Cassa di Risparmio di Parma e Piacenza SpA *v* Rals International Pte Ltd [2015] SGHC 264

Case Number	: Suit No 1173 of 2013 (Registrar's Appeals Nos 166 and 168 of 2014)
Decision Date	: 16 October 2015
Tribunal/Court	: High Court
Coram	: Vinodh Coomaraswamy J
Counsel Name(s)	: Elaine Tay and Wong Jun Ming (Rajah & Tann Singapore LLP) for the plaintiff; Adrian Tan and Kenneth Chua (Stamford Law Corporation) for the defendant.
Parties	: CASSA DI RISPARMIO DI PARMA E PIACENZA SPA — RALS INTERNATIONAL PTE LTD

Arbitration – Stay of court proceedings – Mandatory stay under International Arbitration Act

Arbitration – Agreement – Assignment

Banking – Promissory notes – Payment

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 75 of 2015 was dismissed by the Court of Appeal on 25 April 2016. See [2016] SGCA 53.]

16 October 2015

Vinodh Coomaraswamy J:

Introduction

1 A contract between a buyer and a seller of goods contains an arbitration agreement. In accordance with the contract, the buyer draws promissory notes in favour of the seller as deferred payment for the goods. The seller negotiates the notes to its bank without recourse and, as part of the same transaction, assigns to the bank its contractual right to receive payment for the goods from the buyer. The bank duly presents the notes for payment. All of the notes are dishonoured. The bank, relying only on its rights as the indorsee and holder of the notes, brings an action against the buyer. Can the buyer use its arbitration agreement with the seller as the basis to stay the bank's action under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Act")?

2 That question sets two fundamental principles in competition for primacy. The first is that arbitration is a consensual dispute resolution procedure. That principle has two corollaries. First, no person ought to be compelled to arbitrate a dispute unless he has agreed to do so. Second, a person who has agreed to do so should not be permitted to resile from his agreement or to fragment the resolution of the parties' dispute by specious or technical arguments as to the scope of the agreement.

3 The second fundamental principle is that a promissory note, being a subset of bills of exchange, is the equivalent of cash. It is therefore essential for commerce to have certainty that the payment obligation represented by a bill (including a note) is at all times convertible into cash quickly, simply and effectively.

4 Both of these principles are of high importance in our jurisprudence, and indeed in the jurisprudence of any international commercial and financial centre. Which principle ought to prevail when they compete is therefore of equally high importance.

5 Not surprisingly, the parties have before me taken diametrically-opposed positions on this issue. Having considered the parties' submissions, I have held that the seller's assignment to the bank of its right to receive payment from the buyer under their contract carried with it to the bank, in respect of that right, both the benefit and the burden of the arbitration agreement between the seller and the buyer. But I have also held that it is unarguable that the bank's claim against the buyer on the promissory notes falls within the scope of that arbitration agreement. I have therefore dismissed the buyer's application to stay this action in favour of arbitration. The result is that the bank's claim against the buyer on the promissory notes will be resolved in court and not in arbitration.

6 The buyer has, with my leave, appealed to the Court of Appeal against my decision. I therefore now set out my reasons.

Factual background

The parties

7 Cassa di Risparmio di Parma e Piacenza SpA is the bank. It is incorporated in and carries on business in Italy. It is known informally as "Cariparma" and that is how I shall refer to it.

8 Rals International Pte Ltd ("Rals") is the buyer of the goods and the maker of the promissory notes. Rals is a company incorporated in Singapore which carries on the business of processing raw cashew nuts and exporting processed cashew nuts. [note: 1]

9 Oltremare SRL ("Oltremare") is the seller of the goods and the payee of the promissory notes. Oltremare is a company incorporated in Italy which manufactures and sells machines to process cashew nuts.

10 Cariparma, as holder and indorsee, sues Rals in this action on eight promissory notes which Rals drew in favour of Oltremare on 23 December 2010. [note: 2] The notes fell due for payment sequentially, every six months from 6 January 2012 to 6 July 2015. [note: 3]

11 Cariparma commenced this action after the first four of the eight promissory notes had been dishonoured. The substantive relief which it seeks in this action is, broadly speaking, to recover from the defendant the value of the notes. [note: 4]

12 Cariparma came to be the holder of the eight promissory notes as the ultimate result of four contractual relationships. Those four are, in chronological order:

(a) A supply agreement dated 9 August 2010 between Oltremare and Rals ("the Supply Agreement"); [note: 5]

(b) An assembling and commissioning agreement also dated 9 August 2010 between Oltremare and Rals ("the Services Agreement"); [note: 6]

(c) The eight promissory notes which Rals issued to Oltremare on 23 December 2010; [note: 7]

and

(d) A contract between Oltremare and Cariparma dated 19 July 2011 to discount the promissory notes ("the Discount Contract"). [note: 8]

13 I now summarise in turn the effect and import of each agreement.

The Supply Agreement

14 Under the Supply Agreement, Oltremare agreed to manufacture and deliver to Rals – and Rals agreed to buy – equipment to shell and process raw cashew nuts. Oltremare was obliged to commence delivery of the equipment at Rals' factory in Vietnam in December 2010 and to complete it by March 2011.

15 In exchange for the equipment, Rals agreed to pay Oltremare €1,950,185 in ten instalments of 10% each. [note: 9] The first two instalments were to be paid in cash in October 2010 and November 2010. The last eight instalments were to be paid by the eight promissory notes. The Supply Agreement not only stipulated that the payment mechanism for the last eight instalments would be promissory notes but also stipulated in its Annex C the precise form of the notes.

16 The first of the eight promissory notes was to fall due for payment six months after the date of the bill of lading [note: 10] for the last shipment under the Supply Agreement. Each of the remaining seven notes was to fall due every six months from that date.

17 The effect of all of this was that Oltremare granted Rals four years' credit from the date of the last shipment of equipment under the Supply Agreement to pay in full the final 80% of the purchase price due to Oltremare by eight equal instalments. In exchange for the credit, Rals agreed to pay Oltremare interest of €30,481.50 with each promissory note. The face value of each promissory note was therefore €225,500, being €195,018.50 plus the agreed interest of €30,481.50. The combined face value of the eight promissory notes was €1,804,000.

18 The Supply Agreement is expressly governed by Singapore law. It also provides expressly for arbitration in the following terms:

> Clause 9 Arbitration
>
> All disputes arising in connection with this Agreement shall be settled by a direct conciliation between the parties. Failing this conciliation, the dispute will be settled in accordance with the rules of Conciliation and Arbitration Rules of the International Chamber of Commerce in Singapore.

The Services Agreement

19 At the same time as Oltremare and Rals entered into the Supply Agreement, they also entered into the Services Agreement. Under the Services Agreement, Oltremare undertook to assemble and commission at Rals' factory in Vietnam all of the equipment which it had sold to Rals under the Supply Agreement. Oltremare was obliged to commence the assembly and commissioning in January 2011 and to complete it by May 2011 at the latest. [note: 11]

20 The Services Agreement did not stipulate a separate price which Rals was to pay Oltremare for the contracted services. Instead, it expressly provided that the price for these services was included in the purchase price stipulated in the Supply Agreement.

21 Clause 7 of the Services Agreement sets out a separate arbitration agreement in identical terms to Clause 9 of the Supply Agreement (see [18] above).

The promissory notes

22 On 23 December 2010, Rals duly drew the eight promissory notes in favour of Oltremare. It is not clear why the notes were not delivered within 60 days from the date of the Supply Agreement as required by Clause 5 of that agreement. Nothing, however, turns on this point.

23 Each of the eight promissory notes is in the form stipulated by Annex C to the Supply Agreement. Each note therefore: (i) has a face value of €225,500; (ii) is expressly issued in Singapore; (iii) is payable "to the order of Oltremare"; and (iv) is payable at the Standard Chartered Bank at Battery Road in Singapore. [note: 12]

24 Also on 23 December 2010, as stipulated in the Supply Agreement, [note: 13] Rals sent the eight promissory notes [note: 14] to Oltremare's bank in Italy, Unicredit Banca ("Unicredit"). The notes were accompanied by Rals' letter of instructions to Unicredit. The form of this letter too was stipulated in the Supply Agreement. In the letter, Rals instructed Unicredit [note: 15] to hold the notes and to release them to Oltremare only against its presentation of certain stipulated documents.

The Discount Contract

25 In February 2011, Oltremare approached Cariparma seeking to discount the eight promissory notes. [note: 16] As a result, on 19 July 2011, Cariparma and Oltremare entered into the Discount Contract. [note: 17] The Discount Contract is expressly governed by Italian law and confers exclusive jurisdiction over disputes on the courts of the City of Parma, in Italy.

26 Article 2(1) of the Discount Contract sets out Oltremare's essential obligation under that contract: to assign the eight promissory notes to Cariparma without recourse. [note: 18] In exchange, and subject to certain conditions precedent, Cariparma agrees under Article 2(4) [note: 19] to pay to Oltremare the value of each note discounted at just under 3.6% per annum [note: 20] and after deducting various taxes and fees.

27 Under Article 2(3) of the Discount Contract, Oltremare assigns to Cariparma, together with the eight promissory notes, two additional contractual rights. The first right is the receivable of €1,804,000 which Rals owes to Oltremare under the Supply Agreement. The second right is the benefit of an export credit insurance policy issued to Oltremare by Italy's export credit guarantee agency, Sace S.p.A ("Sace"). [note: 21]

28 Article 3(1) of the Discount Contract records Oltremare as making certain declarations to Cariparma. These declarations are presumably recorded in order to constitute express representations which carry contractual consequences for Oltremare if they are proven to be false. Of particular relevance are Oltremare's declarations that, as at 19 June 2011, *ie* the date of the Discount Agreement: (i) Oltremare's receivable from Rals arising from the Supply Agreement is in existence and

is valid, unencumbered and vested unconditionally in Oltremare; (ii) the receivable is freely assignable and transferable to third parties; (iii) the promissory notes are autonomous and abstract from the receivable; and (iv) the Supply Agreement complies with requirements imposed by Sace in order for Oltremare to transfer to Cariparma the benefit of Sace's insurance policy. [note: 22]

29 One of the requirements imposed by Sace was that the Supply Agreement includes an arbitration agreement providing for disputes to be resolved by arbitration in a New York Convention country. The Supply Agreement clearly meets this requirement: it contains an arbitration agreement (see [18] above) providing for arbitration in Singapore and Singapore is a New York Convention country. By Article 3(1)(f)(iii) of the Discount Agreement, [note: 23] Oltremare expressly declared to Cariparma that this requirement had been met. Cariparma therefore accepts that it was aware that the Supply Agreement was subject to an arbitration agreement before it agreed to discount the promissory notes and before it took the assignment of the debt due from Rals under the Supply Agreement.

30 Articles 4(1) and 5(1) of the Discount Contract read together make it a condition precedent to Cariparma's obligation to discount the eight promissory notes that Oltremare deliver certain documents to Cariparma. [note: 24] Three of those documents are important for present purposes. The first is a notice from Oltremare to Rals that it has assigned to Cariparma its receivable underlying the notes. The second is a declaration by Oltremare that there are no disputes between Rals and Oltremare as at the date of the Discount Contract. The third and final document is a certificate of acceptance in respect of the supplied equipment.

31 Oltremare issued or procured each of these three stipulated documents.

32 First, on 15 July 2011, Oltremare duly gave notice to Rals that it had assigned to Cariparma the receivable underlying the promissory notes. The notice of assignment is in the form stipulated in Article 4(1) of the Discount Contract: [note: 25]

> We refer to our supply provided by [the Supply Agreement] for the price of €1.950.185 ... giving rise to a relevant deferred payment of €1.804.000 which is payable by promissory notes ... Please be informed and notified that we have assigned our credit with you deriving from the above described promissory notes to [Cariparma] ... Accordingly, effective from the date of receipt of this notification, you are directed to make any and all payments exclusively to said company.

Rals does not dispute having received this notice. [note: 26] It is curious that this notice is dated four days *before* the Discount Contract and 21 days *before* the assignment and negotiation under the Discount Contract was to become effective (see [35] below). Neither side, however, takes any point on this discrepancy.

33 Second, on 20 July 2011, Oltremare duly issued to Cariparma the declaration of absence of disputes. The declaration states: [note: 27]

> Subject: Declaration of absence of disputes
>
> In relation to the [Supply Agreement] with [Rals] … with this letter we declare that up to today there are no disputes between the parties of the [Supply Agreement].

34 Finally, on 5 August 2011, Oltremare procured and delivered to Cariparma an original acceptance certificate signed and stamped on behalf of both Rals and Oltremare. The acceptance

certificate was in the following terms: [note: 28]

ACCEPTANCE CERTIFICATE

Re: [the Supply Agreement] dated August 09, 2010

We refer to the machinery and equipment for a cashew nut processing plant with the capacity of 50 tons of raw material supplied by Oltremare SRL (the Supplier) under [the Supply Agreement] dated August 09, 2010 (the Contract) for a total value of €1.950.185 ... entered into between the Supplier and RALS INTERNATIONAL SINGAPORE PTE LTD ... (the Importer).

In this respect, we hereby confirm that:

– the delivery has taken place in full conformity with the Contract;

The Importer has accepted unconditionally and irrevocably the machinery without any reserves.

Singapore: August 05, 2011

signed on behalf of [Rals]	signed on behalf of [Oltremare]
by V. Rajkumar	by S. Massari
(seal and signature)	(seal and signature)

Rals accepts that Mr V Rajkumar, its managing director, signed this acceptance certificate and that he did so with understanding of its contents. [note: 29] Mr V Rajkumar also signed each of the eight promissory notes on behalf of Rals. [note: 30]

Delivery and acceptance of the promissory notes

35 With all the conditions precedent under the Discount Contract satisfied, Oltremare negotiated the promissory notes to Cariparma pursuant to the Discount Contract on 5 August 2011. [note: 31] The negotiation amounted, in substance, to Oltremare's statutory assignment to Cariparma of Rals' payment obligation under the promissory notes subject to statutory conditions and carrying statutory consequences. The two accompanying assignments of contractual rights to Cariparma under the Discount Contract (see [27] above) also became effective on 5 August 2011.

36 In exchange, Cariparma duly paid Oltremare the discounted sum of €1,657,105.11 on 12 August 2011. [note: 32]

Cariparma commences S 1173/2013

37 Cariparma presented for payment the four promissory notes which matured on 6 January 2012,

6 July 2012, 6 January 2013 and 6 July 2013. [note: 33] Each of them was dishonoured. Cariparma has yet to receive payment on any of these four notes. That presumably is also the case for the other four notes which have fallen due since Cariparma commenced this action.

38 Cariparma therefore makes two main claims against Rals in this action: [note: 34]

(a) It seeks to recover €902,000 on the four dishonoured promissory notes; and

(b) It seeks a declaration:

(i) that Cariparma is a holder in due course of the remaining four notes; and

(ii) that Rals is liable to pay to Cariparma on those four notes.

The Assistant Registrar stays this action

39 The Assistant Registrar who heard Rals' application under s 6 of the Act in the first instance granted the stay. Her reasons for doing so were as follows. She held, first, that there was at least an arguable case that Cariparma was itself a party to the arbitration agreement in the Supply Agreement by reason of its status as an assignee of Rals' debt to Oltremare which arose from that agreement. [note: 35] Alternatively, she was of the tentative [note: 36] view that Cariparma came within the extended definition of "a party" in s 6(5)(*a*) of the Act because Cariparma was claiming "through or under" Oltremare, and because Oltremare was undeniably a party to the arbitration agreement. [note: 37] The Assistant Registrar held, further, that Cariparma's claim as the holder of the promissory notes fell within the scope of the arbitration agreement: [note: 38] (i) because the notes were the very mode of payment expressly stipulated in the Supply Agreement; and (ii) because Rals' intended defences to Cariparma's claim all related to Oltremare's performance of the Supply Agreement.

40 In short, the Assistant Registrar held that Cariparma, being Oltremare's assignee under the Discount Contract, had stepped into Oltremare's shoes in respect of all its rights and could be in no better position than Oltremare in enforcing any of those rights. That applied not only in respect of Cariparma's right to recover Oltremare's receivable arising from the Supply Agreement but also in respect of Cariparma's right to recover on the notes themselves, Rals having made those notes pursuant to an express stipulation in the Supply Agreement. [note: 39]

41 I have allowed Cariparma's appeal and lifted the Assistant Registrar's stay. I do accept Rals' argument that Cariparma is "claiming through or under" Oltremare and is hence a party to the arbitration agreement within the extended meaning of that term in s 6(5)(*a*) of the Act. However, in my view, Cariparma's claim – which it has legitimately confined to its rights as the holder of the promissory notes – is not within the scope of that arbitration agreement. Rals is therefore not entitled to have this action stayed under s 6(1). Given that Rals does not suggest that I stay this action on any basis other than that provided in s 6(1), the stay imposed by the Assistant Registrar must fall away.

Stay of proceedings pursuant to s 6(1) of the Act

42 Stripped down to the elements essential for present purposes, s 6 of the Act provides as follows:

6. – (1) ... where any party to an arbitration agreement ... institutes any proceedings in court

against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may ... apply to that court to stay the proceedings ...

(2) The court ... shall make an order ... staying the proceedings so far as the proceedings relate to the matter ...

…

(5) For the purposes of this section ... –

(*a*) a reference to a party shall include a reference to any person claiming through or under such party

...

43 Rals and Oltremare are parties to two arbitration agreements, one in Article 9 of the Supply Agreement and the other in Article 7 of the Services Agreement. Cariparma is neither a party to the Services Agreement nor an assignee of any of Oltremare's rights under the Services Agreement. The only arbitration agreement upon which Rals' application to stay this action under s 6 can be founded is therefore Article 9 of the Supply Agreement. [note: 40] That is therefore the only arbitration agreement I shall analyse and refer to in the rest of this judgment.

44 In order to secure a stay of this action under s 6, Rals must establish the following:

(a) Either:

(i) That Cariparma is a party to Article 9 of the Supply Agreement; or

(ii) That Cariparma is, in this action, "claiming through or under" Oltremare;

and

(b) That this action is in respect of a matter which is the subject of Article 9 of the Supply Agreement.

45 I accept that the burden on Rals in advancing this application is a light one, and that the burden on Cariparma in resisting it is correspondingly heavy. Rals is entitled to a stay if it is at least arguable that the prerequisites of s 6 have been met: *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*") at [24]. Therefore, if Rals satisfies me that its position on both points (a) and (b) are at least arguable, it is entitled as of right to have this action stayed. If Rals fails to do so on either point, its application for a stay must be dismissed.

46 The sequence in which I have set out points (a) and (b) requires me to consider first whether an arbitration agreement exists to which Cariparma is a "party" (whether within that word's core or extended meaning in s 6 of the Act) before considering whether the present dispute is a matter which is the subject of that arbitration agreement. It is equally possible to consider these two points in the reverse sequence. I could consider, first, whether the present dispute is a matter which is the subject of Article 9 of the Supply Contract and then consider whether Cariparma is a "party" to that Article. I prefer, however, the sequence set out at [44] above. It appears to me that ascertaining whether a plaintiff is a party to an arbitration agreement with a defendant is logically anterior to ascertaining whether the plaintiff's claim falls within the scope of that arbitration agreement. In any

event, the sequence in which I have set out and intend to approach these points is the same sequence in which s 6 itself presents them (see also *Tjong Very Sumito* at [22] and [69(a)]).

A party to the arbitration agreement?

47 The first question therefore is whether Cariparma is a party to Article 9 of the Supply Agreement. In my view it is not.

48 The phrase "party to an arbitration agreement" is the central concept of s 6, and indeed forms part of its language. But this phrase is nowhere defined in the Act. Two constituents of the phrase, however, are defined in the Act.

49 First, s 2 of the Act defines "party" as meaning, so far as is relevant, "a party to an arbitration agreement". This definition is, however, intended only to distinguish a party to the agreement in the contractual sense from a party to the arbitration in the procedural sense. This definition – even though it is not the tautology it appears to be – offers no assistance in the current inquiry.

50 The second constituent of the phrase which is defined is "arbitration agreement". Section 2A of the Act defines that as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

51 The agreement which s 2A of the Act envisages is necessarily a *contractual* agreement. The concluding words of the definition modify "legal relationship" and not "an agreement by the parties". If the word "agreement" is used in its widest sense, of course, a person can have an agreement to submit disputes to arbitration which falls short of being a contract. But non-contractual agreement to arbitrate can, by definition, be withdrawn at any time without legal consequence. Arbitration would cease to be founded upon consent if the law of arbitration were to treat an agreement to arbitrate as binding when that agreement had ceased otherwise to be binding under the general law of obligations. An "arbitration agreement" within the meaning of s 2A of the Act exists only if the parties to the agreement have a contractual right as against each other – and a corresponding contractual obligation owed to each other – to arbitrate disputes falling within its scope.

52 Given that an "arbitration agreement" within the meaning of s 2A of the Act must be an agreement in the contractual sense, then a "party" to an arbitration agreement must equally be a party in the contractual sense to the agreement. It is axiomatic that only Rals and Oltremare are parties to a contractual agreement – including an arbitration agreement – between Rals and Oltremare. Only they had the meeting of minds out of which sprang the Supply Agreement and of which the arbitration agreement is an integral, albeit separable, component. Only they participated in the exchange of consideration which gives the arbitration agreement its contractual force. And only they signified their assent to the arbitration agreement, amongst its other provisions, by executing the Supply Agreement.

53 Cariparma's relationship to the Supply Agreement is merely that of an assignee. An assignee does not, simply by taking an assignment of some or all of the rights of an assignor against an obligor under their bilateral contract, become a party to that bilateral contract: *Rumput (Panama) SA And Belzetta Shipping Co SA v Islamic Republic of Iran Shipping Lines (The Leage)* [1984] 2 Lloyd's Rep 259 ("*The Leage*") at 261 per Bingham J; *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola)* [1997] 2 Lloyd's Rep 279 ("*The Jay Bola*") at 285 per Hobhouse LJ.

54 Rals relies on Oltremare's declaration to Cariparma under Article 3(1)(f)(iii) of the Discount

Contract (see [29] above) to argue that Cariparma had knowledge of Article 9 of the Supply Agreement when it took the assignment of Oltremare's rights under the Supply Agreement and therefore, by that fact alone, agreed to be bound by their agreement to arbitrate. I do not accept this submission. Knowledge that Rals and Oltremare had agreed to arbitrate their disputes cannot, in itself, make Cariparma a party in the contractual sense to that agreement. Cariparma had no meeting of minds with Rals at all, whether on the agreement to arbitrate or otherwise. Cariparma never indicated to Rals that it consented to be bound by Article 9, whether by executing the Supply Agreement or otherwise. Most importantly, Cariparma and Rals never exchanged consideration for any of the suite of contractual promises under the Supply Agreement, including the promise to submit disputes to arbitration in Article 9.

55 Cariparma is not a "party to an arbitration agreement" in the contractual sense. It is therefore not within the core meaning of that phrase in s 6(1). It can therefore come within that phrase if and only if it comes within the extended definition of "party" under s 6(5)(*a*) of the Act.

Claiming "through or under" Oltremare?

56 Section 6(5)(*a*) extends the meaning of "a party to an arbitration agreement" to include "any person claiming through or under [a] party" to an arbitration agreement. Applying s 6(5)(*a*) to the facts of this case therefore requires me to determine whether Cariparma makes its claim in this action "through or under" Oltremare.

57 It is important at this stage once again to guard against conflating points (a) and (b) (see [44] above). It is possible to take the approach that whether Cariparma claims in this action "through or under" Oltremare turns on whether Cariparma brings this action in its capacity as the assignee of Oltremare's rights under the Supply Agreement or in its own right as the holder of the promissory notes. Unsurprisingly, this was one of the key arguments of the plaintiff.

58 I do not consider that to be the correct approach. To my mind, points (a) and (b) are distinct inquiries with distinct purposes. The purpose of the inquiry on point (a) is to establish the required connection between the plaintiff and the arbitration agreement which s 6 posits. It is not the purpose of point (a) to establish a connection between the subject-matter of the plaintiff's action and the scope of the arbitration agreement. That is the purpose of point (b). Therefore, the manner in which Cariparma has framed its action is a matter which I consider appropriate to consider only under point (b).

59 With this clarification, I return to consider whether Cariparma in this action claims "through or under" Oltremare.

The case law

60 The words "through or under" are not defined in the Act. The words "through or under" and "under or through" do, however, appear in the stay provisions which are *in pari materia* with s 6(1) read with s 6(5)(a) of our Act and which appear in successive iterations of the English arbitration legislation and in the Australian arbitration legislation. Three English decisions and one Australian decision have considered the scope of these words in that context: *Roussel-Uclaf v GD Searle & Co Ltd* [1978] 1 Lloyd's Rep 225 ("*Roussel-Uclaf*"), *The Mayor and Commonalty & Citizens of the City of London v Ashok Sancheti* [2008] EWCA Civ 1283 ("*Sancheti*"), *The Leage* and *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 ("*Tanning*").

Roussel-Uclaf

61 In *Roussel-Uclaf*, a plaintiff brought an action against two defendants. The first defendant was a wholly-owned subsidiary of the second defendant, its parent. The plaintiff had no arbitration agreement with the subsidiary but did have an arbitration agreement with the parent. The subsidiary intended, in defending the action, to rely on matters relating to the agreement between the plaintiff and its parent. The subsidiary sought a stay of the litigation, relying on s 1(1) of the English Arbitration Act 1975 (in *pari materia* with s 6(1) read with s 6(5)(*a*) of our Act) and on the arbitration agreement between its parent and the plaintiff. Its alternative ground for a stay was founded on the court's inherent jurisdiction.

62 Graham J granted a stay on the alternative ground. Having done so, he then suggested, *obiter*, that he could also have granted a stay under the English arbitration legislation on the basis that the subsidiary and parent were, on the facts before him, so closely related to each other that the subsidiary was thereby "claiming through or under" the parent its right to carry out the acts in respect of which the plaintiff was suing it (at 231).

Sancheti

63 The English Court of Appeal in *Sancheti* disapproved of Graham J's very wide *dictum*. In that case, Mr Sancheti owed the City of London arrears of rent. Mr Sancheti, an Indian national, claimed that the United Kingdom had discriminated against him as an inward investor contrary to a bilateral investment treaty between the United Kingdom and India. He therefore commenced arbitration against the United Kingdom under the treaty. One of his complaints in the arbitration related to the City's conduct in assessing the arrears of rent and in attempting to collect those arrears. While the arbitration was pending, the City sued Mr Sancheti in the County Court to recover the arrears. Mr Sancheti sought to stay the County Court action under s 9 read with s 82(2) of the English Arbitration Act 1996 (*in pari materia* with s 6(1) read with s 6(5)(*a*) of our Act).

64 Mr Sancheti accepted that the City of London was not a party to any arbitration agreement with him. But one of his arguments was that the City was claiming "under or through" the United Kingdom in the County Court action because the City was so closely connected with the United Kingdom that it fell within Graham J's *dictum* in *Roussel-Uclaf*.

65 Lawrence Collins LJ had no hesitation in rejecting Mr Sancheti's argument. He held that for a litigant to be claiming "under or through" a party to an arbitration agreement, a mere legal or commercial connection between the litigant and the party to the arbitration agreement is not sufficient (at [34]). In arriving at that conclusion, he rejected Graham J's *dictum* in *Roussel-Uclaf* and held that that case had, on this point, been wrongly decided and should not be followed.

66 *Sancheti* has thus rejected the very wide meaning of the words "under or through" suggested in *Roussel-Uclaf*. But *Sancheti* does not tell us how much narrower than that very wide meaning the meaning of those words actually is.

The Leage

67 In *The Leage*, Bingham J had to consider whether an assignee who takes an assignment of a debt under an agreement between the assignor and obligor which contains an arbitration agreement – and who takes no assignment of any other rights under that agreement – is bound to recover that debt from the obligor only through arbitration. Bingham J held that the assignee is bound to do so because the assignee's claim to the debt is derived from the assignor and therefore the assignee comes within the words "through or under" in the arbitration legislation (at 262).

Tanning

Tanning

68 In *Tanning*, the question was whether a liquidator of a company who rejects a creditor's proof of debt is entitled to rely on an arbitration agreement between the company and the creditor set out in the contract out of which the debt arises. The provisions of s 7(2) and 7(4) of the Australian Arbitration (Foreign Awards and Agreements) Act 1974 (Cth) are *in pari materia* with s 6(1) and s 6(5)(*a*) of our Act. Brennan and Dawson JJ (Toohey J agreeing on this point) held that "through" and "under" imply a derivative cause of action or ground of defence:

> 10. Of course, a liquidator is not the company and legal title to the assets of the company is not vested in him ... . Nor is the liquidator in the present case a party to the arbitration agreement ... . But s.7(4) of the Act brings within the ambit of sub-s.(2) a person who claims "through or under a party". Although a person who was not a party to the arbitration agreement is not bound by the contract to submit to arbitration, a person who claims "through or under a party" is so bound by force of the statute ... . In statutes similar to s.7 of the Act, the phrase "through or under a party" or its equivalent has been construed to apply to, *inter alios*, a trustee of a bankrupt's estate (*Piercy v. Young* (1879) 14 Ch D 200), an assignee of a debt arising out of a contract containing an arbitration clause (*The "Leage"* (1984) 2 Ll LR 259, at p 262), a company being a subsidiary of a parent company which is party to an arbitration agreement (*Roussel-Uclaf v. Searle* ... (1978) 1 Ll R 225; but *cf*. *Mount Cook (Northland) v. Swedish Motors* (1986) 1 NZLR 720) and a company being a parent of a subsidiary company which is party to an arbitration agreement when claims are brought against both companies based on the same facts: *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.* ... (1988) 863 F 2d 315. However, there is no case to which our attention has been drawn in which the phrase has been held to affect the liquidator of a company which is party to an arbitration agreement, and the position of a liquidator can be distinguished from a trustee, an assignee, a subsidiary company or a parent company referred to in the respective cases cited. The meaning of the phrase "through or under a party" must be ascertained not by reference to authority but by reference to the text and context of s.7(4).
>
> 11. In the first place, as sub-s.(2) speaks of both parties to an arbitration agreement, a person who claims through or under a party may be either a person seeking to enforce or a person seeking to resist the enforcement of an alleged contractual right. The subject of the claim may be either a cause of action or a ground of defence. Next, the prepositions "through" and "under" convey the notion of a derivative cause of action or ground of defence, that is to say, a cause of action or ground of defence derived from the party. In other words, an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence. A liquidator may be a person claiming through or under a company because the causes of action or grounds of defence on which he relies are vested in or exercisable by the company; a trustee in bankruptcy may be such a person because the causes of action or grounds of defence on which he relies were vested in or exercisable by the bankrupt.

Cariparma is claiming "through or under"

69 The intent of the extended definition of "party" in s 6(5)(*a*) is to impose a statutory obligation on a plaintiff to arbitrate even if the plaintiff is not itself a contractual party to an arbitration agreement. But none of these cases lays out a principled approach for ascertaining which plaintiffs ought to be compelled to arbitrate despite not having consented to do so. The scope of this statutory exception to the consensual foundation of arbitration is therefore fraught with difficulty. I therefore return to first principles.

70 Whatever the true scope of the statutory phrase "through or under" might be, the core of that phrase must lie in the law of obligations. Arbitration is a consensual dispute resolution procedure: *Fiona Trust and Holding Corporation and others v Privalov and others* [2007] Bus LR 1719 ("*Fiona Trust*") at [5]. It is consistent with that principle if, at the very least, a plaintiff who is not a contractual party to an arbitration agreement but who is nevertheless bound by that agreement under the general law of obligations, or who is precluded by law from denying that he is so bound, is taken to claim "through or under" a contractual party to the agreement within the meaning of s 6(5)(*a*). The operation of s 6(5)(a) of the Act will, in that situation, do no more than mirror the operation of the general law.

71 On this approach, answering whether Cariparma claims in this action "through or under" Oltremare raises two subsidiary questions:

(a) First, which law should govern whether Cariparma is bound by Article 9 of the Supply Agreement?

(b) Second, does that law consider Cariparma to be bound by Article 9 of the Supply Agreement?

Which law governs?

72 On the first question, the parties are agreed that Singapore law governs whether Cariparma is bound by Article 9 of the Supply Agreement. However, as this issue is being considered in Singapore for the first time in this case, and as Singapore law plays many roles in this case, it is important to articulate with a little more granularity why that is so.

73 I have before me a case in which an obligor (in this case Rals) invites a court to compel an assignee (in this case Cariparma) to pursue its rights against the obligor in arbitration rather than in litigation on the grounds that the assignee is bound by an arbitration agreement between the obligor and the assignor (in this case Oltremare).

74 The law that governs whether Cariparma is bound by Article 9 of the Supply Agreement depends on how one characterises that question. There are five possibilities. First, the court may characterise the question as being purely procedural and apply the *lex fori*. Second, the court may characterise the question as one determined by the nature and scope of the substantive right which the assignee seeks to enforce and apply the proper law of the agreement out of which that substantive right arises. Third, the court may characterise the question as one relating to the fundamental nature of the arbitration agreement and apply the proper law of that (separate and separable) arbitration agreement. Fourth, the court may characterise the question as one determined by the law which governs the arbitral process and apply the *lex arbitri* or curial law. Finally, the court may characterise the question as one determined by the scope of the assignment agreement and apply the law which governs that agreement.

75 In this case, there are only two contenders for the law to be chosen to govern this question: Italian law and Singapore law. The claim of Italian law to govern this question arises from the fact that Cariparma and Oltremare made it the governing law of the assignment agreement between them (*ie*, the Discount Contract) by express agreement.

76 The claim of Singapore law to govern this question arises in four ways. First, Singapore law is the *lex fori* as this question is being considered by a Singapore court. Second, Singapore law is the proper law of Rals' contract with Oltremare by virtue of the parties' express choice of law in the

Supply Agreement. [note: 41] Third, Singapore law is the proper law of the arbitration agreement between Rals and Oltremare. That is because Singapore law governs the broader agreement between Rals and Oltremare in which the arbitration agreement is found and there is, in this case, no reason to move beyond the starting assumption that the parties intended the same law to govern both agreements (*Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102 ("*Sulamérica*") at [11] – [14]). Fourth, Singapore law will be the *lex arbitri* or curial law of any arbitration commenced under the arbitration agreement. That is because the arbitration agreement specifies Singapore as the parties' chosen arbitral seat and there is, in this case, no reason to move beyond the starting assumption that the parties intended the law of their chosen seat to be the *lex arbitri* (*Sulamérica* at [15] – [17]).

77 I examine three of these possibilities further in order to eliminate them: (a) the *lex fori*; (b) the proper law of the assignment agreement; and (c) the *lex arbitri*.

Lex fori

78 The *lex fori* ought not to play a role in determining the question at [71(b)]. I say this for three reasons.

79 First and fundamentally, it is wrong in principle to characterise the question of whether an assignee is obliged to arbitrate its claim against the obligor as purely procedural. The question is a substantive one which touches on the nature of the contract between the obligor and the assignor and of their arbitration agreement. It is a mere quirk of our law that we give effect to a determination of this substantive question through a procedural device, *ie* a stay. That does not convert the substantive question into a procedural one, let alone into one which is *purely* procedural.

80 Second, a choice of law rule which applies the *lex fori* to this question encourages forum shopping. It permits the assignee, by his unilateral act in choosing the forum in which to commence litigation, to choose the law which determines whether he is bound by the arbitration agreement. That forum need not have any connection to any aspect of the substantive agreement between the obligor and the assignor or with their arbitration agreement. It may have been chosen by the assignee simply to minimise the chance of being compelled to arbitrate. Further, allowing the *lex fori* to determine this question means that until the assignee commences action, the law which governs this question is wholly indeterminate. No prediction can even be ventured as to whether the assignee is bound to arbitrate until litigation actually commences. That reduces commercial certainty.

81 Finally, a choice of law rule which points to a law chosen by the unilateral act of the assignee by commencing litigation carries the highest risk of defeating the parties' reasonable commercial expectations. The expectations of the parties as at the time of contracting are either manifested in, or objectively ascertainable from, their agreements. Those expectations are very likely to be defeated by attaching legal significance to one party's unilateral and self-serving subsequent act.

82 All of these considerations exclude the *lex fori* as a candidate for a choice of law rule. This is so even though in a particular case, the assignee may choose the forum for legitimate rather than tactical reasons. That is the case here: Cariparma has chosen to sue on the promissory notes in the courts of Singapore because that is the legal system governing all aspects of the notes. But Singapore law cannot, simply because it happens to be the *lex fori*, govern whether Cariparma is contractually bound by the arbitration agreement between Rals and Oltremare.

Proper law of the assignment agreement

83 The proper law of the assignment agreement between the assignor and the assignee equally ought not to govern this question.

84 As between the assignee and the obligor, a choice of law rule which points to the law of the assignment agreement creates a real risk of defeating the obligor's reasonable commercial expectations. As far as the obligor is concerned, it entered into an arbitration agreement with the assignor as a separable but integral part of their wider bilateral contract. Once invoked, the arbitration agreement operates not only to entitle the obligor and the assignor to resolve their disputes through arbitration but also to oblige them to do so. It is entirely reasonable for the obligor to expect that, even if it is an assignee who brings a particular claim against it under that agreement, the law which determines how that claim is to be resolved will be a law which the obligor had some say in choosing. It appears to me to be wrong in principle that the obligor should find its ability to compel an assignee to arbitrate to be regulated by the proper law of an agreement between assignor and assignee when the obligor is not a party to that agreement; when the obligor may not know of its existence, let alone of its terms; and when the obligor may have had no reason to contemplate an assignment of rights when contracting with the assignor, beyond being a mere theoretical possibility.

85 Finally, adopting a choice of law rule which points to the proper law of the assignment agreement is not necessary in order to give effect to the assignee's reasonable commercial expectations. The assignee will have taken the assignment of his rights with every opportunity of ascertaining the terms of the agreement between the obligor and the assignor, including its proper law.

The lex arbitri

86 The *lex arbitri* ought not to play a role in determining this question. The *lex arbitri* is predominantly procedural in its nature and too narrow in its focus. It is therefore ill-equipped to deal with a substantive issue such as whether the assignee is bound to arbitrate his disputes with the obligor.

Conclusion on governing law

87 By the process of elimination, I am therefore left with only two possibilities for the law which governs the question at [71(b)]: (i) the proper law of the obligor's and assignor's substantive agreement (in this case, the Supply Agreement); and (ii) the proper law of the obligor's and assignor's arbitration agreement (in this case, Article 9 of the Supply Agreement).

88 Singapore law governs both the substantive agreement between Oltremare and Rals as well as their separable arbitration agreement. It is therefore unnecessary for me to express a more granular view on the choice of law rule. The choice between these two residual alternatives remains ultimately a question of characterisation (see [73] above). If it had been necessary for me to choose, I would have inclined towards the law which governs the parties' separable arbitration agreement.

89 I do express the view, however, that the law which governs this question must be ascertained by a choice of law rule which operates to choose a law rather than to yield a pre-ordained result. I therefore have difficulty in accepting Rals' submission that this question should be determined by what has been called a "validation principle" which operates to choose whichever law holds the assignee to be bound by the arbitration agreement. [note: 42] That, with respect, would be to allow the tail to wag the dog.

Bound by the arbitration agreement under Singapore law?

90 The next question is whether, under Singapore law, an assignee of a right against an obligor is bound to submit a dispute over that right to arbitration if the assignor and the obligor would have been bound to do so by virtue of an arbitration agreement between them. If the answer is yes, there can be no doubt that the assignee is – and ought to be – within the meaning of the words "claiming through or under" in s 6(5)(*a*). The assignee will not only be relying on a right derived from the assignor, the assignee will itself be contractually bound under the general law to arbitrate despite not being a party to the arbitration agreement.

91 An analysis of the cases cited by both counsel establish the following propositions of law:

(a) Arbitration agreements are, as a class, capable of assignment.

(b) Where an assignor and an obligor have entered into an arbitration agreement, an assignee of a contractual right against the obligor is *entitled* to exercise all the remedies of the assignor in respect of that right, including the right to arbitrate disputes with the obligor falling within the scope of that arbitration agreement.

(c) Where an assignor and an obligor have entered into an arbitration agreement, an assignee of a contractual right against the obligor is *obliged* to submit to arbitration all disputes with the obligor falling within the scope of that arbitration agreement, notwithstanding the well-established rule that an assignment can convey to the assignee only contractual benefits and never burdens.

These propositions are all, of course, subject to any express or implied agreement to the contrary.

92 I now elaborate on each of these three propositions.

Arbitration agreements as a class are capable of assignment

93 The position in English law on the first of these three propositions took an initial wrong turn but is now well-settled. The English courts' initial approach held that an arbitration agreement was a personal covenant, and therefore remained vested in the assignor even after he had validly assigned to an assignee all of his other rights under his contract with the obligor: *Cottage Club Estates Limited v Woodside Estates Company (Amersham) Limited* [1928] 2 KB 463.

94 In *Shayler v Woolf* [1946] 1 Ch 320, however, the English Court of Appeal held that: (i) arbitration agreements are, as a class, capable of assignment; and (ii) the presence of an arbitration agreement in a contract which contains rights which are otherwise capable of assignment will not, in itself, prevent the rights under that contract from being assigned, including the rights under the arbitration agreement.

Assignee takes the benefit of the arbitration agreement

95 The second proposition at [91(b)] above is the result of moving beyond simply reversing the old rule denying the assignability of arbitration agreements and working out the ordinary consequences of an assignment. Thus, the English cases now recognise as a default rule that the assignment of a contractual right carries with it the benefit of an associated arbitration agreement. The contrary result requires contrary agreement.

96 In *Montedipe SpA and another v JTP-RO Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep 11 ("*The Jordan Nicolov*"), an assignor commenced arbitration against an obligor and then assigned its

cause of action to an assignee. The assignee gave notice of the assignment both to the obligor and, eventually, to the arbitral tribunal. The assignor continued, however, to be named as the claimant in the arbitration. Even though the assignor's notice of assignment was in evidence, thereby putting its title to the claim very much in issue, the assignor did not adduce any evidence that it had the necessary title to maintain the claim in arbitration. The arbitrators held that the assignor's claim was well-founded on the merits, but concluded that they could not award the assignor any relief because it had failed to discharge its burden of proving that it continued to have title to the claim despite the notice of assignment. The question which arose before Hobhouse J was whether the award should be remitted to the arbitrators for them to consider making an award in favour of the assignee rather than the assignor.

97 Hobhouse J rested his decision in large part on s 136 of the English Law of Property Act 1925 (c. 20). That section is in terms virtually identical to s 4(8) of our Civil Law Act (Cap 43, 1999 Rev. Ed) which provides as follows:

> **Assignment of debts and choses in action effectual to pass right and remedy**
>
> (8) Any absolute assignment by writing under the hand of the assignor ... of any debt or other legal chose in action, of which express notice in writing has been given to the ... person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be ... effectual in law ... to pass and transfer the legal right to such debt or chose in action, from the date of such notice, *and all legal and other remedies for the same*....
>
> [emphasis added]

98 Relying on the English equivalent of this provision, Hobhouse J held that: (i) an assignee of a cause of action takes the benefit of all the remedies associated with that cause of action (at 15); (ii) in the absence of contrary agreement, those remedies will include any right which the assignor may have agreed with the obligor to vindicate that cause of action in arbitration (at 15); (iii) an assignee who takes its assignment while an arbitration of a claim involving the assigned right is ongoing need not start arbitration afresh but is entitled to intervene in the assignor's existing arbitration after giving notice of assignment to the opposing party and to the tribunal; and (iv) the arbitrators have, in these circumstances, the jurisdiction to grant an award to the assignee (at 19).

99 This position must, with respect, be correct. I therefore hold that this is also the position in Singapore law.

An assignee is bound by the burden of an arbitration agreement

100 The preceding analysis (at [95] to [99] above) of the second proposition of law set out at [91(b)] above does not, however, address the third proposition at [91(c)] above. It is the third proposition which is in play in this case. Unlike the second proposition, the third proposition poses a serious conceptual challenge.

101 This action is not one in which Cariparma is claiming the *benefit* of Oltremare's arbitration agreement with Rals to pursue Rals in arbitration. Cariparma is resisting Rals' attempt to impose the *burden* of Rals' arbitration agreement with Oltremare upon Cariparma.

102 It is well-established at common law that contractual benefits may be transferred by assignment. But it is equally well-established that contractual burdens cannot be transferred by assignment but only by novation (see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994]

1 AC 85 at 103E). An arbitration agreement is capable of being seen as both a benefit and a burden, depending on one's perspective. From Rals' perspective, the arbitration agreement in Article 9 of the Supply Agreement is a benefit. From Cariparma's perspective, it is a burden. These perspectives are by no means inevitable as between plaintiff and defendant or as between assignee and obligor. Simply put, an arbitration agreement is a benefit to a party – whether the obligor or the obligee – who wishes to arbitrate. It is a burden to a party – whether obligor or the obligee – who does not.

103 There is no Singapore authority on this third proposition. But the answer from the English cases, even if the conceptual underpinnings are not immediately obvious, is that an assignment of a contractual right carries not only the benefit of an associated arbitration agreement but also its burden.

104 In *The Jordan Nicolov* (see [96] above), Hobhouse J held that an assignee is bound by the assignor's arbitration agreement with the obligor in the sense that the assignee cannot vindicate the assigned right without also accepting the obligation to arbitrate. This holding was, however, *obiter*: *The Jordan Nicolov* was not a case in which the obligor was seeking to impose on the assignee the burden of the arbitration agreement. Instead, as I have explained (at [96] – [98] above), the question was whether an assignee could claim the benefit of an arbitration agreement in order to secure an award in an ongoing arbitration between the assignor and the obligor.

105 In *The Jay Bola*, by contrast, an obligor succeeded in imposing the burden of an arbitration agreement on an assignee. In that case, an assignee attempted to pursue its claim against an obligor through litigation in Brazil in circumstances where, if the assignor had been pursuing the claim, it would have been bound by an arbitration agreement. Because the litigation to be restrained in *The Jay Bola* was in Brazil and not in England, the obligor could not seek from the English court a stay under the English equivalent of s 6 of our Act. Instead, the obligor had to seek from the English court an anti-suit injunction to restrain the assignee from pursuing its litigation in Brazil.

106 Hobhouse LJ held that the anti-suit injunction should issue, relying again on the English equivalent of s 4(8) of our Civil Law Act (see [97] above). He held that: (i) this provision permits rights of action to be assigned, but subject always to the obligor's equities; (ii) the obligor's contractual right to have the claim arbitrated was a right which equity required the assignee to recognise; (iii) the assignee was acting unconscionably by disregarding the obligor's equitable right and suing it in Brazil; and (iv) the grant of an injunction was the appropriate equitable remedy for the assignee's unconscionable conduct (at 286).

107 Hobhouse LJ's explanation suffices to explain why the equitable remedy of an injunction issued in that case. But it glides over the fundamental distinction in law between transmitting the benefit of a contractual right to an assignee and transmitting its burden. In summarising the effect of his decision, Hobhouse LJ says: "... the application of the [obligor] for an injunction has been made to protect a contractual right of the [obligor] that the dispute be referred to arbitration, a contractual right which equity requires the [assignee] to recognise" (at 286). If the obligor has a contractual right to have the dispute referred to arbitration, then the assignee must have a corresponding contractual obligation to submit to arbitration. And if the assignee breaches that contractual obligation, its breach ought not only to warrant an injunction but also to sound in damages. But Hobhouse LJ rejects categorically the proposition that the assignee could have any liability to the obligor under the arbitration agreement: "The burden of the contract was not transferred. The [assignee] came under no actionable liability to the [obligor]" (at 286).

108 If arbitration is truly founded upon consent, it is unsatisfactory that an assignee should be compulsorily diverted to litigation if the assignee has never undertaken an obligation to arbitrate. This

suggests that the better explanation for why the anti-suit injunction lay in the *The Jay Bola* is that the assignee was under an actionable obligation to arbitrate, notwithstanding Hobhouse LJ's protestations to the contrary. So too, that is the better explanation for why the litigation in *The Leage* was stayed. The challenge in establishing the third proposition is in finding the legal doctrine by which the burden of an arbitration agreement is transmitted to the assignee in the absence of a novation.

109 A clue, however, to finding the legal basis for such an obligation lies in Hobhouse LJ's remark in *The Jay Bola* (at page 286): "The [assignee] is not entitled to enforce its right without also recognising the obligation to arbitrate." This observation, couched in the language of burden rather than benefit, invokes the doctrine of conditional benefit from the judgment of Megarry V-C in *Tito v Waddell (No. 2)* [1977] 1 Ch 106 ("*Tito*").

1 1 0 *Tito* is not an arbitration case nor, strictly speaking, an assignment case. It is a case which considers the transmissibility of contractual burdens as a matter of general principle. In *Tito*, Megarry V-C considers in detail the various mechanisms under English law by which a contractual burden can be transmitted to a successor in title. One of those is the principle of conditional benefit by which a successor in title of a right takes the benefit of that right subject to all of the burdens which are annexed *ab initio* to that right (at 290):

> (a) CONDITIONAL BENEFITS AND INDEPENDENT OBLIGATIONS. One of the most important distinctions is between what for brevity may be called conditional benefits, on the one hand, and on the other hand independent obligations. An instrument may be framed so that it confers only a conditional or qualified right, the condition or qualification being that certain restrictions shall be observed or certain burdens assumed, such as an obligation to make certain payments. Such restrictions or qualifications are an intrinsic part of the right: you take the right as it stands, and you cannot pick out the good and reject the bad. In such cases, it is not only the original [obligor] who is bound by the burden: his successors in title are unable to take the right without also assuming the burden. The benefit and the burden have been annexed to each other *ab initio*, and so the benefit is only a conditional benefit. In the other class of case the right and the burden, although arising under the same instrument, are independent of each other: X grants a right to Y and by the same instrument Y independently covenants with X to do some act. In such cases, although Y is of course bound by his covenant, questions may arise whether successors in title to Y's right can take it free from the obligations of Y's covenant, or whether they are bound by them under what for want of a better name I shall call the pure principle of benefit and burden.

111 An arbitration agreement is the archetypal annexed burden. It has no purpose and no value in itself. Its entire purpose and value arises from the substantive rights and obligations to which it is annexed. It is entered into, not as one of the parties' substantive rights or obligations, but only to prescribe a procedural right and obligation which caters for the possibility of future disputes over their substantive rights and obligations. If those disputes arise, the arbitration agreement prescribes the mode by which they are to be resolved. Thus, in *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti)* [1991] 2 AC 1 at 33, Lord Goff referred to an agreement to arbitrate as being inevitably transferred to a transferee of rights under a contract because it was "inseparably connected with" those rights. The result is that the assignee of a substantive right which is subject to an arbitration agreement cannot take that right otherwise than with the obligation to arbitrate because that obligation is annexed *ab initio* to it.

112 This principle of conditional benefit is the best explanation for the basis on which English law now recognises that the burden of an arbitration agreement can be transmitted to an assignee. As

Professor Gregory Tolhurst says in his book, *The Assignment of Contractual Rights* (Hart Publishing, 2006), at paragraph 6.118:

> [6.118] ... The benefit of an arbitration provision is a chose in action and is assignable. In practice, however, the issue that usually arises is whether, upon the assignment of a right under a contract, that contains an arbitration provision, the assignee, if he or she chooses to enforce the assigned right, is *bound* to refer any disputes to arbitration. The answer under English law, despite many of the decisions being based in part on the meaning of certain statutory provisions, appears to be that the assignee is so bound. That is, *upon the assignment of the relevant right, the assignee is also benefitted and burdened by the arbitration provision. It could be argued that the obligation to arbitrate is inherent in any such right, and thus the result in the cases is explicable by reference to the conditional benefit principle.*
>
> These examples show that there are cases where an assignee cannot take the benefit without the positive burden. However, in each of these examples, *the assignee could not be required to carry out the condition if it did not want to enjoy the right*. Each example involved a situation where the assignee had a discretion to take or reject the benefit. …
>
> [emphasis added]

113 The result is that a contractual right which is subject to an arbitration agreement has annexed to it *ab initio* both the right and the obligation to arbitrate. If the contractual right is assigned, in the absence of any express or implied agreement to the contrary, the assignment operates to transmit to the assignee both the benefit and the annexed burden of arbitration. If the assignee chooses to enforce its assigned right, it is not only *entitled* by law to do so by arbitration, it is also *bound* by law to do so by arbitration. [note: 43]

Consequences of the conditional benefit analysis

114 Four important consequences follow from founding the third proposition at [91(c)] above on the conditional benefit principle.

115 First, whatever the assignor and assignee may agree in their assignment agreement is irrelevant to the analysis. The assignment agreement comes after the fact as far as the arbitration agreement is concerned. The logic is simple. The assignor and assignee cannot break apart the right and the remedy which the assignor and obligor have created *ab inito* as a single, indivisible whole in their contract, at least not without the obligor's consent.

116 Second, this is yet another reason why it cannot be the proper law of the assignment agreement which determines whether an assignee is *obliged* to arbitrate (see [83] to [85] above). The legal basis of the assignee's obligation to arbitrate is fixed at the time the obligor and the assignee contract, long before the assignee and the assignment agreement come on the scene.

117 Third, it is not necessary on this analysis for the assignee to consent independently to the arbitration agreement, nor indeed to have notice of the arbitration agreement, in order for the assignee to be bound to arbitrate. The obligation to arbitrate is bundled together with the right which the assignee takes. Nothing which the assignee does or knows can result in him receiving or rejecting the obligation to arbitrate separately from receiving the assigned right.

118 Fourth, this analysis supplies the assignee's consent to arbitrate. That consent is located in the assignee's consent to take the benefit of the substantive right in question. That consent

operates, in itself, to bring with it the obligation to arbitrate.

119 How can imputing consent to the assignee in this way be reconciled with the principle that arbitration is a consensual dispute resolution procedure? This point is the cornerstone of Cariparma's submissions. Cariparma submits that it never consented to arbitration and therefore cannot be bound to arbitrate. [note: 44]

120 The principle of conditional benefit does not undermine the consensual nature of arbitration whether on the conceptual or the practical level.

121 On the conceptual level, arbitration is a consensual dispute resolution procedure only in the contractual sense, not in the subjective sense. A subjective desire to arbitrate or a subjective intent to be bound by a promise to arbitrate is quite unnecessary for a party to find itself contractually bound to arbitrate. A court holds a party to perform its contractual promise to arbitrate for the same reason that it holds a party to perform any other contractual promise. It does so because the party's intent to be bound by that promise can be objectively ascertained from its agreement with its counterparty, construed in light of the surrounding circumstances. A party can therefore find itself contractually bound to arbitrate even if it had no subjective intention or desire to arbitrate. The gap between the subjective and the objective – at least in commercial matters – is simply one of the risks of doing business. Despite this gap, commercial arbitration can still legitimately claim to be founded on consent because a party is bound to arbitrate in the same way it is bound to any other contractual obligation. For the same reason, arbitration is nevertheless consensual even though an assignee can find himself bound to arbitrate by the conditional benefit principle without ever having had a subjective intent or desire to arbitrate.

122 Further, on a practical level, every assignee has the opportunity to review – before he takes an assignment – the substantive agreement between the assignor and the obligor which sets out the rights to be assigned as well as any arbitration agreement and any express choice of law agreement which may govern all of those rights. The assignee therefore has an opportunity to take all necessary steps, with the benefit of professional advice if necessary, to ascertain his own post-assignment position, to bargain for protections against any post-assignment risks he is unwilling to take, and to price in any such risks which cannot be mitigated by contract. This includes the risk, if that is how the assignee sees it, of being bound by the arbitration agreement. In that sense also, the conditional benefit principle does not undermine the consensual nature of arbitration.

The limits of the conditional benefit analysis

123 The analysis in the sections above presupposes a substantive right to which is annexed *ab initio*, as an indivisible whole, an obligation to arbitrate disputes arising from that right. That is the basis on which the conditional benefit principle operates. But the conditional benefit principle recognises that it is also possible, at least in theory, for the assignor and obligor to contract in such a way as to prevent the principle from operating. They can do so by providing in their substantive agreement (expressly or by necessary implication) that the arbitration agreement is not annexed to the substantive rights to which it refers. In such a case, the principle of conditional benefit will be excluded.

Conclusion on whether Cariparma is bound

124 I return now to the facts of this case. The only substantive obligation of Rals in play in this case is its obligation to pay the price of Oltremare's equipment under the Supply Agreement. There is nothing in the Supply Agreement which, on its true construction, has the effect of rendering the

arbitration agreement between Oltremare and Rals independent of Rals' obligation to pay that price. Thus, the right to receive the purchase price under the Supply Agreement which has been transmitted by assignment to Cariparma carried with it the burden of Article 9 of the Supply Agreement. Cariparma is therefore contractually bound to arbitrate all disputes which fall within the scope of Article 9 of the Supply Agreement, properly construed.

125 Cariparma is therefore a party claiming "through or under" Oltremare under s 6(5)(*a*) even though it is not a party to Article 9 of the Supply Agreement.

126 Having determined what I have called point (a) (see [44(a)] above) against Cariparma, I turn to consider point (b): whether Cariparma's action is in respect of a matter which is the subject of the arbitration agreement set out in Article 9 of the Supply Agreement.

Subject of the arbitration agreement?

127 Section 6(1) of the Act obliges me to stay this action if and only if it is brought "in respect of any matter which is the subject of the [arbitration] agreement" between Rals and Oltremare by which, as I have held, Cariparma finds itself bound. Applying s 6(1) of the Act to the terms of Article 9 of the Supply Agreement (see [18] above), I am therefore bound to stay this action if the subject-matter of this action can be said to "arise in connection with" the Supply Agreement.

128 There is no doubt that Cariparma's action would have to be stayed if the action were founded on Cariparma's right as Oltremare's assignee to receive the purchase price under the Supply Agreement from Rals. But that is not how Cariparma has framed its claim. It has deliberately confined its claim to the eight promissory notes. On that basis, Cariparma argues that the subject-matter of this action is limited to the statutory contract between Cariparma and Rals comprised in the notes and does not "arise in connection with" the Supply Agreement.

129 The next stage of my inquiry therefore requires me to construe the arbitration agreement. I begin by restating the applicable principles before applying them to Article 9 of the Supply Agreement to ascertain whether a claim on promissory notes comes within its scope.

The approach to interpreting arbitration agreements

130 The old judicial approach to arbitration agreements was one of hostility. Three principal strands underpinned this hostility. First, it was – and indeed, still is – contrary to public policy to enter into a private agreement which ousts the jurisdiction of the courts: *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another and another appeal and another matter* [2015] 3 SLR 1041 at [17] – [18]. Ousting the jurisdiction of the courts is precisely what an arbitration agreement does. Second, it was feared that arbitration was "an inferior process of justice" (*Tjong Very Sumito* at [28]) which could be unfair in its procedure, inaccurate in its outcome or both. Finally, it was feared that a party with stronger bargaining power could exploit the gap between an objectively-ascertained contractual intent to arbitrate and an actual, subjective desire to arbitrate in order to divert an unwilling and weaker counterparty to arbitration for an ulterior purpose, *eg* out of a malign desire for confidentiality or to secure the benefit of a tribunal which was impartial only in appearance.

131 For all these reasons, the old judicial approach treated an arbitration agreement quite differently from any other contractual promise. First, an arbitration agreement was construed narrowly, layering fine semiotic distinctions upon minor semantic differences. Second, a party was in effect permitted to resile unilaterally from a contractual obligation to arbitrate once a dispute had actually arisen. Thus, it was not mandatory to stay an action even if the parties to the action were

also parties to an arbitration agreement and the subject-matter of the action fell squarely within the scope of that agreement. Declining to stay an action in these circumstances is the contractual equivalent of declining specific performance of the arbitration agreement and amounts to releasing the unwilling counterparty from the obligation to arbitrate without contractual consequence.

132 Modern appellate decisions and legislation have swept away the old judicial approach to arbitration agreements: *Tjong Very Sumito* at [28]. An arbitration agreement is today treated in the same way as any other contractual promise. It is construed in order to give effect to the parties' intention objectively ascertained in accordance with the contextual approach to contractual construction. And as far as enforcement is concerned, unilaterally resiling from an arbitration agreement is no longer possible, at least under the Act. A stay under s 6 is mandatory so long as the litigants are parties to an effective arbitration agreement and the subject-matter of the action falls within its scope. Indeed, a court is obliged to stay the action even if it cannot come to a conclusion on either of these criteria. It suffices if it is at least *arguable* that these two criteria are satisfied or if it merely *appears* that they are satisfied: *Tjong Very Sumito* at [24]; *Malini Ventura v Knight Capital Pte Ltd and others* [2015] SGHC 225 at [36].

133 The new approach to construing arbitration agreements is directed at upholding, rather than defeating, the typical expectations of commercial parties who choose arbitration. It is at least part of their expectation to achieve one-stop dispute resolution through arbitration. Thus, in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, Gleeson CJ said (at [165]):

> When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument.

134 In his leading speech in *Fiona Trust*, Lord Hoffman emphasises the importance of giving effect to the expectations of commercial parties who choose arbitration (at [12]):

> 5. ... Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they have used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was same. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets the language.
>
> 6. In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think that there can be no doubt. The parties have entered into a relationship ... which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.
>
> 7. If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only

some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by the national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity and enforceability of the contact decided by the one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.

8. A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause. ...

135 Having set out those general principles, Lord Hoffman concludes that arbitration agreements should be construed from a starting point which meets the expectations of commercial parties by leaning against the fragmentation of dispute resolution (at [13] – [14]):

13. In my opinion, the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered ... to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17 [in the court below]: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."

14. This appears to be the approach adopted in Germany: see the *Decision of 27 February 1970 of the Federal Supreme Court of the Federal Republic of Germany (Bundesgerichtshof)* (1970) 6 Arbitration International 79, 85:

> "There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising therefrom, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals."

136 The Court of Appeal has endorsed and applied this approach. In *Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 ("*Larsen*"), the Court of Appeal cites this passage from Lord Hoffman's speech before opining in the broadest of terms that: "arbitration clauses should be generously construed such that all manner of claims, whether common law or statutory, should be regarded as falling within their scope, unless there is good reason to conclude otherwise" (at [19] and see also [12] – [14] and [20]).

137 As the concluding words of qualification in *Larsen's* statement of principle suggest, however, this broad principle is not without its limits. But even when a court finds "good reason to conclude otherwise", that conclusion is arrived at not out of an anachronistic suspicion of arbitration. It is arrived at to meet the expectations of commercial parties in choosing arbitration and to give effect to their contractual intent, objectively ascertained. Indeed, in *Larsen* itself, the Court of Appeal found "good reason to conclude otherwise" for just that reason. It held (at [20]) that a pre-insolvency arbitration agreement would not ordinarily be construed as encompassing a post-insolvency avoidance claim brought by an insolvency office holder: "Since avoidance claims can only be pursued by [insolvency office holders], there is no reason objectively to believe that a company's pre-insolvency management would ordinarily contemplate including avoidance claims within the scope of an arbitration agreement".

138 The Court of Appeal continued to assimilate the construction of arbitration agreements to the general approach to contractual construction in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 ("*International Research Corp*"). In that case, the Court of Appeal rejects the so-called "strict rule" which determined whether an arbitration agreement had been incorporated into a contract by reference. The "strict rule" requires a clear and express reference in one contract to an arbitration agreement in a second contract before the arbitration agreement in the second contract can be held to have been incorporated by reference into the first contract. The Court of Appeal held that it is, in all cases, purely a question of ascertaining the parties' objective intention through the usual process of contractual interpretation applying the contextual approach (at [34]):

> … The question in general is one of construction: did the parties intend to incorporate the arbitration agreement in question by referring, in their contract, to it or to a document containing it? ... It is ultimately a matter of contractual interpretation; and in undertaking this exercise, as we held in *Zurich Insurance* ..., the task is one which must be done having regard to the context and the objective circumstances attending the entry into the contract. As the Judge [below] rightly noted, "[b]e it incorporation or construction, the court is always seeking to ascertain the parties' objective intentions"… .

139 I make three points about *International Research Corp*. First, there is no reason to think that the Court of Appeal was confining its remarks to the narrow issue of incorporation by reference. The Court of Appeal's quotation from the first instance judgment in that case shows that its intention was to assimilate all questions relating to the construction of arbitration agreements to the ordinary contextual approach to construction.

140 Second, the Court of Appeal held that the "strict rule" had no application to the case before it because the "strict rule" had originated in a narrow category of cases – dealing with negotiable instruments such as bills of lading – but had had its application extended without justification to other categories in which the underlying considerations were quite different: (at [24(a)], [26] and [34]). It is an important point – and one that I will return to – that the Court of Appeal did not reject the more conservative approach of the "strict rule" within the narrow category of negotiable instruments, the category in which it originated.

141 Finally, the Court of Appeal pointed out (at [46]) that Lord Hoffman uses the language of presumption in *Fiona Trust* (at [135] above) only in a loose sense. It is clear from the earlier passages of his speech (also quoted at [135] above) that he is not setting up a presumption in any evidential sense but simply setting out a rule of construction which fixes for the bulk of cases what is ordinarily a sensible starting point from which to ascertain objectively the parties' intention.

142 Having set out the principles which I will apply to construing Article 9 of the Supply Agreement, I now turn to consider Article 9 itself.

Subject matter of the claim

143 There are two ways in which the subject-matter of this action could be a dispute "arising in connection with" the Supply Agreement: (i) if Cariparma's claim arises in connection with the Supply Agreement; or (ii) if Rals' defences arise in connection with the Supply Agreement. I will examine Cariparma's claim before turning to Rals' defences.

Cariparma's claim

144 The starting point in ascertaining the scope of Cariparma's claim is its statement of claim. It deliberately confines the subject-matter of this action to Cariparma's rights as the holder in due course of the eight promissory notes. Thus, it pleads simply that Rals issued the notes to Oltremare, that Oltremare negotiated the notes to Cariparma, that Cariparma is a holder in due course of the notes, that the notes were presented as they fell due and that they were dishonoured upon presentation. [note: 45] The statement of claim is a model of directness and brevity. Cariparma relies on no rights arising from the Discount Agreement or, as Oltremare's assignee, from the Supply Agreement. Indeed, it makes no reference whatsoever to the Discount Contract, to the Supply Agreement, or more generally to Cariparma's position as Oltremare's assignee.

145 Determining whether the subject-matter of this action is nevertheless a dispute "arising in connection with" the Supply Agreement requires me to examine the nature of a promissory note and its commercial purpose as a payment mechanism.

The legal nature of the promissory notes

146 Each of Rals' promissory notes, once dated for payment, satisfies the statutory definition of a promissory note set out in s 92(1) of the Bills of Exchange Act (Cap 23, 2004 Rev Ed) ("Bills of Exchange Act"). That is because they are each an unconditional promise in writing made by Rals to Oltremare, signed by an authorised representative of Rals, engaging to pay at a fixed or determinable future time a sum certain in money to, or to the order of, Oltremare.

147 If, in the taxonomy of financial instruments, negotiable instruments are thought of as a family, then bills of exchange are a genus of that family and promissory notes are a species of that genus. Thus, under s 98 of the Bills of Exchange Act, all of the provisions of that Act which apply to a bill apply to Rals' notes, subject only to the modifications set out in that section and to any other modifications necessary to accommodate the bipartite nature of a note as compared to the tripartite nature of a bill.

148 The commercial purpose of a bill of exchange is to be a freely-transmissible store of economic value. In order to achieve this purpose, the Bills of Exchange Act establishes a bill of exchange as a standardised statutory contract to which the application of certain common law contractual rules has been modified or abrogated entirely. Thus, once drawn and delivered, a bill of exchange in and of itself obliges the drawer to the payee without any need for offer, acceptance or consideration at common law. Similarly, an indorsee of a bill of exchange – the statutory equivalent of an assignee – can sue on the bill in his own name as a holder and without any need to give notice of the indorsement. Most importantly, a holder of a bill who fulfils the conditions to be a holder in due course takes it free of any equities that the drawer may be able to assert against the payee. A holder in due course is, in effect and by statute, an assignee who acquires title to the assigned rights which is better than his assignor's.

149 It is these last two characteristics which make the bill of exchange the archetypal negotiable instrument. Thus, under s 97 of the Bills of Exchange Act, Rals: (i) undertook a statutory engagement that it would pay a holder according to the tenor of each note; and (ii) is deemed by statute to be precluded from denying to a holder in due course the existence of Oltremare or its capacity to endorse each note.

150 The commercial purpose of stipulating a bill of exchange as a payment mechanism is to function as a substitute for cash. Commercial law recognises this commercial purpose by the fundamental and long-standing principle of cash equivalence. As the Court of Appeal said in *Wong Fook Heng v Amixco Asia Pte Ltd* [1992] 1 SLR(R) 654 at [13]:

> … It is the general rule that a bill of exchange evidences a contract separate and distinct from the original and underlying contract in pursuance of which the bill is executed. It does not depend on its enforcement on the performance of the original contract. A bill of exchange, once given, is to be treated as cash and "is to be honoured unless there is some good reason to the contrary" (*per* Lord Denning MR in *Fielding & Platt Ltd v Selim Najjar* [1969] 1 WLR 357 …

151 The cash equivalence principle is not only deeply-embedded in our commercial law, it is also deeply-embedded in our procedural law. Thus, the payee of a bill of exchange is entitled to ignore any underlying contractual dispute with the drawer, to frame its claim as resting on the bill alone and to seek and secure summary judgment for that claim with no prospect of the drawer securing any sort of stay to defer execution. Thus, in *Thomson Rubbers (India) Pte Ltd v Tan Ai Hock* [2012] 1 SLR 772 at [11], Lai Siu Chiu J endorsed the following passage from paragraph 4-010 of *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (Sweet & Maxwell, 17th Ed, 2009):

> … Where an application is made by a claimant for summary judgment against a defendant in respect of a claim on a bill of exchange, cheque or promissory note, the general rule is that the court will give summary judgment for the claimant save in exceptional circumstances.

It is only if a bill is affected with fraud or illegality or if there has been a total failure of consideration or a quantified partial failure of consideration that a payee, exceptionally, cannot rely on the cash equivalence principle.

152 The cash equivalence principle gives a bill of exchange two important commercial advantages over a mere promise to pay. First, where the drawer's payment obligation under the bill has not yet fallen due, a bill offers the payee the means to monetise the promise. The payee can, quickly and effectively, convert by negotiation the drawer's promise to pay in the future into cash in the present. Second, once the drawer's payment obligation under the bill has fallen due and until that obligation is met, the bill is *de facto* security for the payee. The payee can, quickly and effectively, convert by legal action the drawer's promise to pay in the present into cash in the present. Simply put: the drawer is obliged to pay now and argue later.

153 The whole policy of the law has been, through legislation and through the interpretation and application of that legislation in the cases, to ensure that a bill of exchange achieves its intended commercial purpose and yields its intended commercial advantages whenever parties stipulate one as a contractual payment mechanism. The same is true of promissory notes.

Bills of exchange and arbitration agreements

154 What happens, then, when the commercial purpose for which the parties stipulate a bill of exchange as their chosen payment mechanism competes with the commercial purpose for which the parties stipulate arbitration as their chosen mode of dispute resolution? There are a number of cases from a number of jurisdictions – most recently our own – which have considered this issue.

155 The cases establish the following propositions:

> (a) Whether a claim on a bill of exchange falls within the scope of an arbitration agreement is to be resolved by construing the arbitration agreement in accordance with the ordinary contextual approach to contractual construction in order to give effect to the parties' intention objectively ascertained.

(b) The commercial purpose behind stipulating a bill of exchange as a payment mechanism ordinarily leads to the conclusion that a claim on a bill is outside the scope of an arbitration agreement even though this conclusion attributes to the parties an intent to fragment the resolution of their dispute.

(c) This conclusion is all the more appropriate if staying an action on a bill of exchange in favour of arbitration would also fragment the resolution of the parties' dispute. This can arise, for example, because an essential party to the claim on the bill is not bound by the arbitration agreement.

(d) This conclusion will not be warranted, however, if:

(i) The parties' arbitration agreement makes express provision bringing a claim on a bill of exchange within the scope of that agreement; or

(ii) The payee's action, although framed as being confined to the bill, is fundamentally and inextricably linked to a wider dispute between the parties which does fall within the scope of the arbitration agreement.

156 To establish these propositions, I turn now to consider the cases from England, Hong Kong, Australia and Singapore.

England

157 I start with the decision of the House of Lords in *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei* [1977] 1 WLR 713 ("*Nova Jersey*"). An English seller of knitting machines drew bills of exchange on its German buyer, who duly accepted them. The bills of exchange were governed by English law. There was no arbitration agreement in the contract for the sale of the machines. However, the seller and the buyer were also in partnership; and their partnership agreement included an arbitration clause which provided for arbitration in Germany. The partnership agreement was governed by German law. Disputes arose between the buyer and the seller. The buyer informed the seller that it would not meet the bills of exchange. The buyer commenced an arbitration in Germany against the seller seeking unliquidated damages for breach of the contract of sale and also for breaches of the wider partnership agreement between them. The seller then commenced an action in England against the buyer on the unpaid bills.

158 Under s 1(1) of the English Arbitration Act 1975, the court was obliged to stay proceedings brought by one party to an arbitration agreement against another party to that agreement "in respect of any matter agreed to be referred" to arbitration under that agreement unless the court was satisfied, amongst other things, "that there [was] not in fact any dispute between the parties with regard to the matter agreed to be referred".

159 The buyer applied to stay the seller's action under s 1(1) of the 1975 Act, arguing that: (i) the whole of the dispute between the parties should be resolved in the German arbitration; and (ii) the buyer should not be compelled to pay the seller on the bills of exchange until the German arbitrators had resolved those disputes.

160 The House of Lords by a 4:1 majority rejected the buyer's application for a stay and permitted the seller's action on the bills of exchange to continue.

161 The seller's grounds for resisting the stay were twofold. Its primary argument was that the

subject-matter of the English action – a claim confined to the bills of exchange – did not fall within the scope of the parties' arbitration agreement. Its alternative argument was that there was not in fact a dispute between the parties within the meaning of the concluding words to s 1(1) of the 1975 Act.

162 The seller's alternative argument in *Nova Jersey* has no relevance to this case for two reasons. First, it is not relevant to the statutory criteria for granting a stay under s 6 of our Act. Unlike s1(1) of the 1975 Act, s 6 of our Act does not permit me to refuse a stay if I find that there is not in fact a dispute between the parties. Second, it is also not relevant in determining whether Cariparma's claim is a "dispute" within the meaning of Article 9 of the Supply Agreement. As the Court of Appeal has made very clear in *Tjong Very Sumito*, the word "dispute" in an arbitration agreement is to be construed very broadly in order to meet commercial expectations. Thus, there will be a "dispute" even if a plaintiff's claim is met with nothing more than a bare denial (at [49] and [69(c)]). So I shall consider only the House of Lords' analysis of the first of the seller's two points: whether a claim on a bill of exchange falls within the scope of the typical arbitration agreement.

163 Of the five law lords who heard *Nova Jersey*, Lord Russell based his decision solely on the seller's primary argument. Lord Fraser accepted both of the seller's arguments but emphasised the primary argument in his speech. Lord Wilberforce accepted both of the seller's arguments but emphasised the alternative argument in his speech. Viscount Dilhorne agreed with Lord Wilberforce. Lord Salmon dissented.

164 Lord Russell begins his speech by explaining that the principle of cash equivalence is deeply-rooted in English commercial law. Therefore, in order to advance the parties' commercial purpose in stipulating a bill of exchange as their contractual payment mechanism, the law insulates a bill of exchange from any underlying contractual dispute between the parties by deeming the bill to be a separate contract. The result is that an arbitration agreement in the parties' underlying contract is ordinarily to be construed as having no application whatsoever to a claim on a bill drawn pursuant to that contract (at 732G):

> This, my Lords, brings me to a consideration of English law in relation to ... bills of exchange. It is in my opinion well established that a claim for unliquidated damages under a contract for sale is no defence to a claim under a bill of exchange accepted by the purchaser: nor is it available as a set-off or a counterclaim. This is a deep-rooted concept of English commercial law. A vendor and purchaser who agree upon payment by acceptance of bills of exchange do so not simply upon the basis that credit is given to the purchaser so that the vendor must in due course sue for the price under the contract of sale. The bill is itself a contract separate from the contract of sale. Its purpose is not merely to serve as a negotiable instrument, it is also to avoid postponement of the purchaser's liability to the vendor himself, a postponement grounded upon some allegation of failure in some respect by the vendor under the underlying contract, unless it be total or quantified partial failure of consideration. It is conceivable in theory that an arbitration clause in an underlying contract of sale should sufficiently clearly embrace liability under a bill of exchange, though it is not easy to envisage a clause so inconsistent with the nature and function of such a bill. But there is no ground whatever in English law for attributing to [the arbitration] clause ... of the partnership agreement – nor itself even an underlying contract of sale – such potency.
>
> I conclude therefore that in English law (which would be applicable unless the German law were shown to be different) the defendant has not established that the plaintiff's actions on the bills of exchange are "in respect of a matter agreed to be referred.

165 Lord Wilberforce's primary reason for allowing the seller's appeal was because he found that, as

a matter of German law, an arbitration agreement will not encompass a claim on a bill of exchange given by a buyer to a seller to pay for goods unless there is "clear indication of [that] intention", a "manifest intention" to do so or an "express reservation" of such a claim to an arbitral tribunal (at 719F-H). The parties' arbitration agreement did not have any such clear indication. He therefore held that the seller's claim on the bills of exchange was not a matter which the seller and the buyer had, by their arbitration agreement, agreed to refer to arbitration. Although expressed as a finding of German law, it is clear from the tenor of Lord Wilberforce's speech that he too, like Lord Russell, did not consider English law to be different from German law in this respect.

166 Lord Wilberforce concludes his speech by acknowledging the assumed commercial purpose of an arbitration agreement and explaining why the court should nevertheless give effect to the parties' commercial purpose in stipulating a bill of exchange as a payment mechanism. He notes that ideally the seller's claim on the bills of exchange should go to arbitration together with the buyer's claim for unliquidated damages arising from the underlying agreements. But it is nevertheless right to refuse the stay because doing so upholds the parties' commercial expectations and recognises the commercial advantages intended by parties who select a bill of exchange as a payment mechanism (at 721):

> My Lords, I must emphasise, since it seems to be suggested that all the merits require the whole dispute to go to arbitration in Germany, that it is not mere technicality that supports the [seller's] claim. When one person buys goods from another, it is often, one would think generally, important for the seller to be sure of his price: he may (as indeed the [seller] here) have bought the goods from someone else whom he has to pay. He may demand payment in cash; but if the buyer cannot provide this at once, he may agree to take bills of exchange payable at future dates. These are taken as equivalent to deferred instalments of cash. Unless they are to be treated as unconditionally payable instruments ... which the seller can negotiate for cash, the seller might just as well give credit. And it is for this reason that English law (and German law appears to be no different) does not allow cross-claims, or defences, except such limited defences as those based on fraud, invalidity, or failure of consideration, to be made. I fear that the Court of Appeal's decision, if it had been allowed to stand, would have made a very substantial inroad upon the commercial principle on which bills of exchange have always rested. In my opinion, this is a straightforward case of an action on bills, to which no admissible defence has been put forward. I would hold that the judge was right, in result, in refusing a stay and I would restore his order and allow the appeal. As I have said, we are not concerned in this appeal with the future course of this action, but I must demur to the view that a result similar to granting a stay under the Arbitration Act can be obtained by any procedural stay of another character. So to hold would seem quite counter to long accepted principles regarding claims on bills of exchange and would represent an undesirable change in the law.

167 As Lord Wilberforce makes clear in his concluding words, the commercial purposes which the law ordinarily ascribes to a buyer and a seller of goods who stipulate a bill of exchange as their payment mechanism are so strong and well-established that they should not be undermined by preventing a seller from commencing or continuing action on a bill of exchange on any grounds at all, whether by reason of an arbitration agreement or otherwise.

168 Lord Fraser too commences his speech by acknowledging the "obvious convenience of having all claims between the parties dealt with together in the German arbitration" (at 730A). Nevertheless, he holds that the parties' arbitration agreement does not, as a matter of construction, apply to claims on a bill of exchange (at 730C and 731B). He accepts the evidence of the seller's expert on German law (at 731A) that "a very plain manifestation of intention to extend an arbitration clause to claims under bills of exchange is needed to rebut the presumption that businessmen neither wish nor expect bills of exchange to be taken into arbitration." Although again expressed as a finding of German law, it

is clear from Lord Fraser's speech that he too does not consider English law to be different from German law in this respect.

169 Lord Salmon delivered a dissenting speech. He nevertheless agrees with the majority on the fundamental principles. He dissents only because he sees the dispute before him as falling within an exception to those principles applicable to arbitration agreements entered into between partners. Thus, Lord Salmon accepts wholeheartedly the cash equivalence principle, saying (at 727E):

> ... I naturally recognise that bills [of exchange] are generally regarded as the equivalent of money and the courts do not, save in special circumstances, stay a judgment on a bill even if the direct parties to it are the sole parties to the action; and certainly there could be no question of a stay if the bills had been discounted and the holders in due course were the plaintiffs in the action.

170 Lord Salmon also accepts that the buyer could have no defence to an action on the bills (at 726G):

> I agree that there is no defence to the bills, since the only possible defence (which is not relied on by [the buyer]) could be that their acceptance had been procured by fraud, duress or for a consideration which had failed and because the damages claimed in the arbitration are unliquidated damages and such damages cannot be set off against a claim on the bills of exchange ... .

171 However, in Lord Salmon's view, the principle of German law on which Lord Wilberforce relies is confined to arbitration agreements between merchants (see [165] above) and has no application to arbitration agreements between partners who are bound by an obligation of utmost good faith *inter se* (at 726C – 726F) and who, it could be inferred, have an interest in resolving all their disputes confidentially in arbitration (at 725D). Lord Salmon therefore holds that partnership agreements constitute a class of contracts in which an arbitration agreement, by way of exception to the general rule, would ordinarily encompass a claim on a bill of exchange even if there is no express provision to that effect (at 726F). Lord Salmon characterises the parties' dispute as one which arises fundamentally out of their relationship as partners and not out of their relationship as counterparties to the bills (at 727H). That is the sole ground on which Lord Salmon would have granted the stay.

Hong Kong

172 *Nova Jersey* was followed by the Court of Appeal of Hong Kong in *CA Pacific Forex Ltd v Lei Kuan Ieong* [1999] 2 HKC 571 ("*Pacific Forex*"). In that case, the plaintiff was a dealer in foreign exchange and the defendant was its customer. The contract between the dealer and the customer incorporated an arbitration agreement. The customer drew two cheques, *ie* bills of exchange drawn on a bank, in favour of the plaintiff. The cheques were dishonoured upon presentation. The dealer sued the customer on the cheques. The customer applied to stay the proceedings on the ground that the dealer's claim arose out of their underlying agreement and was therefore within the scope of the parties' arbitration agreement.

173 Seagroatt J delivered the judgment of the court. He cites *Nova Jersey* as compelling authority establishing the overriding commercial purpose of a bill of exchange and the fundamental importance of upholding the cash equivalence principle in order to meet commercial expectations. He then holds that the commercial purpose underlying a bill is of such fundamental importance that an arbitration agreement will not ordinarily be construed as encompassing a claim on a bill in the absence of express language. As he says (at 575 – 576):

> … To hold that an arbitration clause referring to disputes arising from the underlying agreement, applies to bills of exchange would make 'a very substantial inroad upon the commercial principles on which bills of exchange have always rested'. Accordingly, there must be a plain manifestation in [an] arbitration clause that it is to apply to bills of exchange if the presumption against taking bills of exchange into arbitration is to be rebutted. As Lord Russell indicated, there is an inconsistency between the nature and function of such a bill and an arbitration clause. The weakness, with respect, of Lord Salmon's argument is that he proceeds from a view that for the arbitration clause to be deemed not to apply, it needed to contain a specific exclusion of disputes arising from claims on bills of exchange (p 725). This view is inconsistent with his recognition of the status of bills of exchange as expressed at pp 726E-F and 727D-F.
>
> It also offends what must in my respectful view be the logical consequence of the commercial principle – there must be an express inclusion of bills of exchange if such an arbitration clause is to bite in this way. Furthermore, as matter of business commonsense [*sic*] and efficacy, no right thinking merchant is going to agree to forego [*sic*] his rights on a dishonoured cheque. They cannot be taken away by implication.

Australia

174 The Supreme Court of Western Australia considered these competing commercial purposes in *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110 ("*Paharpur*"). In that case, a buyer and seller of equipment entered into a contract which required the buyer to pay the purchase price to the seller by a bill of exchange. The contract expressly required the buyer and the buyer's end-user – who was not a party to the contract – to accept the bill. The contract also provided for disputes between the buyer and the seller to be resolved by arbitration.

175 The bill of exchange was duly accepted jointly by the buyer and the end-user and delivered to the seller. But it was dishonoured upon presentation. The seller therefore commenced action on the bill against the buyer and the end-user as co-acceptors. The buyer in response issued a notice of arbitration against the seller and applied for the seller's action to be stayed under s 53(1) of the Commercial Arbitration Act 1985 (WA) – in *pari materia* with s 6(1) of our Act – or under the inherent jurisdiction of the court. The seller resisted the stay arguing that the bill was a separate contract and was not within the scope of the parties' arbitration agreement.

176 The Supreme Court of Western Australia starts by confirming that arbitration agreements warrant a liberal construction. But the court goes on to make the point, citing the judgment of Austin J in *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at [119] – [120], that there is no rule of public policy which channels parties and disputes more readily to arbitration by construing arbitration agreements liberally. These agreements are to be construed liberally simply because it is the task of the court to ascertain objectively the intention of commercial parties (at [34]):

> 'Liberal' construction is not a rigorous notion. In Australia, courts see their task as ascertaining the intention of the authors of a commercial instrument, as expressed in their instrument, taking into account surrounding circumstances and extrinsic materials to the extent permitted by law ... .
>
> In other words, while Australian courts are not constrained by considerations of public policy to adopt a 'liberal' construction of arbitration clauses, reflection on the likely intention of the parties will steer them away from any narrow construction.

The Court also cites the passages at [5] and [13] – [14] of *Fiona Trust* (set out above at [134] –

[135]) to make the same point.

177 Seen in this light, the modern liberal approach to the construction of arbitration agreements is liberal, not in an absolute sense, but in a relative sense. The modern approach is liberal in the sense that it neutralises the traditional restrictive approach. As the court says in *Paharpur* (at [40]):

> ...the emphasis on a liberal interpretation of arbitration clauses has been an attempt by judges in more recent years to counter a restrictive approach to construction of arbitration clauses reflective of suspicion of removal of disputes from courts, being a suspicion more evident in years past. …

178 On the facts of the case before it, the court held that the action should not be stayed. This was because the seller's action was brought against not only the buyer but also against the end-user as a co-acceptor. The end-user was not, however, a party to the arbitration agreement. It was therefore not possible to ascribe to the parties to the contract – the buyer and the seller – an intention that the seller's claim against the buyer as the acceptor of the bill of exchange should be resolved in arbitration while the seller's claim against the end-user as the co-acceptor of the same bill should be resolved by litigation. The fact that the resolution of the parties' dispute would be fragmented by a stay of the action told against the stay.

Singapore

179 Belinda Ang J considered these competing commercial purposes in *Piallo GmbH v Yafriro International Pte Ltd* [2014] 1 SLR 1028 ("*Piallo*"). In *Piallo*, a manufacturer and a distributor had entered into a distributorship agreement which included an arbitration clause. The manufacturer claimed to have terminated the agreement prematurely and validly, on grounds of the distributor's breach. The distributor denied the manufacturer's allegations and alleged instead that it was in fact the manufacturer who was in breach. The parties compromised their dispute on terms which required the distributor to draw and deliver 15 post-dated cheques to the manufacturer. Before the cheques could be presented for payment, however, the distributor countermanded them. The manufacturer commenced action against the distributor on the dishonoured cheques. The distributor applied to stay the action under s 6 of the Act. At the same time, the distributor issued a notice of arbitration against the manufacturer.

180 After citing *Nova Jersey*, *Pacific Forex*, *Fiona Trust*, *Larsen* and *International Research Corp*, Belinda Ang J holds (at [36]), in effect, that the modern trend is for the commercial purpose of an arbitration agreement (as identified in *Fiona Trust*) to prevail over the commercial purpose of a bill of exchange (as identified in *Nova Jersey* and *Pacific Forex*):

> For present purposes, in light of the various statements in the passages quoted above and the statements in *Larsen*, in my view, our courts are now likely to adopt a different approach to construction as compared to Seagroatt J's "presumption against taking bills of exchange into arbitration". …

181 Belinda Ang J then grants the stay sought by the distributor. She holds that the manufacturer's action on the dishonoured cheques is indeed "in respect of a matter which is the subject of the agreement" to arbitrate within the meaning of s 6 of the Act. She comes to this conclusion for four reasons.

182 First, the manufacturer's claim on the dishonoured cheques and the distributor's cross-claims for breach of the agreement both arise out of the same incident, *ie* the parties' compromise

negotiations. She concludes (at [38]) that "[i]n this type of situation, it is not difficult to accept that it was the intention of parties that such claims arising out of the same incident be resolved by the same process, that is, by arbitration alone rather than by arbitration and litigation for different disputes".

183 Second, Belinda Ang J finds, on the facts, that the distributor's cross claims and the manufacturer's claims on the bills of exchange are "so closely connected together on the facts that an agreement to arbitrate on one can properly be construed as covering the other given the sufficiently wide and general words" in the arbitration agreement (at [38]).

184 Third, the parties' agreement contemplates payment by cheque and, in those circumstances, if the parties intended a claim on a dishonoured cheque to fall outside the scope of their arbitration agreement, they would have provided expressly to that effect (at [39]).

185 Finally, if the manufacturer's action on the cheques is not stayed, the distributor is likely to raise a defence and a cross-claim for misrepresentation which are both intricately tied up with the circumstances surrounding the performance of and negotiations over the parties' agreement (at [40]). That would lead to a fragmentation of the resolution of the parties' dispute.

186 Having held that the manufacturer's claim on the cheques falls within the scope of the parties' arbitration agreement, Belinda Ang J then considers whether the cash equivalence principle nevertheless means that there is no "dispute" between the parties within the meaning of their arbitration agreement. Applying the Court of Appeal's guidance in *Tjong Very Sumito*, she holds that there is indeed a dispute because: (i) it is not possible in the circumstances of the case before her to draw the inference that the distributor's delivery of the cheques to the manufacturer amounts to a clear and unequivocal admission by the distributor of both liability and quantum; and (ii) the distributor, in any event, subsequently denied the manufacturer's claim.

The parties' submissions

187 Rals submits that *Piallo* represents the modern approach to reconciling the conflicting commercial purposes of arbitration and of bills of exchange. The modern approach, it is said, starts from the premise that commercial parties ordinarily intend an arbitration agreement to provide for one-stop dispute resolution. This premise, it is submitted, leads to the conclusion that an arbitration agreement includes a claim on a bill of exchange in the absence of express provision to the contrary. Since there is no provision to the contrary in Article 9 of the Supply Agreement, Cariparma's action falls within the scope of the arbitration agreement and this action ought to be stayed.

188 Cariparma submits that *Piallo* undermines the commercial purpose of stipulating a bill of exchange as a payment mechanism. Discounting bills is a well-established international tool for business financing, and a holder of a bill expects to be able to enforce his right to payment under the bill through summary judgment and without any complications from the underlying contract let alone from an arbitration agreement in the underlying contract. [note: 46] For these reasons, Cariparma submits that, because Oltremare and Rals expressly provided in the Supply Agreement for payment by way of promissory notes, they must be taken to have contemplated that the notes would be negotiated and therefore that the holder of those notes should be free to recover on the notes by action rather than in arbitration. [note: 47]

189 Cariparma's alternative submission is that *Piallo* is distinguishable because Cariparma is neither a direct party to the promissory notes nor to the arbitration agreement, being merely Oltremare's indorsee and assignee. It also submits that Lord Hoffman's assumption which was taken as the

starting point in *Piallo* – that parties to an arbitration agreement should be assumed to intend that all disputes arising out of their relationship to be resolved by the same process – has no application to assignees.

190 I accept Cariparma's submissions.

Piallo can be distinguished

191 To my mind, there are two factors which take this case outside the result in *Piallo*: (a) Cariparma is not the payee of the promissory notes but an indorsee; and (b) Cariparma's claim, and Rals' defences to that claim, are wholly distinct from the Supply Agreement. Both of these differences make it unarguable in this case that the objectively ascertained intent of Oltremare and Rals was that an indorsee's claim on the promissory notes should come within the scope of Article 9 of the Supply Agreement.

Cariparma is an indorsee

192 In *Piallo*, the litigants before the court were the payee and the drawer of the cheques. The litigants were also the counterparties to the underlying distributorship agreement which set the context for the cheques and which contained the arbitration agreement which bound both of them. In that context it is not surprising then that Belinda Ang J came to the conclusion that the objectively-ascertained intention of the litigants before her was to provide for all of their disputes, including claims on cheques, to be resolved by arbitration under their arbitration agreement.

193 This case is quite different. In order for Article 9 of the Supply Agreement to encompass Cariparma's claim as an indorsee of the eight promissory notes, I would have to find that the objectively-ascertained intent of Oltremare and Rals when they entered into Article 9 was not only that the arbitration agreement would extend to *Oltremare's* claims against Rals on the notes but also to *Oltremare's indorsee's* claims against Rals on the notes. It appears to me that that conclusion, rather than meeting commercial expectations, would defeat them twice over. While it may well be the objective intention, as in *Piallo*, of the payee of a bill of exchange and the drawer of the bill to bring claims on the bill within the scope of their arbitration agreement, I think it most unlikely that it would be their objective intention to bring claims by indorsees on the bill within the scope of that agreement. I say that for two reasons.

194 First, like Seagroatt J in *Pacific Forex* (see [173] above), I find it hard to believe that any right-thinking merchant will agree to give up his rights on a dishonoured bill of exchange. The right I have in mind here is not the right to receive cash on the bill through summary adjudication. That right is available both in litigation and in arbitration. The right which is given up in this situation is the right to keep open until the last possible moment all of the merchant's options as to how to enforce his right to receive cash on the bill – whether by action or by arbitration – and to exercise that option to his best advantage in light of the actual circumstances prevailing at the time he chooses to mount the claim. I find it even harder to believe that a right-thinking merchant would intend to restrict his indorsee's mode of dispute resolution. If nothing else, that restriction has the potential to affect the depth of the discount he will have to suffer if he negotiates the bill.

195 Second, the parties' choice in this particular case of promissory notes as their payment mechanism appears to me, objectively speaking, to have been a considered decision and not a mere formality or mere happenstance. The promissory notes facilitated Oltremare's agreement to give Rals four years' credit to pay the purchase price while at the same time releasing Rals from any more onerous and expensive obligation to provide security to Oltremare, *eg* by a letter of credit, a standby

letter of credit or a bank guarantee. The length of the period of credit also makes more likely the prospect that Oltremare would monetise Rals' deferred payment obligation under the notes through negotiation and less likely that a merchant in Oltremare's position would agree to anything in its arbitration agreement with Rals which would make that prospect more difficult or less valuable. All of this makes it in both Oltremare's and Rals' interests at the time of contracting to maximise rather than to restrict Oltremare's indorsee's procedural rights to claim against Rals on the bill.

196 This view of the special position of indorsees is consistent with authority. Even Lord Salmon, who would have stayed the payee's action in *Nova Jersey*, acknowledged in his speech that there could be no question of a stay of the action if the action had been brought by a holder in due course of the bills against the drawer (see the passage quoted at [169] above).

197 This view is supported by a passage from a leading text on bills of exchange which Cariparma has cited to me. In *Bills of Exchange and Bankers' Documentary Credits* by William Hedley and Richard Hedley (LLP, 4th Ed, 2001), the authors note that, where a bill of exchange is drawn and delivered in the context of an underlying contract which contains an arbitration agreement, s 9 of the English Arbitration Act 1996 (in *pari materia* with s 6 of our Act) may well operate under the modern judicial approach to stay a payee's action on the bill against the drawer pending the completion of the arbitration proceedings. They add, however, the following caveat at pages 94 – 95:

> The operation of s 9 in the way stated must only be applicable between the immediate parties. So if the bills are negotiated, for example, by way of discounting, it is inconceivable that a court would stay an action by a remote party (who was not a party to the main contract and hence the arbitration proceedings) while arbitration proceedings are undertaken between the immediate parties.

198 This view is also supported by a case note on *Piallo* published at [2014] LMCLQ 146 by Mr Lau Kwan Ho. The author expresses the view that the stay in *Piallo* was correctly granted before saying (at 149 – 150):

> The fact that bills of exchange are frequently negotiated to third parties ought not to affect the result. If a claim on a bill falls within the scope of an arbitration agreement, then that will affect only the rights and obligations of the immediate parties thereto. In no way should this imperil a stranger who becomes a holder of the bill and who may sue on it if it is dishonoured.

199 This view of the special position of indorsees is not inconsistent with the modern judicial approach to construing arbitration agreements.

200 First of all, it adheres to the underlying purpose of the court's aim, which is not to divert parties to arbitration but to give effect to the intention of commercial parties, objectively ascertained.

201 Further, bills of exchange are negotiable instruments. Although *International Research Corp* endorsed the modern judicial approach to construing arbitration clauses, it did so in cases not involving negotiable instruments. The Court of Appeal did not disturb the authority of earlier cases which established that arbitration agreements which extend to rights under negotiable instruments ought to be construed somewhat more conservatively (see [140] above). Construing an arbitration agreement as binding a remote party to a negotiable instrument carries with it significant potential for adversely affecting third party rights and for undermining the commercial intent and purpose of the immediate parties in agreeing to give and take the negotiable instrument.

Claim is distinct from the Supply Agreement

Claim is distinct from the Supply Agreement

202 In *Piallo*, Belinda Ang J found on the facts that the manufacturer's claim on the dishonoured cheques was so closely connected with the distributor's cross-claim under the distributorship agreement that both fell within the scope of the parties' arbitration agreement. She further held that the distributor's likely defences to the manufacturer's claim on the cheques were so intricately tied up with the underlying distributorship agreement and the compromise negotiations that it could not have been the parties' objective intention to fragment the resolution of the disputes.

203 This is yet another point of distinction between this case and *Piallo*. I explain (at [209] to [234] below) why Rals' foreshadowed defences arise within the four corners of the Bills of Exchange Act and, unlike the case in *Piallo*, are wholly unconnected to the merits of Rals' allegations against Oltremare.

Claim does not fall within the scope of the arbitration agreement

204 For all of these reasons, I find that it is unarguable that Cariparma's claim for the face value of the eight promissory notes is a dispute arising in connection with the Supply Agreement. That contract, and the rights and obligations arising under it, are separate and independent from the statutory contract represented by the notes. It is only the statutory contract which is in issue in Cariparma's narrowly-confined claim.

Cariparma is entitled to confine its claim to the notes

205 Rals submits that Cariparma has deliberately confined its claim to the promissory notes and omitted all mention of its rights as the assignee of Oltremare's receivable under the Supply Agreement in an illegitimate attempt to avoid its obligation to arbitrate. In response, counsel for Cariparma relies on the decision of the Court of Appeal in *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*") to submit that Cariparma has the same freedom as any other litigant with multiple causes of action to maximise its substantive or procedural advantage by choosing the cause of action which it asserts.

206 In *Rickshaw Investments*, an employee had a cause of action against his employee in both contract and in tort. He chose to bring his claim in tort alone in order to avoid being subject to an express provision in his employment contract stipulating German law as its governing law. The Court of Appeal upheld his right to do so. The court observed at [47]:

> **With respect, however, absent bad faith on the part of the [plaintiffs], we see no reason why they should be denied the freedom of choice to frame their causes of action in the way they have.** This has in fact been made clear in the case law. It is, for example, established law that the mere presence of a contractual relationship does not in itself preclude the existence of an *independent* duty of care in tort: see the leading House of Lords decision in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 as well as the decision of this court in *The Jian He* [1999] 3 SLR(R) 432 at [26]. Liability can exist concurrently in tort and contract, and provided that the latter does not expressly limit or exclude the former, **a plaintiff is free to choose whichever is more advantageous to him**: see *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1979] Ch 384.
>
> [emphasis in italics in original; emphasis in bold added]

207 The principle in *Rickshaw Investments* is one of general application. It is not confined to a plaintiff who has cause of action in both contract and tort, nor to one who chooses his cause of

action in order to avoid the operation of a governing law clause.

208 Indeed, there is an even stronger argument for the principle to apply in a case, like this one, where the choice is between founding a cause of action as a holder of a bill of exchange and founding it on the contractual rights which underlie the bill. A bill is intended by commerce and recognised by law to represent a contract entirely separate from a contract which gives rise to the bill. In fact, Cariparma expressly relied on this separation in transacting with Oltremare. Thus, Cariparma extracted from Oltremare in the Discount Contract an express confirmation of this separation (see [28] above). It is therefore part of the commercial purpose of a bill to permit a holder to isolate the payment obligation represented by the bill and to pursue that obligation separately by action, free of all entangling set-offs, counterclaims and cross-claims. Whether the plaintiff succeeds in its claim is, of course, a matter of substantive law and is a different matter. But the fact remains that a plaintiff who frames his case as Cariparma has done is not only not acting in bad faith, he is exercising a procedural right which is part of the fundamental commercial purpose of the negotiable instrument on which he sues.

Defences that Rals may argue

209 The other way in which the subject-matter of this action can be said to be within the scope of Article 9 of the Supply Agreement is if Rals' intended defences arise "in connection with" the Supply Agreement. This inquiry does not require me to investigate the merits of any possible defences that Rals may raise. That investigation is for the court or arbitral tribunal – depending on whether Rals succeeds or fails in its appeal – which ultimately resolves this dispute. I therefore consider Rals' defences solely to ascertain whether they bring this action within Article 9 of the Supply Agreement, and therefore within s 6 of the Act. In other words, I am now concerned with the scope and nature of Rals' foreshadowed defences, and not with their merits.

210 Rals indicates that it will resist Cariparma's claim on the following grounds:

(a) Cariparma is not a holder in due course of the promissory notes because it did not take the notes in good faith, and because it took them with notice that Oltremare's title was defective; [note: 48] and

(b) Rals has suffered a total failure of consideration. [note: 49]

That Cariparma is not a holder in due course

211 Rals first argues that Cariparma is not a holder in due course of the promissory notes. The consequence is said to be that, by virtue of s 38(1)(*b*) of the Bills of Exchange Act, Rals took the notes subject to any defects in Oltremare's title and subject to any personal defences that Rals has against Oltremare. The question therefore is this: does Rals' foreshadowed defence that Cariparma is not a holder in due course of the promissory notes give rise to a dispute "arising in connection with" the Supply Agreement, and thus fall within the scope of Article 9 of that agreement? In my view, it does not, for the reasons which follow.

212 There is no dispute that Cariparma is a holder of the promissory notes. It is therefore entitled to the benefit of the presumption under s 30(2) of the Bills of Exchange Act that it is also a holder in due course of the notes. The burden thus rests on Rals to prove that Cariparma is not a holder in due course. Rals can deal with that burden either by casting it back on Cariparma or by discharging the burden on the balance of probabilities.

213 The only way in which Rals can cast this burden back on Cariparma is by establishing that the issue or negotiation of the promissory notes was affected with fraud, duress, force and fear or illegality within the meaning of s 30(3) of the Bills of Exchange Act. Although fraud appears to have been alleged in the hearing before the Assistant Registrar, [note: 50] it was alleged only faintly. Before me, Rals makes no such allegation or submission. Rals must, therefore, deal with its burden of proof under s 30(2) of the Bills of Exchange Act by discharging it.

214 To discharge its burden, Rals must prove on the balance of probabilities that Cariparma does not satisfy the statutory definition of a holder in due course.

215 "Holder in due course" is defined in s 29(1) of the Bills of Exchange Act as follows:

> **Holder in due course**
>
> **29.** – (1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions:
>
> (a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact;
>
> (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him, he had no notice of any defect in the title of the person who negotiated it.

216 "Value" is defined in s 2 of the Bills of Exchange Act as "valuable consideration". "Valuable consideration" is defined in s 27(1) of the Bills of Exchange Act as either "any consideration sufficient to support a simple contract" or "an antecedent debt or liability".

217 "Good faith" is defined in s 99 of the Bills of Exchange Act as follows:

> **Good faith**
>
> **99**. A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.

218 Thus, for Rals to prove that Cariparma is not a holder in due course of the promissory notes, it must prove on the balance of probabilities that Cariparma took the notes:

(a) after they were overdue; or

(b) with notice that they had been previously dishonoured; or

(c) not in good faith; or

(d) not for value, as defined in s 27; or

(e) with notice of the defect in the title which Rals alleges against Oltremare.

219 Rals argues that Cariparma is not a holder in due course of the promissory notes either: (i) because it did not take the notes in good faith; or (ii) because it took the notes with notice of a defect in Oltremare's title. Rals first submits that Cariparma knew or ought to have known about the

dispute between Rals and Oltremare when it entered into the Discount Contract with Oltremare. That dispute, Rals submits, is that the machines supplied by Oltremare do not perform up to the performance guarantee which Oltremare gave Rals in the Supply Agreement. [note: 51]

220 The critical point for present purposes is not that this submission is directly contradicted by Rals' acceptance certificate (see [34] above). That point goes to the merits of the defence and I leave it aside.

221 The critical point is that Rals' foreshadowed defence that Cariparma is not a holder in due course of the promissory notes arises and will be determined within the four corners of the Bills of Exchange Act. It does not involve an inquiry into the terms of the Supply Agreement or into the sufficiency or deficiency of Oltremare's performance of its obligation under it. It involves only an examination of the circumstances in which Oltremare negotiated the notes to Cariparma in order to determine whether Cariparma acted in good faith or whether it had notice of the alleged defect in Oltremare's title. These inquiries are not related to the Supply Agreement. They are not within the scope of its arbitration agreement.

That there has been a total failure of consideration

222 Rals also foreshadows the defence that it suffered a total failure of consideration under the Supply Agreement. This defence, it submits, will require any court which has to hear and dispose of Cariparma's claim on the promissory notes – even if the scope of the claim is confined to Cariparma's rights as a holder of the notes – to look into the circumstances in which Oltremare and Rals entered into the Supply Agreement, the nature and the terms of the Supply Agreement, and the extent to which Oltremare performed its obligation under the Supply Agreement to deliver equipment which could meet the terms of Oltremare's guarantee of performance to Rals under the Supply Agreement. [note: 52] This issue, Rals submits, clearly arises "in connection" with the Supply Agreement within the meaning of Article 9 of that agreement.

223 There are two fatal difficulties with this foreshadowed defence. The first difficulty is on the evidence. The second difficulty is on the law.

On the evidence

224 The difficulty on the evidence is that there is absolutely no evidential basis whatsoever to support Rals' submissions on this foreshadowed defence. Rals filed only two affidavits in support of its application. The deponent of both affidavits was Mr Hamzah Sikkander Basha, Rals' Country Manager. Nowhere in his affidavits does he allege – even as the barest of bare assertions – that Rals has suffered either a total failure of consideration or even a partial quantified failure of consideration under the Supply Agreement whether for the reasons which Rals put forward in submissions or otherwise. There is not even a hint or even an oblique suggestion in his affidavit that Rals suffered any type of a failure of consideration. Instead, he refers vaguely in certain paragraphs of his affidavit to wholly unspecified "disputes" between Rals and Oltremare [note: 53] and alleges in another paragraph that Oltremare has failed to deliver "all the machine parts it was contractually obliged to deliver under the Supply Agreement". [note: 54]

225 So too, nowhere in Rals' written submissions does Rals submit that it has suffered a total failure of consideration or a partial quantified failure of consideration. The submissions instead describe the machines merely as being "defective". [note: 55] The further point made by the written submissions is that the defect has to do with a breach of Oltremare's performance guarantee to Rals under the

Supply Agreement: [note: 56]

> The machines that were eventually delivered turned out to be defective. In particular, the Performance Guarantee was breached.

226 The first time that the defence of failure of consideration was even mentioned in the proceedings before me was in oral argument. And even then, rather than Rals' counsel making the submission of his own initiative, he made it in response to a series of leading questions from me asking how his argument that Oltremare's machinery did not meet the performance guarantee, even if true, operated to give Rals a defence to a claim on the promissory notes. [note: 57] At a further hearing in this matter a week later, counsel for Rals developed the submission further, saying that Oltremare's machines were just a "heap of metal" because they did not meet the performance guarantee. [note: 58] Once again, there was no evidential basis whatsoever to support this submission, even though there was time between the hearings for the necessary evidential basis to be brought forward on affidavit.

227 *Tjong Very Sumito* has reduced virtually to vanishing point the threshold which a defendant seeking a stay under s 6 of the Act has to satisfy in order to show that he has a "dispute" with the plaintiff within the meaning of the typical arbitration agreement. But the threshold has not yet vanished: there remains a threshold to be crossed.

228 In *Tjong Very Sumito* itself, the defendant made a positive assertion that the plaintiff's action was without merit on two grounds: because the underlying contract was governed by Indonesian law and because it contained an arbitration agreement. While the defendant's positive assertion that the action lacked merits was eminently disputable, the facts underlying the assertion were indisputable. In those circumstances, the Court of Appeal held, with respect correctly, that it is not the court's function to assess whether the action lacked merit in order to determine whether there is a dispute between the plaintiff and the defendant within the meaning of their arbitration clause. That threshold task is properly the function of the arbitral tribunal.

229 Here, by contrast, I have an assertion in the affidavits of a specific dispute (incomplete delivery of machine parts) which is not the subject of any written or oral submission to me. At the same time, I have an assertion in the oral submissions (an alleged failure to meet a performance guarantee, which is further alleged to constitute a total failure of consideration) which is supported by no evidence whatsoever, not even by a deponent's self-serving bare assertion.

230 I do not consider it a deviation from the binding authority of *Tjong Very Sumito* to conclude, in this case, that whether there has been a total failure of consideration is not capable of being a dispute within the meaning of the arbitration agreement. In arriving at that conclusion, I am not expressing any view on the merit of this foreshadowed defence. I am merely pointing out that this foreshadowed defence is wholly unsupported by any evidence whatsoever. This is not so much a finding that the case is open and shut against Rals on the merits as it is a finding that the case is altogether missing.

On the law

231 The second fatal difficulty is on the law. Rals' submission fails to recognise that the drawer of a bill of exchange cannot avail himself of the defence of a total failure of consideration or a quantified partial failure of consideration as against a holder in due course. As between the immediate parties to a bill, both a total failure of consideration and a quantified partial failure of consideration are defences

to a claim on the bill. Where there is a total failure of consideration, the drawer has no liability on the bill at all: see *Elliott v Crutchley* [1906] AC 7. Where there is a quantified partial failure of consideration, the drawer has a defence to a claim on the bill *pro tanto*: *Nova Jersey* at 720 and 732.

232 A remote party to a bill of exchange such as Cariparma is not in the same position as a direct party. A total failure of consideration is not a defence against a remote party who is a holder in due course (though it may be if the remote party is a mere holder or a holder for value): see Nicholas Elliott, Q.C. and John Odgers, Q.C. and Jonathan Mark Phillips, *Byles on Bills of Exchange and Cheques* (Sweet & Maxwell, 29th Ed, 2013), page 283. *A fortiori*, a quantified partial failure of consideration will not be a defence against a holder in due course either.

233 Limiting the availability of this defence to the immediate parties is closely linked to the commercial purposes of a bill of exchange. It is essential to promote the free circulation of bills of exchange that those who are in a position to become a holder in due course of a bill have the confidence that they can acquire and pass on indefeasible title to the bill by negotiation as or to a holder in due course. This rule is fair to the drawer only because of the strict requirements for a indorsee to acquire the status of a holder in due course (see [215] above).

234 I have already explained why determining whether Cariparma is a holder in due course does not fall within the scope of the arbitration agreement (at [211] to [221] above). If that question is determined against Rals, then the issue of whether there has been a failure of consideration is quite irrelevant as a matter of law. Even if that question is determined in Rals' favour, however, Rals has not laid any evidential basis before me for me to be able to conclude that Rals has crossed even the very low threshold necessary to give rise to a dispute on total failure of consideration which falls within the scope of the arbitration agreement.

Conclusion

235 I have found that it is unarguable that Cariparma's claim and Rals' foreshadowed defences are in respect of any matter which is the subject of Article 9 of the Supply Agreement. Rals is therefore not entitled to have this action stayed under s 6 of the Act. I have therefore allowed Cariparma's appeal and permitted its action to continue.

Application for leave to appeal

236 Dissatisfied with my decision, Rals applied for leave to appeal against it to the Court of Appeal as required by s 34(2)(*d*) read with paragraph (d) of the Fifth Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). I have allowed Rals' application for two reasons.

237 First, as I explained at the beginning of this judgment, this case involves two fundamental principles of our commercial law. Although both principles are so well-established in our case law as to be virtually axiomatic, the interplay between the two principles where they both compete for primacy has never been considered by the Court of Appeal.

238 Second, although I have distinguished *Piallo* in arriving at my decision, I am conscious that the distinctions I have drawn are not entirely satisfactory. Although it is true in point of fact that *Piallo* was a case between the immediate parties to a bill of exchange and this case is one between remote parties, it could be argued that the two cases are in fact indistinguishable. If, as I have found, a typical right-thinking merchant would not intend to tie the hands of his indorsees by bringing claims on a bill of exchange within the scope of an arbitration agreement, it appears to me equally unlikely that hypothetical merchant would want to tie his own hands by doing so. To ascribe to this

hypothetical merchant a hypothetical intention to tie his own hands but not those of his indorsees appears to me to be somewhat artificial.

239 If that is correct, then it may well be the case that my decision is conceptually irreconcilable with *Piallo*, requiring Singapore law to choose one approach over the other.

240 In these circumstances, I have agreed with counsel for Rals that this case raises important questions of law, on which an authoritative ruling from the Court of Appeal is necessary.

[note: 1] Defendant's written submissions dated 20 June 2014, paragraph 4.

[note: 2] Statement of claim dated 24 December 2013, paragraph 3.

[note: 3] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 64.

[note: 4] Statement of Claim for S 1173/2013 filed on 24 December 2013, paragraph 5.

[note: 5] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, paragraph 8 and page 11.

[note: 6] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, paragraph 8 and page 29.

[note: 7] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 46.

[note: 8] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 58.

[note: 9] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 12.

[note: 10] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 12.

[note: 11] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 30.

[note: 12] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 46.

[note: 13] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 12.

[note: 14] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 44.

[note: 15] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 45.

[note: 16] Affidavit of Stefano Bellucci filed on 19 February 2014, paragraph 5; Plaintiff's submissions filed on 20 June 2014, paragraph 7(a).

[note: 17] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 58.

[note: 18] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 58.

[note: 19] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 59.

[note: 20] Affidavit of Stefano Bellucci filed on 19 February 2014, pages 24, 26, 28, 30, 32 and 34.

[note: 21] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 59, Art 3(1).

[note: 22] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 59, Art 3(1).

[note: 23] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 59, Art 3(1).

[note: 24] Affidavit of Stefano Bellucci filed on 19 February 2014, paragraph 16; Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, pages 60 61.

[note: 25] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 69.

[note: 26] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, paragraph 22.

[note: 27] Affidavit of Stefano Bellucci filed on 19 February 2014, page 17.

[note: 28] Affidavit of Stefano Bellucci filed on 19 February 2014, page 22.

[note: 29] Defendant's written submissions dated 20 June 2014, paragraph 41.

[note: 30] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, paragraph 14; Defendant's written submissions dated 20 June 2014, paragraph 30.

[note: 31] Affidavit of Stefano Bellucci filed on 19 February 2014, paragraph 23.

[note: 32] Affidavit of Stefano Bellucci filed on 19 February 2014, paragraph 25; page 24.

[note: 33] Statement of Claim filed on 24 December 2013, paragraph 4.

[note: 34] Statement of Claim filed on 24 December 2013, paragraph 5.

[note: 35] Certified Transcript, 24 April 2014, page 11, lines 9 14.

[note: 36] Certified Transcript, 24 April 2014, page 13, line 7.

[note: 37] Certified Transcript, 24 April 2014, page 13, lines 15 18.

[note: 38] Certified Transcript, 24 April 2014, page 14, lines 31 32.

[note: 39] Certified Transcript, 24 April 2014, page 15, lines 1 20.

[note: 40] Defendant's written submissions dated 20 June 2014, paragraph 2.

[note: 41] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, page 13; Clause 10 of the

Supply Agreement.

[note: 42] Defendant's written submissions dated 20 June 2014 at [84].

[note: 43] Defendant's written submissions dated 20 June 2014, paragraph 89.

[note: 44] Plaintiff's written submissions dated 20 June 2014, paragraphs 22 23.

[note: 45] Statement of Claim filed on 24 December 2013, paragraph 5.

[note: 46] Plaintiff's written submissions dated 20 June 2014, paragraphs 69 73.

[note: 47] Plaintiff's written submissions dated 20 June 2014, paragraph 73.

[note: 48] Defendant's written submissions dated 20 June 2014, paragraph 1.

[note: 49] Certified Transcript, 20 October 2014, page 7, lines 1 8; 27 October 2014, page 4, lines 1 16.

[note: 50] Certified Transcript, 2 April 2014, page 3 line 25.

[note: 51] Defendant's written submissions dated 20 June 2014, paragraph 17.

[note: 52] Defendant's written submissions dated 20 June 2014, paragraph 17.

[note: 53] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, paragraph 18; affidavit filed on 20 March 2014, paragraphs 6, 7 and 12.

[note: 54] Affidavit of Hamzah Sikkander Basha filed on 21 January 2014, paragraph 23.

[note: 55] Defendant's written submissions dated 20 June 2014, paragraphs 17 and 43.

[note: 56] Defendant's written submissions dated 20 June 2014, paragraph 17.

[note: 57] Certified Transcript, 20 October 2014, page 6, line 35 to page 7 line 8.

[note: 58] Certified Transcript, 27 October 2014, page 4 lines 1 16.