according to counsel is supported by the plain and literal reading of the widely worded s 15.

H 116 Counsel also contrasted s 15 of the IAA with s 21 of the Australian International Arbitration Act 1974. In s 15, both Part II *and* the Model Law are inapplicable the moment the parties have provided otherwise than in accordance with *either* Part II *or* the Model Law. Whereas the Australian provision only allows the parties to opt out of the Model Law but not the principal Act itself. I From this, counsel submitted that parties could opt out of the mandatory stay provision in Part II of the principal Act.

117 Turning to the factual matrix in the case at hand, it would appear that Switzerland does not adopt the UNCITRAL Model Law. The parties themselves have decided that Geneva is to be the place of arbitration and the Geneva Rules are to apply.

118 The Model Law and the Geneva Rules are not limited to procedural rules but also cover substantive matters. By adopting the Geneva Rules, counsel for the appellants submitted that the parties had clearly provided for the disputes to be resolved 'otherwise than in accordance with the Model Law' since the Geneva Rules contain both substantive and procedural rules different from that of the Model Law. They had by implication excluded both Part II and the Model Law. With the consequent exclusion of s 6, the stay is no longer mandatory.

119 On the other hand, counsel for the respondents adopted the reasoning of the learned assistant registrar in his submissions and also addressed the apparent anomaly which appellants' counsel had raised at the hearing below that the IAA and the Model Law ironically would have been ousted if parties had instead provided for arbitration in Singapore under the Geneva Rules.

120 In answer to this, respondents' counsel referred to the following article in the Model Law:

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

121 Counsel's contention was that art 19 allows parties the freedom to select another set of rules to be adopted when the arbitration is in Singapore. Hence, the mere choice of a different set of rules is insufficient to bring s 15 into operation unless parties had clearly and expressly excluded Part II or the Model Law for the arbitration. In other words, the mere fact that the parties had specified the Geneva Rules is insufficient per se to oust the Part II and the Model Law because the Act itself allows parties the freedom to select rules different from the Model Law.

My views

122 It is necessary to look at the Arbitration (Foreign Awards) Act (Cap 10A) (AFFA), which was repealed when the IAA was enacted, to better understand how the IAA is intended to operate.

123 Section 4 of the AFFA reads:

4 (1) This section shall apply in relation to every arbitration agreement —

(a) which provides, expressly or by implication, for arbitration in any State other than Singapore; or

(b) to which there is, at the time the legal proceedings under subsection (2) are commenced, at least one party who is a national of, or habitually resident in, any State other than Singapore.

(2) Where —

(a) any party to an arbitration agreement to which this section applies institutes any legal proceedings in any court in Singapore against any other party to the greement; and

(b) the proceedings involve the determination of a dispute between the parties in respect of any matter which is required, in pursuance of the agreement, to be referred to, and which is capable of settlement by, arbitration,

any party to the agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.

(3) ... the court to which an application has been made in accordance with subsection (2) shall make an order, upon such conditions or terms as it thinks fit, staying the proceedings or, as the case may be, so much of the proceedings as involves the determination of the dispute and which refers the parties to arbitration in respect of the dispute in accordance with the arbitration agreement.

124 Under the repealed AFFA, there was no opting out provision equivalent to s 15 of the IAA as we now have. Stay of proceedings was therefore mandatory when the arbitration agreement provides for arbitration in a foreign state. See s 4(1)(a) of AFFA. There is obviously no need to cater for opting out of the AFFA when the arbitration is to be conducted outside Singapore, which should then fall entirely under the jurisdiction of the foreign state.

125 What if the parties decide to arbitrate in Singapore but have chosen foreign arbitration procedures instead, and s 4 of the AFFA applied on the basis that one of the parties is a foreign national or habitually resident outside Singapore? Since the AFFA did not prescribe any comprehensive arbitration procedures or rules (unlike the IAA), the necessity for a provision to allow parties to opt out of the AFFA did not arise.

126 This shows that the legislature had basically intended all along since the enactment of the AFFA that stay is to be mandatory when the arbitration clause calls for arbitration in a foreign state.

127 It would be difficult to understand why after the IAA had been enacted and the AFFA repealed, the Swiss party for instance in this case, who has agreed with the Singapore party to arbitrate their dispute in Geneva under Geneva Rules would be subjected to a discretionary stay regime; but had it been under the AFFA, it would have been mandatory. I can see no policy reasons in the Parliamentary debates for a change in this regard.

128 Turning back to the IAA, which has incorporated most of the comprehensive rules of the UNCITRAL Model Law (see s 3(1) of the IAA), there is thus a need to allow parties to opt out of the Model Law, including those sections (e.g. s 8, 9 and 10) in Part II of the IAA which modify the Model Law, so that parties have the widest possible flexibility should they decide to arbitrate *in Singapore*. This must be the background against which s 15 must be construed. But if they should choose to arbitrate in a foreign state, I cannot see how the IAA can have any extraterritorial reach, so that the parties have to opt out of it.

129 Section 15 therefore applies only if parties had chosen to arbitrate *in Singapore* because the parties will be subject to the Model Law procedures unless they take advantage of s 15 to opt out entirely of the Model Law and Part II of the IAA. This may well be part of the Government's policy to encourage the growth of arbitration within Singapore by not unnecessarily constraining the parties to any fixed set of procedures be it in the form of the Model Law or otherwise.

130 It is pertinent to note the many references by Professor Ho concerning the applicability of the IAA and the Model Law to arbitration *in* Singapore during the Second Reading of the International Arbitration Bill. He said:

> This Bill will facilitate the settlement of commercial disputes *in Singapore*. ... Currently, foreign businessmen are uncomfortable with unfamiliar arbitration laws and excessive intervention from local courts if they *select Singapore* as the venue for arbitration. They will therefore welcome the application of the Model Law *in Singapore*. ... international arbitration is a highly competitive business. Businessmen are able to choose from a variety of attractive international centres including Hong Kong, Hawaii, Kuala Lumpur, Melbourne and Vancouver. Currently, a glaring disadvantage of the SIAC is the non-applicability of the Model Law *in Singapore*. ... Let me briefly take the House through the main parts of the Bill. Part II will give the Model Law, ... , the force of law *in Singapore*. ... The reason for this approach is to let foreign businessmen and lawyers know at the outset the changes that have been made to the Model Law. This will facilitate their *choice of Singapore as a venue* for their cases. ... In summary, the reasons why Singapore should adopt the Model Law are as follows: ... it will promote *Singapore's role as a growing centre* for international legal services and *international arbitrations*.

131 No doubt the scheme of the IAA which incorporates the Model Law is intended to apply to arbitrations in Singapore. When parties choose a place of arbitration in a foreign country, I do not think that Parliament ever intended the IAA and the Model Law to apply to that foreign arbitration such that the parties must expressly opt out of those procedures pursuant to s 15. Comity of nations and reciprocity dictate that a foreign country's own substantive laws and procedures governing the conduct of arbitration within their own territory must be respected.

132 For the reasons given, I am of the view that s 15 cannot be invoked for the purpose of depriving s 6 of the IAA of its efficacy when the arbitration is to take place outside Singapore.

133 This construction I have placed on s 15 is further supported by art 1(2) of the Model Law where it is clear that none of the articles in the Model Law except arts 8, 9, 35 and 36 apply when the place of arbitration is not in Singapore. Article 1(2) reads as follows:

> *Article 1. Scope of application*
>
> (2) The provisions of this Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

134 Hence, when the place of arbitration is outside Singapore, no inconsistency with the Articles of the Model Law can possibly arise as the Model Law is basically irrelevant when arbitration is outside Singapore. Only arts 8, 9, 35 and 36 remain relevant for very good reasons.

135 Articles 8 and 9 serve to preserve the bargain of the parties to an international arbitration agreement by ensuring that the court will not deal with the dispute itself but refer the matter to arbitration and that the court will have powers to afford the parties interim protection before or during the arbitral proceedings, for example, to order interim injunctions, preservation, interim custody or sale of any of the disputed properties.

136 Articles 35 and 36 deal with the recognition and enforcement of arbitral awards inclusive of foreign arbitral awards in Singapore.

137 I do not see how articles 8, 9, 35 and 36 can ever be inconsistent with the Geneva Rules or for that matter the rules of arbitration enacted by any foreign jurisdiction for the conduct of arbitration within their jurisdiction. In any event, arts 35 and 36 have been excluded by the Legislature under s 3(1) of the IAA and do not have the force of law in Singapore because there is already separate legislation under Part III of the IAA governing the recognition and enforcement of foreign awards in Singapore.

138 That essentially leaves us with arts 8 and 9. But these two articles do not affect the way disputes are to be resolved or settled under those rules. Hence, the agreement per se to resolve the dispute by arbitration in Geneva, Switzerland, in accordance with the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva cannot be construed as an agreement to resolve the dispute 'otherwise than in accordance with either Part II of the IAA or the Model Law'. I agree entirely with the reasons given by the learned assistant registrar on this point.

139 Finally, counsel for the respondents referred me to the 'Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration'. Although the note is prepared for information only and is not an official commentary on the Model Law, nevertheless I think it is most helpful. It would of course be better if counsel had made available the official commentaries for my perusal. In fact, s 4 of the IAA specifically provides that reference may be made to the documents relating to the Model Law of the United Nations Commission on International Trade Law and its working group for the preparation of the Model Law for the interpretation of the Model Law, which has (subject to the IAA and with the exception of arts 35 and 36) the force of law in Singapore by virtue of s 3.

140 Paragraphs 12, 13, 16, 21 and 22 of the said explanatory note state:

> (a) *Substantive and territorial scope of application*
>
> ...
>
> 12 Another aspect of applicability is what one may call the territorial scope of application. According to art 1(2), the Model Law as enacted in a given State would apply only if the place of arbitration is in the territory of that State. However, there is an important and reasonable exception. Articles 8(1) and 9 which deal with recognition of arbitration agreements, including their compatibility with interim measures of protection, and arts 35 and 36 on recognition and enforcement of arbitral awards are given a global scope, ie they apply irrespective of whether the

place of arbitration is in that State or in another State and, as regards arts 8 and 9, even if the place of arbitration is not yet determined.

13 The strict territorial criterion, governing the bulk of the provisions of the Model Law, was adopted for the sake of certainty and in view of the following facts. The place of arbitration is used as the exclusive criterion by the great majority of national laws and, where national laws allow parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties in practice rarely make use of that facility. The Model Law, by its liberal contents, further reduces the need for such choice of a 'foreign' law in lieu of the (Model) Law of the place of arbitration, not the least because it grants parties wide freedom in shaping the rules of the arbitral proceedings. This includes the possibility of incorporating into the arbitration agreement provisions of a 'foreign' law, provided there is no conflict with the few mandatory provisions of the Model Law. Furthermore, the strict territorial criterion is of considerable practical benefit in respect of arts 11, 13, 14, 16, 27 and 34, which entrust the courts of the respective State with functions of arbitration assistance and supervision.

16 Beyond the instances in these two groups (referring to the arts 11, 13, 14, 16, 27 and 34), 'no court shall intervene, in matters governed by this Law'. This is stated in the innovative art 5 ...

(b) *Arbitration agreement and the courts*

20 Articles 8 and 9 deal with two important aspects of the complex issue of the relationship between the arbitration agreement and resort to courts. Modelled on art II(3) of the 1958 New York Convention, art 8(1) of the Model Law obliges any court to refer the parties to arbitration if seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request which a party may make not later than when submitting his first statement on the substance of the dispute. While this provision, where adopted by a State when it adopts the Model Law, by its nature binds merely the courts of that State, it is not restricted to agreements providing for arbitration in that State and, thus, helps to give universal recognition and effect to international commercial arbitration agreements.

21 Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (eg pre-award attachments) are compatible with an arbitration agreement. Like art 8, this provision is addressed to the courts of a given State insofar as it determines their granting of interim measures as being compatible with an arbitration agreement, irrespective of the place of arbitration. Insofar as it declares it to be compatible with an arbitration agreement for a party to request such measure from a court, the provision would apply irrespective of whether the request is made to a court of the given State or of any other country. Wherever such request may be made, it may not be relied upon, under the Model Law, as an objection against the existence or effect of an arbitration agreement.

141 The above commentary on the Model Law lends support to the construction that I have placed on s 15 of the IAA.

142 I will now deal with the hypothetical situation referred to by counsel for the appellants where the parties have chosen *Singapore as the place of their arbitration* but agree to abide entirely by the Geneva Rules, which are clearly incompatible with the Model Law as applied in Singapore. Take for instance r 12.1 of the Geneva Rules where the *Chamber of Commerce and Industry of Geneva* shall appoint the sole arbitrator if the parties fail to select a sole arbitrator

by mutual agreement within the thirty-day time limit set. This will certainly be incompatible with the s 8(2) of the IAA read with art 11(3)(b) of the Model Law, where in the absence of agreement, the sole arbitrator shall be appointed, upon request of a party, by the *Chairman of the Singapore International Arbitration Centre* or such other person appointed by the Chief Justice by notification published in the Gazette. Under the circumstances, would the parties have succeeded in opting out pursuant to s 15 since they have not expressly stated in their arbitration agreement that the Model Law or Part II of the IAA has been excluded?

143 Article 19 does not help much as the selection of the arbitrator is not simply a rule of procedure that has to be followed by the arbitral tribunal in conducting proceedings. It is substantive in nature. In this hypothetical case, the parties had selected a procedure which is contrary to the mandatory provision in the IAA and the Model Law.

144 In my opinion, it is not necessary to have an explicit agreement stating that the Model Law or Part II will not apply, as counsel for the respondents had contended. Section 15 itself does not appear to require a clear express term of exclusion. On a plain and literal reading of that section, it can cover both express and implied exclusions. If the intention is to limit s 15 to an express ouster only, Parliament could easily have provided for it.

145 Second, the transition provision in s 26 of the IAA provides that Part II shall not apply to an international arbitration that was commenced before 27 January 1995, the date the IAA came into force. It would appear that the IAA covers international arbitration agreements concluded before the IAA was in force. Parties certainly could not be expected to know that there is a need under s 15 to expressly opt out of the Model Law or Part II. I do not think that Parliament could have intended that these parties should be precluded from opting out and that they should be forced to adopt procedures for arbitration in Singapore that are contrary to what the parties had agreed between themselves. As with international arbitration agreements concluded on or after 27 January 1995, they should also have the same facility to opt out and the only way this can be done is to construe s 15 such that opting out by implication is allowed.

146 By choosing procedures which are alien and contrary to the mandatory provisions in the Model Law or Part II for arbitration *in Singapore*, I think parties would have successfully opted out by implication.

147 What then is the legal regime to govern that arbitration in Singapore after the parties had by implication opted out? Having regard to s 5(4), I am of the view that if Part II is no longer applicable, then the legal regime reverts to the Arbitration Act (Cap 10) (AA). The definition of arbitration agreement in s 2 of the AA is extremely wide and would cover all arbitration agreements, whether domestic or international in nature. When Part II and the Model Law in the IAA applies, the AA is not applicable. So when Part II and the Model Law are inapplicable, the AA must apply. I cannot envisage a lacuna here.

148 I do not think I should go further to deal with the question how the arbitration is going to be conducted having regard to the fact that the Geneva Rules

are not exactly in line with many of the provisions in the AA. It may well be easier if the parties, after realising the complexities, simply agree to go to Geneva to arbitrate rather than have it done in Singapore if they still want to follow the Geneva Rules. But the point remains that they can arbitrate in Singapore using procedures other than the Model Law.

149 If the AA applies, then the stay is discretionary under s 7 of the AA. The principles to be followed have been set out in the recent Court of Appeal decision in *Kwan Im Tong Chinese Temple & Anor v Fong Choon Hung Construction Pte Ltd*. I do not think there is anything absurd as contended by appellants' counsel in the hypothetical case that if the place of arbitration is in Singapore, the stay is discretionary but where it is in Switzerland, the stay is mandatory. The point really is that Parliament has legislated that *within Singapore*, international arbitrations (including non-international arbitrations) following the Model Law procedures (see s 5(1) of the IAA) will come under IAA for which the stay shall be mandatory whilst those that do not apply the Model Law will come under the AA, for which the stay shall be discretionary. For arbitration agreements to arbitrate *outside Singapore*, the stay will invariably be mandatory whether or not the parties have agreed to follow the Model Law for their arbitration.

Appeal allowed.

Reported by Zaheer Merchant