IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHCR 10

Suit No 362 of 2017

Between

BASF INTERTRADE AG
SINGAPORE BRANCH

… Plaintiff(s)

And

H&C S HOLDINGS PTE LTD

… Defendant(s)

JUDGMENT

[Arbitration – Stay of court proceedings]

[Arbitration – Exercise of discretionary case management powers]

Version No 1: 27 Oct 2020 (22:40 hrs)

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BASF Intertrade AG Singapore Branch
v
H&C S Holding Pte Ltd

[2017] SGHCR 10

High Court — Suit No 362 of 2017 (Summons No 2237 of 2017)
Tan Teck Ping Karen AR
4, 10 July 2017

8 August 2017 Judgment reserved.

Tan Teck Ping Karen AR:

Introduction

1 This is an application by the Defendant for a stay of this suit.

2 The Defendant's application is based on two grounds:

(a) The suit should be stayed pursuant to Section 6 of the International Arbitration Act (Cap 143A) ("IAA") because the issues that arise in these proceedings concern a dispute that falls within the ambit of an arbitration agreement.

(b) Further and/or alternatively, pending the resolution of arbitration proceeding the suit should be stayed pursuant to the Court's inherent

powers of case management as the arbitration proceedings and the suit involve common parties and issues.

Background facts

3 The Plaintiff and Defendant are companies engaged in commodities trading. Since 2015, the Plaintiff and Defendant have been engaged in a number of contracts involving the trading of petrochemicals.

4 Disputes have arisen between the parties concerning certain contracts. These contracts may be broadly divided into two categories.

Category 1 Agreements

5 The first category comprise ten "wash-out" Agreements ("Wash-Out Agreements") and one "circle-out" Agreement ("Circle-Out Agreement") entered into between the Plaintiff and the Defendant ("Category 1 Agreements").

6 Between November 2016 and February 2017, the Plaintiff and Defendant entered into several contracts for the sale and purchase of consignments of Benzene or Toulene. Under these contracts, either (a) the Defendant was the seller and the Plaintiff was the buyer ("Sale Contract") or (b) the Defendant was the buyer and the Plaintiff was the seller ("Purchase Contract").

7 Following this, between December 2016 and January 2017, the Plaintiff and Defendant entered into ten Wash-Out Agreements. A Wash-Out Agreement pairs a Sale Contract with a Purchase Contract and sets off the sums payable

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under the two contracts. This oblivates the need for physical delivery of any cargo and only requires one party to pay the other the difference between the relevant Sale Contract and Purchase Contract.

8 In addition, the parties also entered into a Circle-Out Agreement on 25 January 2017. The Circle-Out Agreement involved the Plaintiff, Defendant and two other parties, GS Caltex ("Caltex") and SK Networks ("SK"). The Circle-Out Agreement arose based on a chain of contracts between the Plaintiff, Defendant, Caltex and SK under which 2,000 MT of Toulene was sold in a "circle" (i.e. Caltex sold to Plaintiff, Plaintiff sold to Defendant, Defendant sold to SK and SK sold back to Caltex). Under the Circle-Out Agreement, the chain of contracts was settled without any physical delivery of the Toulene cargo by any party in the chain. Instead, each party was to pay its contractual counterparty in the underlying chain of contracts the difference between the contract price and the price in the Circle-Out Agreement. Accordingly, as part of the Circle-Out Agreement, the Defendant was to pay the Plaintiff the difference between the price at which the Plaintiff sold the Toulene cargo to the Defendant and the Circle-Out Agreement price. The effect of a Circle-Out Agreement is similar to a Wash-Out Agreement in that physical delivery of the underlying goods is obviated.

9 The Plaintiff claims that it is entitled to the aggregate sum of US$4,368,230 based on these Wash-Out and Circle-Out Agreements.

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Category 2 agreements

10 The second category comprise two Sales Contracts and two Purchase Contracts between the Plaintiff and Defendant for consignments of Benzene to be delivered within the month of April 2017 ("Category 2 Agreements").

11 The Plaintiff claims an aggregate sum of US$426,000 as damages arising out of the Defendant's alleged repudiation of the Category 2 Agreements.

The dispute

12 The key dispute in this matter is whether the Defendant is bound by these transactions which the Defendants say were purportedly entered into by the Defendant's former trading manager, Mr Peter Chia ("Chia"), in the absence of any or in excess of his authority.

13 Chia was the Defendant's trading manager from 13 April 2015 to 27 February 2017. During that time, Chia entered into various transactions for the sale and purchase of petrochemicals on behalf of the Defendant. These transactions were entered into with various traders, including the Plaintiff. Chia was assisted by Mr Eddie Sim, an Operations Executive, who performed operational task arising from Chia's trades.

14 Prior to the middle of December 2016, Chia was authorised to enter into "open" positions in trades which cumulatively added up to 3.000 MT of petrochemical cargo at any one point of time. In the middle of December 2016, Chia was instructed by the Defendant's management to cease taking "open"

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positions in trades, and that he was only authorised to trade on a "back to back" basis.

15 An "open position" in trading refers to a situation where the Defendant enters into a contract and commits to a particular buying or selling position downstream, *without* having obtained or secured a corresponding selling or buying position (as the case may be) upstream to "match" or "close out" the trade.

16 A "back to back" basis trade refers to trades where the Defendant buys or sells a quantity of cargo, having obtained or secured the corresponding sale or purchase of the said cargo (as the case may be). In a "back to back" trade, the Defendant would negotiate both the sale and purchase of a quantity of cargo concurrently. Once the commercial terms (such as price, quantity and shipment period) for both the sale and purchase of the said cargo are settled with the potential buyers or sellers, the Defendant would then enter into buy and sell contracts with these parties at roughly the same time.

17 "Back to back" basis trades are less risky as the Defendant would have crystallised its margin for the trades at the time the sale and purchase contracts are entered into. In comparison, an "open position" trade is risker as the Defendant would be taking on the market risk, in particular price movements, in the intervening period before the corresponding selling or buying position (as the case may be) is entered into.

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Arbitral Proceedings

18 After the commencement of this suit, the Defendant has commenced arbitral proceedings in the Singapore International Arbitration Centre ("SIAC") in respect of, amongst others, the Purchase and Sale Contracts and the Wash-Out Agreements that are the subject of the claims under Category 1 Agreements.

19 The Plaintiff has objected to the competence of SIAC to administer the arbitral proceedings, and the jurisdiction of the tribunal to be appointed. This jurisdictional challenge is pending before the SIAC Court.

The issues

20 The issues before me were as follows:

(a) Whether the Defendant's standard terms which included an arbitration clause were incorporated as part of the Sale Contracts and Purchase Contracts which fall under the Category 2 Agreements such that the dispute between parties is to be stayed pursuant to section 6 of the IAA.

(b) In the event, the arbitration clause is found to apply to the Sale Contracts and Purchase Contracts, whether the arbitration clause extends to and is applicable to the Wash-Out Agreements and Circle-Out Agreement which comprise the Category 1 Agreements.

(c) Alternatively, whether the agreements under the Category 1 and Category 2 Agreements should be stayed pursuant to the Court's inherent powers of case management.

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Category 2 Agreements

21 As the underlying contracts which formed the basis for the Category 1 Agreements are Sale Contracts and Purchase Contracts, I will start with an analysis of whether the Defendant's standard terms, including the arbitration clause, have been incorporated as part of the Sale Contracts and Purchase Contracts entered into between the parties.

22 Based on the documents provided, the parties began transacting with each other from March 2015 and entered into both Sale Contracts and Purchase Contracts. Regardless of whether the transaction was a Sale Contract or a Purchase Contract, the documents show that in broad terms, each transaction was negotiated and concluded in a largely similar manner, as follows:

(a) The parties would first agree on the key terms of respective Purchase or Sale Contract that they wished to enter into.

(b) This would be followed by an email from the Defendant setting out the key terms that were agreed and attaching the relevant Sales Contract or Purchase Contract containing the Defendant's standard terms, which included a term that disputes be resolved through arbitration.

23 The Sales and Purchase Contracts that form the Category 2 Agreements did not have an email from the Defendant attaching the respective Sales Contract or Purchase Contract containing the Defendant's standard terms. Accordingly, the issue is whether the Defendant's terms, including the arbitration clause, applied to the Category 2 Agreements.

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The Defendant's arguments

24 The Defendant's position is that, though the Defendant's standard terms were not sent by the Defendant to the Plaintiff in respect of the Category 2 Agreements, the course of conduct between parties showed a tacit agreement between the parties that all the Purchase and Sale Contracts would be on the Defendant's standard terms. This is based on the following:

(a) The Defendant has provided documents in relation to 27 transactions between the Plaintiff and Defendant dated from 9 March 2016 to 11 January 2017. Some of these transactions are Sale Contracts and some are Purchase Contracts. Each of the transactions were prepared on the Defendant's standard terms. The Defendant says that Plaintiff did not once object to the fact that these contracts were on the Defendant's standard terms.

(b) On several occasions, the Defendant's representatives had omitted to provide the Plaintiff with the Sale and Purchase Contract. The Defendant has produced documents to show that on some of these occasions, the Plaintiff had asked the Defendant's representatives to prepare and provide them with the contract, which was prepared and provided on the Defendant's standard terms. The Defendant says that again the Plaintiff did not object to the fact that those contracts were on the Defendant's standard terms.

25 The Defendant's standard terms contained an arbitration clause, which provides:

13. DISPUTE SETTLEMENT

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> Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination shall, save as set out below, be referred to and finally resolved by arbitration. Arbitrate location shall be Singapore in accordance with the arbitration rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force with rules are deemed to be incorporated by reference into this clause. The tribunal shall consist of one (1) arbitrator to be appointed by the chairman of SIAC. The language of the arbitration shall be English. Without derogating from the above, the seller may in its sole election and discretion however commence legal proceedings against the buyer in or through the courts of any competent jurisdiction as it deems fit.

The Plaintiff's arguments

26 The Plaintiff's position in respect of the Category 2 Agreements is simply that on their face, none of the agreements contain an arbitration clause. Further, none of the agreements make reference to the Defendant's standard terms. Therefore, there is no basis for the Category 2 Agreements to be resolved by arbitration.

27 The Plaintiff submitted that the Plaintiff and Defendant never agreed or understood that all contracts entered into between the parties would be on the Defendant's standard terms, as alleged by the Defendant. The Plaintiff says that this would have been against industry practice where the sale and purchase of goods is generally done on the seller's terms. Given that the Defendant was at times seller of goods and at times buyer of goods, it could never be the case that *all* contracts between the parties would be governed solely by the Defendant's standard terms.

28 The Plaintiff also argued that there is no such thing as the "Defendant's standard terms" as each contract entered into stands alone on its own terms and

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there is no reference in any of them to "standard terms". It was submitted that if there had been an agreement to use the "Defendant's standard terms", there would have been no need for the Defendant to keep sending its contracts over and asking the Plaintiff to accept the terms.

29 Further, the Plaintiff submitted that the Defendant has not been able to show a single instance in which the Plaintiff has signed or accepted any of the Defendant's contracts.

30 Most importantly, the Plaintiff point out that the Defendant has not shown that the Plaintiff actually performed any of the contracts in dispute under the Category 2 Agreements.

31 The Plaintiff also submit that there is no course of conduct between parties which incorporated the arbitration clause. The Plaintiff point out that the Defendant has only managed to locate 17 contracts on the Defendant's standard terms that were sent to the Plaintiff out of which at most, 6 contracts were sent to the Plaintiff. It is argued that out of the numerous individual contracts which were entered into, the fact that 6 contracts were communicated to the Plaintiff hardly indicates an understanding that the parties were contracting on the Defendant's standard terms in respect of all contracts entered into between the parties. I pause here to note that the Plaintiff may have misunderstood the documents provided by the Defendant. The 6 instances referred here were the 6 instances in which the Defendant's representative, Mr Eddie Sim, had sent the contract to the Plaintiff which were prepared on the Defendant's standard terms. Apart from these 6 instances, the Defendant subsequently provided other instances in which the other representatives from the Defendant (apart from Mr

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Eddie Sim) provided contracts on the Defendant's standard terms to the Plaintiff in respect of both Sale Contracts and Purchase Contracts.

32 The Plaintiff's final argument is that the contracts that fall under the Category 2 Agreements were all based on terms sent by a broker. The broker's terms do not refer to an arbitration clause nor do they incorporate the Defendant's standard clause. Therefore, the Plaintiff say that there is no standard way of conducting business as no brokers were involved in the earlier transactions relied on to establish a course of conduct.

My decision in respect of the Category 2 Agreements

The applicable legal principles

Stay in favour of arbitration

33 Section 6 of the IAA provides:

> **Enforcement of international arbitration agreement**
>
> 6 – (1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any 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, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to court to stay the proceedings related to that matter.

34 The Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 ("*Tomolugen*") observed at [63] –[64] that a *prima facie* standard of review applied when hearing a stay application under s 6 of the IAA:

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> …We agree that a Singapore court should adopt a *prima facie* standard of review when hearing a stay application under s 6 of the IAA. In our judgment, a court hearing such a stay application should grant a stay in favour of arbitration if the applicant is able to establish a *prima facie* case that:
>
> (a) there is a valid arbitration agreement between parties to the court proceedings;
>
> (b) the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and
>
> (c) the arbitration agreement is not null and void, inoperative or incapable of being performed.
>
> Once this burden has been discharged by the party applying for a stay, the court should grant the stay and defer the actual determination of the arbitral tribunal's jurisdiction to the tribunal itself. …

Course of conduct between parties

35 The Defendant relied on the Court of Appeal decision in *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 ("*R1 International*") in support of its position that the arbitration clause has been incorporate into the Sale Contract and Purchase Contract by course of conduct.

36 In *R1 International*, the parties entered into five separate transactions over the course of a year for the purchase of rubber. Each transaction was concluded in a similar manner: Following the conclusion of negotiations, the seller would send an email confirmation to the buyer. This would be followed by a detailed contract note sent by the seller to the buyer which contained a term which provided that disputes were to be resolved by arbitration. A dispute arose in respect of the second transaction. The Court of Appeal held that the terms containing an agreement to arbitration was incorporated as part of the contract between parties.

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37 In coming to its decision, the Court of Appeal in *R1 International* observed at [51] to [53] that:

> (a) First, an objective approach is to be adopted towards the question of contractual formation and the incorporation of terms. This would turn on ascertaining the parties' objective intentions gleaned from their correspondence and conduct in light of the relevant background which includes the industry parties are in, the character of the document which contains the terms in question and the course of dealing between the parties.
>
> (b) Second, it is not uncommon for parties to first agree on a set of essential terms which bind the parties even while there may be ongoing discussions on the incorporation of other detailed terms.
>
> (c) Third, although silence by one party may not by itself constitute acceptance of the terms sent by the other party, silence is not fatal to a finding that the terms sent have been accepted. The effect of silence is context-dependant and the parties' positive, negative or even neutral conduct can evince acceptance.

38 One of the reasons which formed the basis for the Court of Appeal's decision was the fact (at [65]) that it was evident from the parties' conduct throughout the course of the five transactions that they *both* in fact contemplated that the basic terms would be supplemented by a set of standard terms.

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The arbitration clause was incorporated by the parties' course of conduct

39 On the facts before me, I am satisfied that the arbitration clause in the Defendant's standard terms were incorporated by the parties' course of conduct.

40 First, the Defendant has produced documents which show that 27 transactions were entered into between the parties, all of which were prepared on the Defendant's standard terms, which included the arbitration clause. Prior to the dispute in early 2017, which led to the commencement of this suit, there is no evidence that Plaintiff had objected to the fact that the Defendant's standard terms applied to transactions between the parties.

41 The position that both parties accepted that the Defendant's standard terms applied to the transactions between parties is fortified by the evidence that on several occasions when the Defendant had omitted to provide the Sale Contract or Purchase Contract, the Plaintiff has specifically requested the Defendant to prepare the contract, which was prepared on the Defendant's standard terms. There was no objection at that time by the Plaintiff to these terms.

42 In light of the above, I am satisfied that the Defendant has shown a consistent practice between parties which shows that the Defendant's standard terms, including the arbitration clause, apply by way of conduct to the transactions between parties, regardless of whether it is a Sales Contract or a Purchase Contract.

43 Second, I do not agree with the Plaintiff's argument that it would be against industry practice for all contracts between the parties to be on the

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Defendant's standard terms. As held in *R1 International*, an objective approach is to be adopted in ascertaining the intention of the parties in respect of the terms applicable to the contracts. Parties are free to depart from industry practice and determine the terms which govern their contracts. The conduct of parties from the evidence provided show that the intention of both parties were to contract on the Defendant's standard terms and these terms would apply to the Category 2 Agreements which would likely have been performed subject to these terms, but for the dispute that has arisen in respect of Chia's authority.

44 Third, the fact that the Plaintiff did not sign the contracts does not affect the "contractual force" of the unsigned contracts. In *R1 International*, the Court of Appeal at [76] stated:

> … A party may request that a counter-signed copy of a document be returned but whether this is an essential act to constitute a contract will depend on an objective assessment of all the facts and circumstances, …

45 The objective evidence before me is that parties have engaged in 27 transactions from 9 March 2016 to 11 January 2017. Each of these transactions followed a similar pattern (supra [22]). In each of these transactions, it appears that the contract was not signed by the Plaintiff. However, the Plaintiff did not object at any time to any of these contract and it would be reasonable to presume, in the absence of evidence to the contrary, that the Plaintiff performed these contracts without protest. Therefore, I am of the view that the objective assessment is that the Plaintiff, by its conduct in the 27 transactions, had accepted the Defendant's terms and the fact that the contracts were not signed did not affect the "contractual force" of the unsigned contracts.

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46 Fourth, the fact that the contracts that fall under the Category 2 Agreements were based on terms sent by a broker does not affect my decision that the arbitration clause was incorporated by conduct. I note that 2 transactions amongst the 27 transactions provided by the Defendant were transactions based on terms sent by a broker. The evidence is that the parties did not treat these transactions in a different manner and had engaged in the same course of conduct in respect of the transactions based on terms sent by the broker. Therefore, the fact that the contracts that fall under the Category 2 Agreements were based on terms sent by a broker is immaterial.

Conclusion on Category 2 Agreements

47 For the above reasons, I am satisfied that the arbitration clause which is part of the Defendant's standard terms has been incorporated as part of the Sale Contracts and Purchase Contracts that comprise the Category 2 Agreements.

48 The dispute as to whether the Defendant is bound by the Category 2 Agreements would fall within the scope of the arbitration agreement. No arguments were raised by the parties that the arbitration clause is null, void, inoperative or incapable of being performed. Accordingly, I find that the court proceedings in respect of the Category 2 Agreements is subject to a mandatory stay under s 6 of the IAA.

Category 1 Agreements

49 I now turn to consider the Category 1 Agreements. As stated above, the agreements which comprise the Category 1 Agreements arise when a Sale Contract is paired with a Purchase Contract and the sums payable under the two contracts is set off. This results in only one party having to pay the price

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difference between these two contracts and all other obligations under the two contracts are oblivated.

50 The issues to be considered in respect of the Category 1 Agreements are:

(a) Whether the Category 1 Agreements are subject to a choice of law clause;

(b) If the answer is in the negative, whether the arbitration clause which applies to the underlying Sale and Purchase Contracts extends to the Wash-Out and Circle-Out Agreements which comprise the Category 1 Agreements.

(c) If the answer to the second question is no, should the court exercise its inherent power of case management to stay the court proceedings in respect of the Category 1 Agreements.

Whether the Category 1 Agreements are subject to a choice of law clause

The position of the parties

51 The Plaintiff submits that the Category 1 Agreements is subject to a choice of law clause which states:

> … the parties hereby irrevocably agree that the courts of Singapore shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with the agreement or its subject matter, formation, validity, performance or termination …

52 The Plaintiff's position is based on the following:

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(a) Each of the Category 1 Agreements was made in writing and is evidenced by (i) email correspondence between the Plaintiff and Defendant and (ii) a written contract issued by the Plaintiff to the Defendant via email, which contained the above choice of law clause.

(b) The Defendant never objected to the terms and conditions of the Category 1 Agreements, including the choice of law clause and is deemed to have accepted these terms as there is a clause in the terms and conditions which state that the Defendant is deemed to have accepted and agreed to the terms and conditions unless written objection is received within two business days after transmission of the contract to the Defendant.

(c) Despite the Defendant's position that Chia lacked authority to enter into the Wash-Out Agreements, the Defendant had ratified 11 Wash-Out/Circle-Out Agreements. These agreements are not part of this present suit.

53 The Defendant disagrees with the Plaintiff's position that the Plaintiff's terms, including the choice of law clause applies to the Category 1 Agreements.

54 The Defendant submits that the choice of law clause does not apply to the Category 1 Agreements for the following reasons:

(a) The Wash-Out Agreements and the Circle-Out Agreements which comprise the Category 1 Agreements were entered into from as early as 8 December 2016 to 25 January 2017. It was only from 18 January 2017 that the Plaintiff began providing the Defendant with sets of the Plaintiff's terms in respect of these agreements.

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(b) The Defendant did not accept the Plaintiff's terms and had, in fact, issued a letter dated 7 February 2017 ("7 February letter") to the Plaintiff stating that transactions entered into by Chia, including the Category 1 Agreements, were not authorised and, save for the transactions which were expressly ratified, the Defendant disavowed the transactions. The relevant portion of the 7 February letter is as follows:

> 2. [The Plaintiff] is hereby put on notice that Mr Chia and Mr Sim were not authorised to enter into any of the said transactions and agreements. In the circumstances, unless we ratify any of the transactions detailed at ANNEX 1, and/or any corresponding circle out / washout agreement in relation thereto, we are not bound to the same. For the avoidance of doubt, in light of the foregoing, **please take this as formal written notice that we do not agree to any terms of any purported transactions and/or agreements which [the Plaintiff] may have sent, or may send to us in relation to the aforesaid transactions and/or agreements, including but not limited to the purported "*contract correspondence*" and/or alleged "*details*" of any purported agreement, enclosed to your emails which we received on 4, 6 and 7 February 2017**. [emphasis in bold added]

Analysis on the applicability of the choice of law clause

55 In *R1 International* (supra [44]), the Court of Appeal had held that whether the signing of a document would constituted an essential act will depend on the objective assessment of the facts and circumstances.

56 The facts appear to show that a Wash-Out Agreement would be concluded in two stages:

(a) An email would be sent from the Plaintiff proposing that a Sales Contract be matched with a Purchase Contract and a washout price

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would be proposed ("Wash-Out Proposal"). The Defendant would reply by email confirming the Wash-Out Proposal (collectively referred to as "Email correspondence").

(b) An email would be sent by the Plaintiff to the Defendant enclosing the contract with the Plaintiff's terms, including the choice of law clause ("Contract document").

57 I note that the Contract document concludes with "[we] kindly appreciate your confirmation of the foregoing without undue delay, your co-operation will be estimated (sic)." This is followed by the deeming clause which states "your acceptance and agreement to the terms and conditions set out herein shall be deemed in place unless we receive any written objection by fax within two (2) business days after the transmission of this agreement to you."

58 The concluding paragraphs of the Contract document show that the contract would only be concluded when the Defendant gave its confirmation. If not, there would be no need for the deeming clause.

59 It appears that the Defendant did in fact reject the Contract document by way of the 7 February letter, which clearly states that the Defendant did not agreement to "any terms of any purported transaction and/or agreement which [the Plaintiff] may have sent, or may send". In my view, this is a clear and unequivocal rejection and denial of the Plaintiff's terms in the contract. In the face of such a denial, even if the denial was not made within two business days of receipt of the Contract documents, the objective assessment of the facts would lead to the conclusion that the Defendant's silence cannot be deemed to be acceptance of the Plaintiff's terms.

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60 Further, the clear denial in the 7 February letter is in contrast to the facts in *R1 International*, where there had been merely silence and no actual denial of the seller's terms.

61 In addition, the Defendant's denial of the Plaintiff's terms in the 7 February letter may also be contrasted against the Plaintiff's conduct in respect of the incorporation of the Defendant's terms into the Sale Contracts and Purchase Contract where, prior to the commencement of this action, the Plaintiff had never denied that the Defendant's terms applied to the Sale Contract and Purchase Contracts.

62 Therefore, in light of the above, I am of the view that the Defendant's silence is not to be deemed acceptance of the Plaintiff's terms, including the choice of law clause.

63 The next question is whether having ratified some of the Circle-Out/Wash-Out Agreements, the Defendant is to be taken to have agreed to the Plaintiff's terms despite what was stated in the 7 February letter. In the 7 February letter, the Defendant ratified certain agreements as follows:

> 4. Strictly without prejudice and notwithstanding any of the foregoing, [the Plaintiff] is put on further notice that [the Defendant's] management has decided to ratify the transactions and corresponding circle out / washout agreements, detailed at **ANNEX 2** to this letter…

64 The transactions which are detailed at Annex 2 of the 7 February letter refer to the Email correspondence only. There is no reference to the Contract document.

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65 The Plaintiff submits that having ratified some of the Circle-Out/Wash-Out Agreements, the Defendant must be taken to have agreed that the Plaintiff's terms applied to the ratified agreements and cannot prevaricate and now take the position that the Plaintiff's terms do not apply to the Wash-Out and Circle-Out agreements that constitute the Category 1 Agreements.

66 The Defendant's position is that only the Email correspondence were ratified and not the Contract document.

67 An objective assessment of the 7 February letter shows that the Defendant had only ratified the Wash-Out agreements as concluded in the Email correspondence. This conclusion is supported by the fact that the ratification was only in respect of the Email correspondence as detailed in Annex 2 to the 7 February letter. Further, the ratification was in the same letter where in the preceding paragraph, the Defendant had specifically rejected the Plaintiff's terms. Reading the 7 February letter as a whole, I am of the view that the Defendant had only ratified the Wash-Out Agreements as per the Email correspondence and did not accept the Plaintiff's terms as part of the ratification.

68 Therefore, for the foregoing reasons, I am of the view that the choice of law clause is not applicable to the Category 1 Agreements.

Whether the arbitration clause in the underlying Sale and Purchase agreements extends to the Category 1 Agreements

69 In line with my earlier decision that an arbitration clause applies to the Category 2 Agreements, an arbitration clause would similarly apply to the Sale and Purchase Contracts which underlie the Category 1 Agreements. With this in mind, I turn to the next issue of whether the arbitration clause in the

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underlying Sale and Purchase Contracts extends to the Category 1 Agreements.

70 The Defendant submits the Wash-Out and Circle-Out Agreements are premised on the underlying Sale and Purchase Contracts and so the arbitration clause which applies to the underlying Sale and Purchase Contracts would extend to the Wash-Out and Circle-Out agreements which constitute the Category 1 Agreements. Alternatively, the Defendant says that the Category 1 Agreements are variations of the Sale and Purchase Contracts.

71 The Plaintiff disagrees and says that the Wash-Out and Circle-Out Agreements which form the Category 1 Agreements are separate, stand-alone, compromise agreements which release both parties from all liabilities, claims and demands arising out of the original Sale and Purchase Contracts, which are considered lapsed. They do not vary or amend the original Sale and Purchase Contracts but cancel them out altogether and release the parties from all liabilities thereunder. The Plaintiffs rely on the following clause in the Email correspondence to support their position (the "Release clause"):

> Upon receiving your acceptance to the above washout proposal, we would like to confirm that both parties (namely [Plaintiff] and [Defendant] shall **release each other from all liabilities, claims and demands arising out of the original contracts except settlement of net price difference based on washout conditions**. [emphasis added]

72 The Plaintiff referred to *Coop International Pte Ltd v Ebel SA* [1998] 1 SLR(R) 615 ("*Coop International*") in support of its position. In *Coop International*, the Appellant and Respondent entered into a distributorship agreement which contained an arbitration agreement. The distributorship agreement was subsequently terminated and parties entered into a separate

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termination agreement which did not include an arbitration clause. A third agreement was entered into on 4 September 1996 ("4 September agreement") which was in the nature of a settlement agreement. Disputes arose over the 4 September agreement and the appellant commenced proceedings in the Singapore courts. The respondent applied to stay proceedings and one of the grounds relied on was that the dispute was connected with the distributorship agreement and must be referred to arbitration. Chan Seng Onn JC (as he then was) held that the 4 September agreement was an independent contract with no arbitration clause and which made no reference either to the distributorship agreement or to any of its terms. The dispute concerned a payment term in the 4 September agreement and did not arise out of or in connection with any of the terms of the distributorship agreement.

73 Chan JC (as he then was) held at [30] to [31]:

> It is therefore a question of construction whether the new agreement is merely supplemental to or a variation of the first agreement, or it is one which is wholly separate and independent of the first agreement. Whether an arbitration clause present in one agreement could be construed to cover both agreements is another question of construction.
>
> Where two agreements can be regarded substantially as one agreement rather than two separate agreements, then it is likely that the arbitration clause in one agreement would also govern disputes arising out of the other agreement. However, if in reality, the two agreements are distinct and separate agreements which cannot be viewed properly as one agreement with varied or additional terms, it would be much less likely for an arbitration clause in one agreement to be construed as having been imported or incorporated into the other agreement without there being some appropriate words in either agreement indicating that there was such an intention by the parties to have it construed in that way. There is no presumption that parties, after having agreed to refer to arbitration disputes arising out of one agreement must necessarily have agreed to also refer disputes in all subsequent agreements to arbitration.

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74 The Defendants point out that the facts in the present case are entirely different from *Coop International* for the following reasons:

(a) The Wash-Out Agreements are not independent of the underlying Sales and Purchase Contracts but arise from these contracts. In the absence of the Sales and Purchase Contracts, there would be no need for parties to enter into the Wash-Out Agreement and the Wash-Out Agreement would be incapable of being performed.

(b) Unlike the situation in *Coop International*, there is a dispute arising from the underlying Sales and Purchase Contracts, namely whether these underlying contracts are binding on the Defendant due to Chia's alleged lack of authority. This dispute falls within the scope of the arbitration clause in these underlying contracts.

(c) The Wash-Out Agreements are not settlement, compromise or release agreements.

My Analysis

75 In *Coop International*, Chan JC (as he then was) referred at [49] to *Kianta Osakeyhtio v Britain & Overseas Trading Company, Ltd* [1954] 1 Lloyd's Rep 247 in which Lord Justice Somervell provided a test to determine whether the dispute falls within the arbitration clause of the earlier agreement:

> …the real test is, has [the new contract] substituted wholly new rights and obligations for those which existed under the original contract so that the terms of the original contract do not affect the dispute which had arisen; in other words, the dispute which has arisen and which came before the arbitrators was not a dispute arising out of the interpretation or the fulfilment of the original contract …

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76 Therefore, the question is whether the dispute that has arisen in respect of the Wash-Out/Circle-Out Agreements that comprise the Category 1 Agreements is one which has arisen out of the interpretation or fulfilment of the underlying Sale and Purchase Contracts.

77 The dispute in respect of the Category 1 Agreements is only in respect of the payment of the price agreed under the Wash-Out/Circle-Out Agreements. This dispute has nothing to do with the rights and obligations in the underlying Sale and Purchase Contracts, such as the quantity of goods and the time and place of delivery. This view is supported by the Release clause in the Email correspondence which clearly states that "both parties … shall release each other from all liabilities, claims and demands arising out of the original contracts except settlement of net price difference based on washout conditions."

78 In my view, the intention of the parties when they entered into the Category 1 Agreements was to extinguish all the rights and obligations such as the delivery under the Sale and Purchase Contracts save for the difference in price which parties had agreed to under the Category 1 Agreements. This intention is evidenced by the Release clause which clearly states that upon acceptance of the Wash-Out Agreement, parties "release each other from all liabilities, claims and demands arising out of the original contracts except settlement of net price difference based on washout conditions". Therefore, once the parties had entered into the Category 1 Agreements, the Sale and Purchase Contracts were "dead" and no longer operative. The only obligation between parties in respect of the Category 1 Agreements is the payment of the washout price. Accordingly, the dispute concerned only the Category 1

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Agreements and is not connected with any of the terms of the underlying Sale and Purchase Contracts.

79 Therefore, I am of the view that the Wash-Out/Circle-Out Agreements which comprise the Category 1 Agreements are separate and independent contracts and the arbitration clause applicable to the underlying Sale and Purchase Contracts do not extend to the Category 1 Agreements.

Court's inherent powers of case management

80 Having found that the arbitration clause does not apply to the Category 1 Agreements, the next issue is whether the court should exercise its inherent powers of case management to stay the proceedings ("case management stay") in respect of the Category 1 Agreements.

The legal principles

81 In *Tomolugen*, the Court of Appeal examined how the courts of Australia, Canada, England and New Zealand have addressed the situation where a dispute falls to be resolved in part by arbitration and in part by court proceedings. The Court of Appeal set down these principles which guide the court's decision whether to grant a case management stay:

> 186 …The unifying theme amongst the cases is the recognition that the court, as the final arbiter, should take the lead in ensuring the efficient and fair resolution of the dispute as a whole. The precise measures which the court deploys to achieve that end will turn on the facts and the precise contours of the litigation in each case.
>
> 187 … We recognise that a plaintiff's right to sue whoever he wants and where he wants is a fundamental one. But, that right is not absolute. It is restrained only to a modest extent when the plaintiff's claim is stayed temporarily pending the resolution

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> of the related arbitration, as opposed to when the plaintiff's claim is shut out in its entirety … In appropriate cases, that right may be curtailed or may even be regarded as subsidiary to holding the plaintiff to his obligation to arbitrate where he has agreed to do so.
>
> 188 … This does not mean that if part of a dispute is sent for arbitration, the court proceedings relating to the rest of the dispute will be stayed as a matter of course. The court must in every case aim to strike a balance between three higher-order concerns that may pull in different considerations: first, a plaintiff's right to choose whom he wants to sue and where; second, the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and third, the court's inherent power to manage it processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes. The balance that is struck must ultimately serve the ends of justice. …

82 Following *Tomolugen*, Chong J in *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong* [2016] 3 SLR 431 ("*Maybank*") consider the issue of whether a case management stay was to be granted. *Maybank* concerned two separate and independent contracts. The first contract was a series of contract for differences ("CFD transactions") entered into between the 1st respondent and the appellant. The CDF transactions had an arbitration agreement. The 2nd respondent, the 1st respondent's husband, was her remisier for the CFD transactions under a remisier agreement containing an indemnity ("Indemnity") in favour of the appellant. Court proceedings were brought against the respondents. The proceedings against the 1st respondent was stayed in favour of arbitration.

83 Chong J granted a case management stay of the Indemnity in respect of proceedings against the 2nd respondent and expressed the view at [26] that:

> … the relevant question is not whether the two *contracts* are legally independent, but rather whether the two *proceedings* are in fact separate and independent such that the determination

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> of the claim in arbitration will be irrelevant to the suit against the 2nd respondent.

84 Chong J noted that the issue of whether the respondents had authorised the closing out of the CFD transactions is a common issue to both proceedings. He was of the view that the arbitral tribunal's decision on this issue would have a direct impact on the court proceeding against the 2nd respondent as, if it was found by the arbitral tribunal that no authority had been given, then no debt is due by the 1st respondent to the appellant under the CFDs and this would mean that there would be no liability owed by the 2nd respondent to the appellant under the terms of the indemnity in the court proceedings (see [29] and [31] of *Maybank*).

The parties' position

85 The Defendant relies on *Maybank* and submits that a case management stay should be granted because the common issue to both the arbitral proceeding and the court proceeding is whether Chia had authority to enter into the Sale and Purchase Contracts, including those which underlie the Category 1 Agreements ("Authority issue"). The tribunal's finding on the Authority issue is directly relevant to whether the Plaintiff is entitled to proceed with its claim in respect of the Category 1 Agreements. This is because if the tribunal finds that Chia had no authority, this would mean that the Defendant would not be bound by the Sale and Purchase Contracts and this would undermine the entire basis of the Category 1 Agreements and the Plaintiff's right to claim a debt under the Category 1 Agreements.

86 The Plaintiff argues that for the Category 1 Agreements, the arbitrations should await the outcome of the Court proceedings and not the other way round.

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The Plaintiff says that the only issue in contention is whether the Defendant is bound by the underlying Sale and Purchase Contracts due to Chia's alleged lack of authority. If the issue is resolved in favour of the Plaintiff, then the underlying Sale and Purchase Contracts are irrelevant. If the issue is resolved in favour of the Defendant and the underlying Sale and Purchase Contracts is relevant, then the arbitration proceedings may proceed.

87 The Plaintiff also highlights that unlike *Maybank* and *Tomolugen*, the jurisdiction of SIAC in respect of the arbitration proceedings is being challenged and it is unclear at this time whether SIAC will take jurisdiction.

Analysis

88 First, while it is true that the jurisdiction of the arbitral tribunal to determine the Authorisation issue is challenged by the Plaintiff, this per se would not be a bar to granting a case management stay.

89 As was observed by the Court of Appeal in *Tomolugen* at [187] and Chong J in *Maybank* at [37], the Plaintiff's right to proceed in court is not absolute. This right is not unduly prejudiced by the temporary nature of the stay. If the arbitral tribunal decides it does not have jurisdiction, then the court proceedings in respect of the Category 1 Agreements will resume and the Plaintiff may exercise its full rights in the court proceedings.

90 Second, in deciding whether to grant a case management stay, I am mindful of the following factors in favour of a stay which were identified by Chong J in *Maybank* at [37]:

> …

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> (c) Finally, dealing with the court's duty to ensure the efficient and fair resolution of the dispute, I note that the following factors in favour of a stay, identified in *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-Operative Group Limited* [2014] NZHC 1681 and approved in *Tomolugen Holdings Limited* (at [188]), are present in this case:
>
> > (i) the factual bases underlying the claims in the two proceedings are essentially the same;
> >
> > (ii) there are common issues in both claims …
> >
> > (iii) there is a practical risk of inconsistent findings of fact and law between the court proceedings and the arbitration given these overlapping issues; and
> >
> > (iv) there would be a duplication of witnesses and evidence between the arbitration and the court proceedings.

91 Applying the factors identified in *Maybank*, I am of the view that a case management stay should be granted in respect of the Category 1 Agreements for the following reasons:

(a) The facts underlying the two proceedings are essentially the same. Both the arbitral tribunal and the court would have to consider all the facts in relation to the authority that was granted to Chia at the material time to enter into these contracts.

(b) There is a significant overlap between the issues before the arbitration tribunal and the court proceedings, namely the Authorisation issue. If the tribunal were to find that Chia had no authority or had acted in excess of his authority at the material time such that the Defendants are not bound by the Sale and Purchase contracts, this finding would have a significant impact on the Plaintiff's right to claim under the Category 1 Agreements as the entire foundation of this claim would be demolished.

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(c) The court in determining whether the Plaintiff had a right to its claim under the Category 1 Agreements would have to determine the Authorisation issue. This same issue is before the arbitral tribunal. This would result in the practical risk of inconsistent findings in the court and arbitral proceedings.

(d) Finally, all the witnesses and evidence before the court and the arbitral tribunal would be identical.

92 Therefore, considering that the determination of the Authority issue would be relevant to the Category 1 Agreements, I am of the view that the balance in this case points to the court granting a case management stay in respect of the Category 1 Agreements pending the resolution of the arbitration proceedings in respect of the Category 2 Agreements.

Conclusion

93 For the reasons stated above, the Category 2 proceedings are stayed in favour of arbitration and a case management stay is granted in respect of the Category 1 Agreements.

Tan Teck Ping Karen
Assistant Registrar

Mr Edmund Jerome Kronenburg and Ms Jaclyn Tan (Braddell Brothers LLP) for the plaintiff;

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Mr Jared Kok and Ms Ki Kun Hang (Rajah & Tann LLP) for the defendant.

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