IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 28

Suit No 204 of 2020
(Registrar's Appeal No 112 of 2020)

Between

(1) Richard Cheung Teck Cheong
(2) Chew Chai Har
(3) Shan Ming Airconditioning (S) Pte Ltd
(4) Sim Solutions Pte Ltd
(5) Ramachandran Ananthanarayanan
(6) Green Oak Pte. Ltd.
(7) Hao Bo Pte. Ltd.
(8) Andrew Yeo Seng Thean
(9) Tan Kay Kerng
(10) Lim Hui Hung Luanne
(11) Sun Xihua
(12) Chiam Chye Hong
(13) A Wen Mianshi Pte. Ltd.
(14) Achi501 Pte. Ltd.
(15) M2L Holding Investment Pte. Ltd.
(16) Loo Kah Hui (Lu Jiahui)

… *Plaintiffs*

And

LVND Investments Pte. Ltd.

… *Defendant*

GROUNDS OF DECISION

[Arbitration] — [Agreement] — [Definition] — [Section 4(1) of the Arbitration Act] — [Whether agreement to consider mediation before referring dispute to arbitration or court is an arbitration agreement]
[Arbitration] — [Agreement] — [Whether agreement concluded by parties' conduct]
[Arbitration] — [Agreement] — [Whether effective arbitration agreement deemed by Section 4(6) of the Arbitration Act]
[Arbitration] — [Stay of court proceedings] — [Section 6(1) of the Arbitration Act] — [Whether a valid arbitration agreement existed]

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v
LVND Investments Pte Ltd

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Ang Cheng Hock J
22 July, 19 August, 27, 30 October 2020

5 February 2021

Ang Cheng Hock J:

1 This matter involves a contractual clause which stipulates that the parties have to consider mediation before referring any disputes arising from the contract to arbitration or court proceedings. The parties are in contention over whether this is a valid arbitration agreement. This disagreement led to a protracted course of correspondence and dealings between the parties, including the commencement and termination of two arbitrations, which then culminated in the plaintiffs commencing the present suit in court ("Suit 204"). The central question in Registrar's Appeal No 112 of 2020 ("RA 112") is whether the parties' course of conduct either formed or deemed, by virtue of s 4(6) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA"), a valid arbitration agreement so that Suit 204 should be stayed pursuant to s 6(1) of the AA. The Assistant Registrar ("AR") granted a stay of Suit 204 on the basis that a valid arbitration agreement between the parties had been concluded through their course of

conduct, and the plaintiffs sought to overturn the AR's decision via RA 112. The defendant, on the other hand, filed Registrar's Appeal No 111 of 2020 ("RA 111") against the AR's decision that the aforesaid contractual clause is not a valid arbitration agreement. At the conclusion of the hearing, I dismissed both Registrar's Appeals ("RAs") and I provided parties with brief reasons for my decision. The plaintiffs have since appealed against my decision in RA 112, and so I shall elaborate on those reasons below.

Facts and procedural history

The parties

2 The defendant, LVND Investments Pte Ltd, is the developer of Macpherson Mall ("the Mall").[1] The 16 plaintiffs purchased 12 shop units in the Mall from the defendant, pursuant to 12 different sale and purchase agreements ("the SPAs").[2]

Purchaser	Unit	Date of SPA
1st and 2nd Plaintiffs	#02-04	14 March 2014
3rd Plaintiff	#03-02	27 September 2013
4th Plaintiff	#03-07	24 September 2013
5th Plaintiff	#01-19	28 October 2013
6th Plaintiff	#02-02	8 November 2013
7th Plaintiff	#02-17	10 March 2014

1 Mok Mun Hon Derek's 1st affidavit dated 24 March 2020 ("Mok's 1st Affidavit") at [5].

2 Richard Cheung Teck Cheong's 1st affidavit dated 16 April 2020 ("Cheung's 1st Affidavit") at [5]–[8].

8th, 9th and 10th Plaintiffs	#02-14	14 May 2014
11th and 12th Plaintiffs	#03-01	12 May 2014
13th Plaintiff	#01-07	12 May 2014
14th Plaintiff	#03-22	21 May 2014
15th Plaintiff	#02-20	11 August 2014
16th Plaintiff	#02-21	8 June 2016

Background to the dispute

3 The plaintiffs claim that the defendant had, through its agents and/or representatives, made fraudulent representations to the plaintiffs to induce the plaintiffs to purchase the respective shop units in the Mall.[3] These false representations include:

(a) deliberate suppression of the true usable area of their respective shop units, which turned out to be substantially less than represented;

(b) deliberately suppressing information that the "aircon-ledges" and "advertisement panel ledges" in the shop units were not ledges or panels but were part of the common areas of the building;

(c) misrepresenting the rental yields of the respective shop units, because the rental yields represented to the plaintiffs were premised on the entire shop unit area being rented out, but this was untrue given the sizeable non-rentable marked out common areas, including advertising panels, in the stated total shop unit floor area; and

[3] Cheung's 1st Affidavit at [10]–[21].

(d) misrepresentations that popular brands and quality tenants will be leasing units in the Mall, when at least one of the major retail entities specified by the defendant and/or its sales agents did not take up units in the Mall.

4 The plaintiffs also claim that, alternatively, the defendant had made the foregoing misrepresentations negligently.

Alleged arbitration clause

5 Each of the 12 SPAs contained the following clause ("Clause 20A.1"):[4]

> 20A. Mediation
>
> 20A.1 The Vendor and Purchaser agree that before they refer any dispute or difference relating to this Agreement to arbitration or court proceedings, they shall consider resolving the dispute or difference through mediation at the Singapore Mediation Centre in accordance with its prevailing prescribed forms, rules and procedures.
>
> 20A.2 For the avoidance of doubt, this clause shall not amount to a legal obligation on the part of either the Vendor or Purchaser to attempt mediation as a means of resolving their dispute or difference.

6 In these proceedings, the defendant claims that Clause 20A.1 is an arbitration clause. While the plaintiffs had claimed in two earlier arbitrations commenced that Clause 20A.1 is an arbitration clause (as will be explained below), they have now taken the position in Suit 204 that the clause is *not* an arbitration clause.

1st notice of arbitration

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4 Mok's 1st Affidavit at pp 28, 72, 116, 160, 204, 248, 292, 336, 380, 422, 466, and 510.

7 The plaintiffs were initially represented by another set of solicitors ("former solicitors"). The plaintiffs commenced arbitration proceedings against the defendant by way of a notice of arbitration dated 6 May 2019 ("1st NOA"); the 1st NOA was served on the defendant on 7 May 2019.[5] The claimants in the 1st NOA were the 16 plaintiffs and the defendant was the respondent. The plaintiffs took the position in the 1st NOA that the arbitration is to be administered by the Singapore International Arbitration Centre ("the SIAC"), and the arbitration shall be conducted in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (6th Ed, 2016) ("the SIAC Rules"). The 1st NOA highlighted Clause 20A.1 and stated that "[t]he Claimants hereby elect to submit this dispute to arbitration, *pursuant to Clause 20A.1 of the SPA* which confers on parties *the option to refer to arbitration* any dispute relating to the SPA" [emphasis added].[6]

8 The defendant issued 12 separate responses (each dated 21 May 2019) to the 1st NOA objecting to the plaintiffs' proposed arbitration ("Responses") because the defendant did not agree that: (a) the arbitration should be administered by the SIAC; (b) the arbitration should be conducted according to the SIAC Rules; and (c) the arbitrations should proceed as a single consolidated arbitration. However, the Responses stated that the defendant agreed that the arbitration "should be seated in Singapore" and that the AA applies.[7] In other words, the defendant took the position that there should be 12 different arbitrations, corresponding to the 12 different SPAs concluded among the

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5 Cheung's 1st Affidavit at p 12 at [26] and p 22 at [1]; Richard Cheung Teck Cheong's 2nd affidavit dated 12 August 2020 ("Cheung's 2nd Affidavit") at [8]–[11].

6 Mok's 1st Affidavit at pp 558–559 at [61]–[64].

7 Cheung's 1st Affidavit at p 22 at [5], and p 23 at [7] and [10]; see also Mok Mun Hon Derek's 2nd affidavit dated 5 May 2020 ("Mok's 2nd Affidavit") at p 92 at [5] and p 93 at [7] and [10].

parties (see [2] above), and that the arbitrations should not be administered by the SIAC or be conducted according to the SIAC Rules.

9 From 28 to 30 May 2019, the parties had extensive email correspondence with the SIAC, wherein the parties made submissions to convince the SIAC Court of their respective positions on whether the arbitrations can be administered by the SIAC. The following pertinent emails bear highlighting.

(a) The plaintiffs' former solicitors emailed the SIAC on 28 May 2019 at 8.47pm to state, *inter alia*, that ("28 May 2019 email"):[8]

> The matter is very simple really:
>
> a) The [defendant] *does not deny that there is an arbitration agreement*.
>
> b) The [defendant] acknowledges that the Singapore Arbitration Act applies (and we say the IAA applies instead; and this can be in any event be decided by the Tribunal).
>
> c) From (b), the [defendant] necessarily agrees on the record that the seat of arbitration is Singapore.
>
> [emphasis added]

(b) The defendant's solicitors replied to the SIAC on 29 May 2019 at 10.15am to say, *inter alia*, that:[9]

> Contrary to what the [plaintiffs] imply, *the mere fact that LVND does not deny that there is an arbitration agreement*, that the Arbitration Act applies, or that the seat of the Arbitrations is Singapore, does not lead to the conclusion that parties intended the SIAC to administer the Arbitrations. …
>
> [emphasis added]

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8 Mok's 2nd Affidavit at p 103.

9 Mok's 2nd Affidavit at p 101.

10 The SIAC Court issued 12 arbitration reference numbers for the plaintiff's 1st NOA. On 19 June 2019, the SIAC Court found that it was "not *prima facie* satisfied that the parties have agreed that SIAC shall administer these arbitrations, or on the application of the SIAC Rules in these references" because the "asserted arbitration provisions in the relevant contracts make no reference to SIAC, as an administering institution or otherwise, or to the application of the SIAC Rules." The SIAC Court thus terminated the 12 arbitrations pursuant to Rule 28.1 of the SIAC Rules.[10]

2nd notice of arbitration

11 On 28 June 2019, the plaintiffs commenced an *ad hoc* arbitration against the defendant, again as a single arbitration with all 16 plaintiffs as the claimants and the defendant as the respondent. In the plaintiffs' 2nd notice of arbitration dated 28 June 2019 ("2nd NOA"), the plaintiffs again "elect[ed] to submit this dispute to arbitration, pursuant to Clause 20A.1". This time, notably, the plaintiffs also made an additional broader assertion of the existence of an arbitration agreement between the parties independent from Clause 20A.1:[11]

> **V. THE ARBITRATION AGREEMENT AND DEMAND FOR ARBITRATION**
>
> **A. THE ARBITRATION AGREEMENT**
>
> 61. This arbitration pertains to disputes in connection with and/or arising out of the respective SPAs.
>
> 62. Clause 20A of the SPA provides:
>
> …
>
> 63. The Claimants have considered and are of the view that mediation at the Singapore Mediation Centre pursuant to Clause 20A.1 of the SPA will be futile.

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10 Mok's 1st Affidavit at pp 565–566.

11 Mok's 1st Affidavit at pp 586–587.

> 64. The Claimants note that the Respondent ***has agreed on record that there is a valid arbitration agreement between the parties***, in its email to the Singapore International Arbitration Centre ("**SIAC**') dated 29 May 2019 (timestamp: 10:15am) (the "**Email**") (**Exhibit 15**).
>
> [emphasis in original in bold; emphasis added in bold italics]

12 The plaintiffs also took the position in the 2nd NOA that the arbitration was to be an *ad hoc* arbitration seated in Singapore and that the arbitration was to be conducted by a single arbitrator jointly appointed by the parties.[12]

13 It appears that the defendant did not issue a formal response to the 2nd NOA. Instead, on 2 July 2019, the defendant's solicitors wrote a letter to the plaintiffs to object to the commencement of a "single *ad hoc* arbitration" because the "twelve different sets of purchasers … entered into twelve different [SPAs] on different dates with [the defendant] in relation to different units in [the Mall]".[13] On 10 July 2019, the defendant's solicitors wrote a further letter to the plaintiffs to reiterate the defendant's objection to the "single *ad hoc* arbitration" pursuant to "twelve different contracts and the arbitration agreements contained therein".[14] However, in neither letter did the defendant deny that there was an agreement that the dispute should be submitted to arbitration.

14 In the plaintiffs' former solicitors' reply letter to the defendant (dated 11 July 2019), they stated that:[15]

> 6. Your client is using the purported issue of consolidation as an excuse to delay matters. Our clients take the firm

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12 Mok's 1st Affidavit at p 587 at [66].

13 Cheung's 1st Affidavit at p 28 at [3].

14 Mok's 2nd Affidavit at p 108 at [3].

15 Cheung's 1st Affidavit at pp 32–33.

> view that this is **not** the appropriate juncture to consider the issue of consolidation. The present focus is on appointing an arbitrator. Now is not the right time to determine whether our clients' claims should be consolidated.
>
> …
>
> d. Our client's position is that the [*sic*] any question of consolidation ought properly to be placed before the Tribunal once appointed. It is for the Tribunal, and not your client, to decide as a matter of procedure whether our client's claims may rightly be consolidated into a single action against your client.
>
> …
>
> 7. Your client is of course free to take the position to regard the 12 claims against your client as in the NOA and [statement of claim] dated 28 June 2019 as 12 separate arbitrations.
>
> a. It is for logistical ease and convenience that these actions have been recorded within a single NOA and [statement of claim].
>
> b. The fact of the single NOA and [statement of claim] filed in a single document is not determinative of any question of consolidation.
>
> c. If your clients insist, we can oblige by sending 12 separate but substantially similar NOAs and [statements of claim]. We note however that this would be counterproductive, dilatory, and entirely unnecessary.
>
> 8. Our clients wholly disagree with your client's allegations that they had utilized the wrong procedures to bring their claims against you[r] client. ***We wish to put on record that***:
>
> a. ***Parties agreed that the right forum for dispute resolution is arbitration***.
>
> b. ***Parties agreed that there is a valid arbitration agreement between them***.
>
> c. Parties agreed that the seat of arbitration is Singapore.
>
> d. ***The only point of difference*** between parties had been whether the SIAC had the authority to administer the arbitration. …
>
> …

> 10. Despite ***your client's admission that arbitration is the appropriate forum of dispute resolution***, your client has persistently refused to appoint an arbitrator. …
>
> [emphasis in original in bold; emphasis added in bold italics]

15 Therefore, the plaintiffs' position, as spelt out (and "placed on record") by their former solicitors in the foregoing letter, is that "[p]arties agreed that there is a valid arbitration agreement between them"; "any question of consolidation ought properly to be placed before the Tribunal once appointed"; and "[i]t is for logistical ease and convenience that these actions have been recorded within a single NOA and [statement of claim]".

16 On 29 July 2019, the plaintiffs' former solicitors sent a letter to the SIAC to request the appointment of an arbitrator ("29 July 2019 letter"). For *ad hoc* arbitrations, if parties are unable to agree on the appointment of an arbitrator, the President of the SIAC Court of Arbitration is the default appointing authority: ss 13(2)–13(4) and 13(8) of the AA. In this letter, the plaintiffs' former solicitors stated that "[p]arties have agreed that there is a valid and binding arbitration agreement between them, and that the seat of arbitration is Singapore".[16] In response to this letter and the 2nd NOA, the defendant's solicitors wrote to the SIAC on 2 August 2019 to state that "no *ad hoc* arbitration has been validly commenced against [the defendant]". However, "[e]ven if there is any valid commencement of arbitration, there must necessarily be twelve different *ad hoc* arbitrations" so 12 different arbitrators should be appointed, "one for each of the *ad hoc* arbitrations".[17]

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16 Mok's 1st Affidavit at p 590 at [3].

17 Cheung's 1st Affidavit at p 39 at [19].

17 Subsequent to this, the plaintiffs decided to instruct a new set of solicitors. The plaintiffs then took a different view as to the legal effect of Clause 20A.1. On 3 February 2020, the plaintiffs' new solicitors, who are also their counsel in these proceedings, wrote to the SIAC to state that the plaintiffs "wish to notify the SIAC that they do not wish to proceed against [the defendant] by way of arbitration proceedings".[18]

Suit No 204 and Summons No 1422

18 The plaintiffs filed and served their writ of summons in Suit 204 on 4 March 2020. After entering an appearance on 5 March 2020, the defendant filed Summons No 1422 of 2020 ("SUM 1422") on 25 March 2020 seeking a stay of Suit 204 pursuant to s 6(1) of the AA on the basis that the parties "have agreed to refer to arbitration the matters in respect of which this action is brought".

Decision below

19 The AR granted the stay sought in SUM 1422. She held that Clause 20A.1 does not constitute an arbitration agreement as it "only requires parties to consider mediation" and it "does not indicate a choice by parties to resolve the dispute by arbitration". However, the AR held that the parties had entered into a valid arbitration agreement "through their conduct and correspondence", particularly via three documents: the 1st NOA, the defendant's Responses to the 1st NOA, and the 28 May 2019 email. The AR also decided that this arbitration agreement was not vitiated by any unilateral or common mistake.[19]

Requirements of ss 6(1)–6(2) of the Arbitration Act

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18 Mok's 1st Affidavit at p 594 at [2].

19 Transcript, 10 June 2020, pp 17–18.

20 Sections 6(1)–6(2) of the AA provide:

> **Stay of legal proceedings**
>
> **6.**—(1) Where any party to an arbitration agreement 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 that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) may, if the court is satisfied that —
>
> > (a) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and
> >
> > (b) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration,
>
> make an order, upon such terms as the court thinks fit, staying the proceedings so far as the proceedings relate to that matter.

21 Therefore, under s 6(1) of the AA, the court must be satisfied that: (a) an arbitration agreement exists between the plaintiffs and the defendant; and (b) the present application was made "after appearance and before delivering any pleading or taking any other step in the proceedings". If s 6(1) of the AA is satisfied, the court "may" grant a stay of the court proceedings if the requirements under s 6(2) are satisfied.

Parties' submissions in the appeals

22 The parties only disputed two requirements under ss 6(1)–6(2) of the AA. First, that an arbitration agreement exists, and second, if such an agreement exists, that the court should exercise its discretion to grant a stay of Suit 204. There were three main planks to the plaintiffs' submissions.

(a) First, the plaintiffs submitted that there was no valid arbitration agreement. Clause 20A.1 is not an arbitration agreement because a plain reading of it does not suggest that the parties agreed to be bound to arbitrate any disputes arising from the SPAs. There was also no arbitration agreement concluded by the parties' conduct and correspondence because all of the plaintiffs' offers to resolve the dispute through arbitration were rejected by the defendant. Thus, no agreement was reached. Section 4(6) of the AA also did not apply to the present case because none of the purported "assertions" in the various correspondence (the two NOAs, the 28 May 2019 email and the 29 July 2019 letter), properly construed, amounted to assertions of the *existence* of an arbitration agreement. Rather, they were either statements that the plaintiffs elected to submit the dispute to arbitration or mistaken references to a pre-existing arbitration agreement.

(b) Second, the plaintiffs submitted that any purported arbitration agreement was, in any event, vitiated by the doctrine of mistake because such an agreement arose pursuant to the parties' mistaken belief that Clause 20A.1 was a valid and binding arbitration clause when it was not. As such, the purported arbitration agreement should be set aside.

(c) Third, even if there was a valid arbitration agreement between the parties, the plaintiffs submitted that the court's discretion to stay Suit 204 should not be exercised on the facts of the present case.

23 The defendant submitted that the parties had entered into a valid arbitration agreement and that there was no mistake which would vitiate the arbitration agreement. It was contended that Clause 20A.1 is a valid arbitration agreement because there is an option for parties to elect for either litigation or

arbitration to resolve their disputes. Alternatively, the parties concluded an arbitration agreement via their correspondence and conduct because the defendant had not denied the existence of an arbitration agreement in the defendant's Responses to the 1st NOA. Further, in the alternative, s 4(6) of the AA applied to this case to deem an effective arbitration agreement as having come into existence. Yet another alternative argument was that the plaintiffs were estopped by their conduct from taking the position that there was no valid arbitration agreement. The defendant also argued that, under s 6 of the AA, a court should only refuse a stay in exceptional cases and this was not such a case.

Issues to be determined

24 There were thus five main issues in RA 112.

(a) Did the parties conclude a valid and binding arbitration agreement, independent from Clause 20A.1 of the SPA?

(b) Did s 4(6) of the AA apply to the present case to deem an effective arbitration agreement between the parties?

(c) If there was a valid arbitration agreement, was this agreement vitiated by mistake?

(d) If there was no valid arbitration agreement, were the plaintiffs estopped from taking the position that there was no valid arbitration agreement?

(e) If all the requirements for a stay under ss 6(1) and 6(2) of the AA were satisfied, should the court nonetheless exercise its discretion under s 6(2) not to order a stay of Suit 204?

25 In addition to the foregoing, another question that arises from the present facts is whether Clause 20A.1 is a valid arbitration agreement. That was the issue in RA 111. The defendant did not seek leave to appeal against my decision in RA 111, where I agreed with the AR that Clause 20A.1 is not an arbitration agreement. While not directly relevant to RA 112, let me first turn to this issue briefly.

Is Clause 20A.1 a valid arbitration agreement?

26 Section 4(1) of the AA defines an arbitration agreement as such:

> **Definition and form of arbitration agreement**
>
> **4.**—(1) In this Act, "arbitration agreement" means 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.
>
> [emphasis added]

27 Therefore, for there to be an arbitration agreement, there has to be an agreement by the parties to "*submit* to arbitration" [emphasis added]. What must be found in the agreement is "the consent of both parties to be *bound* to arbitrate" [emphasis in original]: *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 ("*Dyna-Jet*") at [37].

28 It is uncontroversial that the mere absence of an agreement on the seat of arbitration, arbitral rules, or arbitral institution does not affect the validity of the agreement to arbitrate. References in an arbitration agreement to non-existent arbitral institutions or rules have generally been held to be insufficient to negative the intention to arbitrate. For instance, in *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd and another suit* [2017] 4 SLR 182 ("*KVC Rice*"), the High Court dealt with arbitration clauses that "merely

provide[d] for submission of disputes to arbitration without specifying the place of the arbitration, the number of arbitrators or the method for establishing the arbitral tribunal". The court held (at [29]) that such a bare arbitration clause "remains a valid and binding arbitration agreement if the parties have evinced a clear intention to settle any dispute by arbitration". Thus, the mere fact that Clause 20A.1 did not provide for the seat of arbitration, arbitral institution, or arbitral rules is not determinative of whether it is a valid arbitration agreement.

29 The critical point in this case was that Clause 20A.1 did not objectively evince any intention by the parties to be *bound* to submit their disputes arising from the SPAs to arbitration. The clear text of Clause 20A.1 only stipulates that parties have a duty to *consider mediation* before referring their dispute "to arbitration or court proceedings". This can be contrasted with the text of the arbitration clauses in *KVC Rice*. In that case, the clauses stated that the parties' dispute "shall be referred to and finally resolved by arbitration" (see *KVC Rice* at [7]):

> The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement *shall be referred to and finally resolved by arbitration* as per [Indian/Singapore] Contract Rules. [emphasis added]

30 Therefore, I agreed with the AR's decision that Clause 20A.1 was not a valid arbitration agreement within the meaning of s 4(1) of the AA.

31 The defendant also submitted that Clause 20A.1 is a valid arbitration agreement even if it merely provides an option for parties to elect either litigation or arbitration to resolve their disputes. The defendant relied primarily on *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088 ("*WSG Nimbus*") and *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362 ("*Wilson Taylor*") for this proposition.

32 However, Clause 20A.1 is distinct from the arbitration clauses in the foregoing cases relied on by the defendant. In those cases, the arbitration clause explicitly conferred a right on the parties to refer the dispute to arbitration.

(a) In *WSG Nimbus*, the operative clause stated:

> … In the event that the parties have a dispute over any term or otherwise relating to this Agreement they shall use their best endeavours to resolve it through good faith negotiations. In the event that they fail to do so after 14 days then *either party may elect to submit such matter to arbitration* in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') for the time being in force which rules are deemed to be incorporated by reference with this clause to the exclusive jurisdiction of which the parties shall be deemed to have consented. Any arbitration shall be referred to three arbitrators, one arbitrator being appointed by each party and the other being appointed by the Chairman of the SIAC and shall be conducted in the English language. [emphasis added]

(b) In *Wilson Taylor*, the operative clause provided:

> Any claim or dispute or breach of terms of the Contract shall be settled amicably between the parties by mutual consultation. If no amicable settlement is reached through discussions, *at the election of Dyna-Jet, the dispute may be referred to and personally settled by means of arbitration proceedings*, which will be conducted under English Law; and held in Singapore. [emphasis added in *Wilson Taylor*]

33 The text of the foregoing clauses showed that the parties agreed that, once the right to elect to refer the dispute to arbitration is exercised, the parties are bound to submit the dispute to arbitration: see *WSG Nimbus* at [21]; *Wilson Taylor* at [13]. The agreement to refer disputes arising from the contract to arbitration, once the relevant party has elected to do so, is clear and unqualified. On the other hand, Clause 20A.1 goes no more than to state that the parties "shall consider" *mediation* "before they refer any dispute or difference relating to [the SPA] to arbitration or court proceedings". The modal auxiliary verb expressing compulsion ("shall") is used in reference to *mediation*, not

"arbitration or court proceedings". The reference to "arbitration or court proceedings", ordering wise, comes after the act mandated by the modal auxiliary verb (*viz*, considering mediation). Simply put, Clause 20A.1 mandates the parties to consider mediation, and nothing more. That is the focus of that clause, and such consideration is to be had *before* the dispute is referred to either arbitration or court proceedings. This suggests that parties *then* have to agree on whether to refer the disputes to arbitration or court proceedings.

34 Therefore, the text of Clause 20A.1 does not objectively show that there was an agreement by the parties to submit disputes regarding the SPAs to arbitration. Consequently, I found that Clause 20A.1 is not a valid arbitration agreement within the meaning of s 4(1) of the AA.

Did the parties separately conclude an arbitration agreement?

35 I now turn to the first main issue in RA 112, which was whether the parties separately concluded an arbitration agreement. From my review of the parties' conduct and the positions taken by them in correspondence and in the documents in relation to the two arbitrations, I was satisfied that the parties separately concluded an arbitration agreement within the meaning of s 4(1) of the AA.

Was there an arbitration agreement?

36 In the first attempted arbitration, it appeared quite clear to me that the plaintiffs were, in effect, proposing to arbitrate the disputes that had arisen with the defendant. This is spelt out in the 1st NOA. In the Defendant's Responses, the defendant did not disagree that parties should arbitrate the disputes (see [8] above). The defendant's objections were only as to the SIAC being the institution that should administer the arbitration; that the SIAC rules should

apply to the arbitration; and that there should be a single consolidated arbitration.

37 In the second attempted arbitration, the plaintiffs unequivocally took the position in the 2nd NOA that the parties had already agreed to submit their disputes to an *ad hoc* arbitration, which would be seated in Singapore. To this, the defendant did not disagree. Rather, the defendant's objection was that 12 separate *ad hoc* arbitrations should be commenced instead. The plaintiffs' reply was that this was an issue of procedure that could be decided by the arbitrator to be appointed. The plaintiffs then reiterated the fact that "[p]arties *agreed that the right forum for dispute resolution is arbitration*" [emphasis added]; "there is a valid arbitration agreement between them"; and "the seat of arbitration is Singapore" (see [14] above). This plainly confirmed and reiterated the fact that the parties had an agreement, independent of Clause 20A.1, through their conduct and expressed statements, that their dispute regarding the SPAs should be resolved by arbitration.

38 In my judgment, it was clear therefore that, independently of Clause 20A.1, the parties had agreed to submit their disputes to arbitration to be seated in Singapore. Under s 4(1) of the AA, there are three – and only three – essential terms for an arbitration agreement to be formed: (a) the parties; (b) a defined legal relationship between these parties; and (c) that these parties intend to be bound to submit disputes arising from this defined legal relationship to arbitration. This is why, for instance, there is no need for the arbitral procedure and rules, or even the seat of arbitration, to be agreed on for a valid arbitration agreement to be formed (see [28] above). In this case, there was an unequivocal consensus between the parties on the essential terms. As mentioned, it was repeatedly stated in the correspondence by both the plaintiffs and defendant that there was an arbitration agreement between them in respect of their dispute

concerning the SPAs. Hence, the conduct and expressed words of the parties were more than sufficient to indicate that there was a valid arbitration agreement within the meaning of s 4(1) of the AA.

Was the arbitration agreement in writing?

39 To be valid, an arbitration agreement also has to be recorded in writing as required by s 4(3) of the AA. The written record of the arbitration agreement in this case, as I had found in my preceding analysis, is extensive. It included:

(a) the Defendant's Responses to the 1st NOA, where the defendant agreed that the arbitration "should be seated in Singapore" and that the AA applies;

(b) the 2nd NOA issued by the plaintiffs, which explicitly noted that the defendant "has agreed on record that there is a valid arbitration agreement between the parties";

(c) in the plaintiffs' reply letter to the defendant dated 11 July 2019, the plaintiffs reiterated the position that "[p]arties agreed that the right forum for dispute resolution is arbitration" and that "there is a valid arbitration agreement between the parties"; and

(d) in the plaintiffs' 29 July 2019 letter to the SIAC, the plaintiffs again stated that "[p]arties have agreed that there is a valid and binding arbitration agreement between them, and that the seat of arbitration is Singapore".

40 While each of the foregoing was unilaterally recorded by one of the parties but unsigned by *both* parties, s 4(4) of the AA provides that "an arbitration agreement is in writing if its content is recorded in *any form*, whether

or not the arbitration agreement or contract has been concluded orally, by conduct or by other means" [emphasis added]. In *AQZ v ARA* [2015] 2 SLR 972 ("*AQZ v ARA*") at [119], Judith Prakash J (as she then was), after studying the legislative history of s 2A(4) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), which is *in pari materia* with s 4(4) of the AA, held that s 2A(4) of the IAA "would be satisfied if one party to the agreement unilaterally records it in writing. It would not matter that the written version of the agreement is neither signed nor confirmed by all the parties involved". In my view, the same approach should apply to s 4(4) of the AA.

41 The *raison d'être* for s 4(4) of the AA, which was based on the Article 7(3) of the UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006) ("2006 Model Law"), was explained in the *Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration as amended in 2006* at p 28 as such (also cited in *AQZ v ARA* at [117]):

> … It was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical. In such cases, *where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognized.* For that reason, article 7 was amended in 2006 to better conform to international contract practices. … *The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded.* This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties. [emphasis added]

42 This was echoed by Mr K Shanmugam SC, Minister for Law (also the then Minister for Foreign Affairs), during the second reading of the International Arbitration (Amendment) Bill (Bill No 10/2012), which introduced s 4(4) of the AA and s 2A(4) of the IAA at the same time, in

Singapore Parliamentary Debates, Official Report (9 April 2012) vol 89 at p 71 (also cited in *AQZ v ARA* at [118]):

> … The general intention is that an arbitration agreement can be entered into in any form, including orally, if there is some record of the content of the agreement which can subsequently be referred to. …
>
> So, does the record made by one party suffice? The answer is 'yes'. This is the answer we give. At the end of the day, the courts have to decide. Our legislative intention is that, yes, a record by one party would suffice. Section 2A [of the IAA, which is *in pari materia* with s 4(4) of the AA] does not require that the record of the arbitration agreement to be confirmed by all parties. Of course, there could be disputes as to the authenticity of the record if the record is made only by one party or if inconsistent records by different parties are produced. Those disputes would have to be resolved by the courts or by the tribunal in the same manner that disputes on authenticity of written arbitration agreements are resolved, or, for that matter, any other dispute, on facts, are resolved.
>
> Legislatively, the question is whether the possibility of such disputes arising should preclude us from recognising unilateral records. The answer must balance the competing needs of certainty as opposed to flexibility, and that is, of course, a challenge that both legislation and the courts deal with in commercial law. In this case, the loosening of the writing requirement has been recommended by UNCITRAL. When we held consultations on the Bill, the feedback was also in support of relaxing the writing requirement.

43 Thus, the writing requirement is not intended to be an onerous one, and it was clear that the written record in this case, as highlighted at [39] above, satisfied the s 4(3) writing requirement. Those documents clearly recorded the agreement between the plaintiffs and the defendant to submit their disputes arising from the SPAs to arbitration.

44 As such, I found that ss 4(3) and 4(4) of the AA were satisfied, and there was a valid and binding arbitration agreement in this case.

Does s 4(6) of the Arbitration Act apply in this case?

45 I also found that an "effective" arbitration agreement was deemed pursuant to s 4(6) of the AA. This provision provides:

> (6) Where in any arbitral or legal proceedings, a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances in which the assertion calls for a reply and the assertion is not denied, there shall be deemed to be an effective arbitration agreement as between the parties to the proceedings.

46 I was not referred by counsel to any local authority that has interpreted s 4(6) of the AA (or s 2A(6) of the IAA, which is *in pari materia* with s 4(6) of the AA). The text of s 4(6) of the AA makes clear that there are three requirements to s 4(6): (i) a party must assert the existence of an arbitration agreement in a pleading, statement of case, or any other document in circumstances in which the assertion calls for a reply; (ii) this assertion is not denied by the other party; and (iii) this assertion and non-denial occurs in an arbitral or legal proceeding. If these requirements are met, then s 4(6) "deems" an "effective" arbitration agreement "as between the parties to the proceedings".

47 In my view, there are two main sources of ambiguity in s 4(6): what constitutes "any other document in circumstances in which the assertion calls for a reply" and what does it mean that an "effective arbitration agreement" is "deemed". The first question is of particular relevance to the present case because the assertion of the existence of an arbitration agreement by the plaintiffs was not in a pleading or statement of case.

48 It is trite that statutory interpretation is a purposive endeavour, in that an interpretation that would promote the purpose or object underlying the written law must be preferred to an interpretation that would not do so: s 9A(1) Interpretation Act (Cap 1, 2002 Rev Ed). The three-step approach to purposive

interpretation is well-established (*Tan Cheng Bock v AG* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [38]–[54]).

(a) First, a court should ascertain the possible interpretations of the provision in question, by determining the ordinary meaning of the words in the provision, aided by rules and canons of statutory construction (*Tan Cheng Bock* at [38]).

(b) Second, a court should then ascertain the legislative purpose of the provision and the part of the statute in which the provision is situated. In this regard, it may be necessary to consider the specific purpose of the particular provision in question, although it should be presumed that a statute is coherent as a whole, such that its individual provisions should as far as possible be read consistently with both the specific purpose of the provision and the general purpose of the underlying statute (*Tan Cheng Bock* at [40]–[41]). In ascertaining the legislative purpose, extraneous material may be a useful aid to interpretation, but primacy must be accorded to the text of the provision and its statutory context (*Tan Cheng Bock* at [43]); hence, extraneous material should not contradict the express text of the provision except in very limited circumstances (*Tan Cheng Bock* at [50]).

(c) Third, a court should compare the possible interpretations of the provision against the purpose of the relevant provision and prefer the interpretation which furthers the purpose of the written text (*Tan Cheng Bock* at [54(c)]).

Legislative history of s 4(6) of the AA

49 Section 4(6), in its current form, was present in the AA since it was enacted in 2001 (though it was formerly numbered s 4(4)). Section 4(6) of the AA was not found in the previous version of the Arbitration Act (Cap 10, 1985 Rev Ed) in Singapore, which was largely based on English arbitration law. Section 4 of the AA is based on Art 7 of the original version of the UNCITRAL Model Law on International Commercial Arbitration, as it was adopted in 1985 ("1985 Model Law"). Art 7 of the 1985 Model Law provides as follows:

> ARTICLE 7. DEFINITION AND FORM OF ARBITRATION AGREEMENT
>
> (1) "Arbitration agreement" is 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. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (2) The arbitration agreement shall be in writing. *An agreement is in writing if it is contained* in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or *in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another*. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.
>
> [emphasis added]

50 The 1985 Model Law was then amended in 2006 in the 2006 Model Law, but the pertinent portion of the former Art 7(2) was retained in the same terms as the amended Art 7(5):

> Article 7 Definition and form of Arbitration Agreement
>
> …
>
> (2) The arbitration agreement shall be in writing.
>
> …
>
> (5) Furthermore, *an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in*

> *which the existence of an agreement is alleged by one party and not denied by the other.*
>
> [emphasis added]

51 While obviously the inspiration for s 4(6) of the AA, it is quite apparent that the text of Art 7(2) of the 1985 Model Law (and Art 7(5) of the 2006 Model Law) has both similarities and differences from the text of s 4(6). These call for a closer examination.

52 The common theme is the inclusion of a provision stipulating that, where one party asserts the existence of an arbitration agreement in a formal document, in the context of arbitral or legal proceedings, and the other party does not deny this assertion when he is expected to do so, the arbitration agreement is then deemed to be "in writing" and thus formally valid, in the case of the Model Law articles, or deemed to be an "effective arbitration agreement", in the case of s 4(6) of the AA. I shall refer to such a provision as a "deeming provision".

53 The full text of Art 7(2) of the 1985 Model Law enumerates different ways in which the writing requirement can be satisfied. In the Report of the Working Group on Arbitration and Conciliation ("Working Group") on the work of its forty-fourth session (23–27 January 2006), A/CN.9/592 at [68], the Working Group explained that the reason it agreed to retain the deeming provision without modification in the 2006 Model Law was because no other provision of the Model Law could be construed as "a positive presumption of the existence of an arbitration agreement, in the absence of material evidence merely by virtue of the exchange of statements of claim and defence".

54 The next question is the type of situation to which the deeming provision is intended to apply. The text of both Art 7(2) of the 1985 Model Law and Art 7(5) of the 2006 Model Law clearly state that the deeming provision only

applies if the assertion of the existence of an arbitration agreement is made in a statement of claim, and the non-denial of this assertion is made in a defence. The *travaux préparatoires* of Art 7(2) of the 1985 Model Law and commentary by the UN Secretariat further highlight that the deeming provision was to provide for the "submission-type situation" where "parties who had not concluded an arbitration agreement in the form required under paragraph (2) *[nonetheless] participated in arbitral proceedings* and where that fact, whether viewed as a submission or as the conclusion of an oral agreement, was recorded in the minutes of the arbitral tribunal, even though the signatures of the parties might be lacking" [emphasis added]: Report of the UNCITRAL on the work of its eighteenth session (3–21 June 1985), UNGAOR, 40th Sess, Supp No 17 at [87]–[88], UN Doc A/40/17; see also Note by the Secretariat, A/CN.9/309 at [19]. Therefore, one view is that Art 7(2) of the 1985 Model Law "was intended to encompass the situation in which the parties *submitted to and participated* in the arbitration despite formal flaws in their arbitration agreement" [emphasis added]: Howard M. Holtzmann *et al*, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Wolters Kluwer, 2015) at p 39. The rationale for the deeming provision is intuitively understandable. Even if there was no prior arbitration agreement concluded between the parties, it is eminently sensible why the parties should be regarded as having concluded such an agreement *through* the process of the exchange of the statement of claim, in which there is an assertion of the existence of an arbitration agreement, and the defence, in which there is no denial that parties had agreed to arbitrate the dispute. The act of starting an arbitration would be regarded as an offer by the claimant to arbitrate the dispute, and the participation in that arbitration without complaint by the respondent would be regarded as an implicit acceptance that the dispute should be resolved by arbitration.

55 In other words, the deeming provision must have been intended to prevent parties who participate in an arbitration, without any complaint that there was no arbitration agreement, from subsequently claiming that the arbitral tribunal lacked jurisdiction over them because there was in fact no arbitration agreement. One would expect that it would usually be the respondent to the arbitration who would attempt such an argument, but there is no reason in principle why the deeming provision should not also apply in favour of a respondent if it is the claimant who is figuratively doing a U-turn and seeking to deny that there is an arbitration agreement.

56 However, the text of s 4(6) of the AA does differ from Art 7(2) of the 1985 Model Law (and Art 7(5) of the 2006 Model Law) in at least four significant ways.

(a) Section 4(6) of the AA explicitly restricts its application to situations where the assertion of the existence of an arbitration agreement is made "in any arbitral or legal proceedings". Art 7(2) of the 1985 Model Law has no equivalent words to contour its application, though one might observe that the reference to an assertion of the existence of an arbitration agreement in a "statement of claim", which is not denied in the "defence", must obviously be within the context of arbitral or legal proceedings.

(b) Under s 4(6) of the AA, the assertion of the existence of an arbitration agreement may be made in a greater variety of documents: "a pleading, statement of case or any other document in circumstances in which the assertion [of the existence of an arbitration agreement] calls for a reply". In contrast, under Art 7(2) of the 1985 Model Law, the

assertion of the existence of an arbitration agreement must be made in a "[statement] of claim".

(c) Under Art 7(2) of the 1985 Model Law, the denial of the existence of an arbitration agreement is only expected in the "defence". On the other hand, s 4(6) of the AA does not specify where the denial of the existence of an arbitration agreement is expected to be found.

(d) Under s 4(6) of the AA, the consequence of the deeming provision being applicable is that there is "an effective arbitration agreement as between the parties to the proceedings". Under Art 7(2) of the 1985 Model Law, the effect of the deeming provision is that the arbitration agreement shall be deemed to be "in writing".

57 The Explanatory Statements and Parliamentary records of the AA and the IAA do not shed light on why Parliament chose to depart from the wording of Art 7(2) of the 1985 Model Law when drafting the text of s 4(6) of the AA or s 2A(6) of the IAA. The only relevant statement made in the Second Reading of the Arbitration Bill (Bill No 37/2001) ("the Arbitration Bill 2001") is that the amendments to the law were to bring the AA "more in line with our [IAA] and international practices, as reflected in the UNCITRAL Model Law on International Commercial Arbitration": see *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2213 (Assoc Prof Ho Peng Kee, Minister of State for Law). I had not been referred by counsel to any other jurisdiction which has tweaked the text of the deeming provision in Art 7(2) of the 1985 Model Law in the same way. Consequently, foreign case law is of limited assistance in the interpretation of s 4(6) of the AA.

58 Applying the *Tan Cheng Bock* framework (at [48] above) to the present case, I was of the view that s 4(6) of the AA can be interpreted in the following way.

What is "any other document in circumstances in which the assertion calls for a reply"?

59 The phrase "any other document in circumstances in which the assertion calls for a reply" could mean, literally, *any* other document made in the course of an arbitral or legal proceeding, including emails or correspondence between counsels. Alternatively, s 4(6) could contemplate only documents made by a party in the course of the party's substantive participation in the arbitral or legal proceeding, and which form part of the record of those proceedings.

60 The phrase "any other document in circumstances in which the assertion calls for a reply" is listed alongside "pleading" and "statement of case". The *ejusdem generis* principle is a principle of statutory construction "whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character". This is determined by identifying the "genus" or common thread that runs through all the items in the list that includes the disputed term: *Public Prosecutor v Lam Leng Hung and others* [2018] 1 SLR 659 at [105]–[121]. The common thread between a "pleading" and "statement of case" is that both documents involve a *substantive participation* in the arbitral or legal proceedings. Therefore, applying the *ejusdem generis* principle of statutory interpretation, "any other document in circumstances in which the assertion calls for a reply" should be interpreted consistently with "pleading" and "statement of case" such that it must refer to a document made in or for an arbitral or legal proceeding, which involves a participation in the arbitral or legal proceeding and which is part of the record of that proceeding.

61 The question in the present case was whether a notice of arbitration ("NOA") falls within the term "any other document in circumstances in which the assertion calls for a reply", since an NOA is not a "pleading" or "statement of case". While Art 7(2) of the 1985 Model Law does not expressly include NOAs within its ambit, one can readily accept that an NOA falls within the meaning of "any other document" under s 4(6) of the AA, since an NOA properly commences arbitral proceedings by formally requesting for the parties' dispute to be referred to arbitration: see Nandakumar Ponniya and Michelle Lee, "Commencement of Arbitration" in *Arbitration in Singapore: A Practical Guide* (Sundaresh Menon CJ *et al* eds) (Sweet & Maxwell, 2nd Ed, 2018) ("*Arbitration in Singapore*") at paras 9.026–9.033. The NOA typically sets out the identity of the respondent(s), a brief description of the dispute and also asserts and identifies the arbitration agreement between the parties. It is a document filed for an arbitral proceeding and forms part of the record of those proceedings. In practice, the NOA is an important document as it demarcates generally the scope of the matters that the claimant has referred for resolution by arbitration. Having said that, the precise nature and scope of the disputes referred to the arbitral tribunal for adjudication will be defined by the pleadings filed by the parties: see *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [31]–[33].

62 However, this is only the initial part of the analysis. The more pertinent question as to whether s 4(6) of the AA would operate is whether there was a response to the "document" and whether, viewed objectively in the circumstances of the case, one would expect that response to answer the assertion in the "document" that an arbitration agreement exists. If the answer is that one would expect the response to deal with the assertion of the existence of an arbitration agreement, and there is no denial of that assertion, then s 4(6) would apply. To be clear, there is no duty on a party to respond to an NOA if

it takes the position that there is no arbitration agreement: *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [73]–[76]. However, *if* there is in fact a response, and that response evinces an intent to participate in the arbitration, and does not object to the assertion of the existence of the arbitration agreement in the NOA, then my view is that s 4(6) of the AA would operate to deem an "effective arbitration agreement". If, on the other hand, the respondent does not respond to the NOA at all, then s 4(6) of the AA would not apply.

63 As such, in my view, "any other document in circumstances in which the assertion calls for a reply" should have the narrower interpretation stated at [59] above, *ie*, only documents made by a party pursuant to that party's substantive participation in the arbitral or legal proceeding and which are part of the record of those proceedings, because this interpretation better furthers the purpose of s 4(6) of the AA. Hence, there should be no difficulty in accepting that an NOA can fall within the ambit of "any other document".

Is s 4(6) satisfied in this case?

64 Bearing in mind the views set out above, I found that s 4(6) was satisfied in this case. This is because, contrary to the plaintiffs' submission (at [22(a)] above), which I found to be contrived, the plaintiffs made a clear assertion in the 1st NOA that there existed an arbitration agreement between the parties. The defendant did not disagree in its 12 separate responses to the 1st NOA that there was an agreement to arbitrate. The parties' disagreement was whether the SIAC Rules would apply and whether the SIAC would administer the arbitration. In my judgment, the operation of s 4(6) of the AA would deem the existence of an "effective arbitration agreement" between the parties given the Defendant's Responses to the plaintiffs' 1st NOA.

What happens when an "effective arbitration agreement" is deemed?

65 Given that s 4(6) of the AA applied, the next question is what is meant by the deeming of an "effective arbitration agreement" between the parties? Does it merely satisfy the writing requirement under s 4(3) of the AA (as is the position under Art 7(2) of the 1985 Model Law), or does it deem an effective arbitration agreement for all intents and purposes that satisfies *both* ss 4(1) and 4(3) of the AA? This issue was the subject of some contention between the parties at the hearing of the RAs. The plaintiffs submitted that the effect of s 4(6) of the AA being applicable merely satisfies the writing requirement under s 4(3). On the other hand, the defendant submitted that s 4(6) deems an effective arbitration agreement that satisfies both ss 4(1) and 4(3). In other words, according to the defendant, quite apart from deeming the arbitration agreement to be in writing, it creates the fiction that there exists an arbitration agreement between the parties, even where none actually existed in reality. I did not have to definitively resolve this question to decide RA 112 because I found that the parties had in fact concluded an arbitration agreement between them through their conduct and words, and hence s 4(1) was satisfied quite independently of s 4(6). Nonetheless, let me express my tentative views on the subject of what is meant by an "effective arbitration agreement".

66 There did not seem to be a consistent position in the academic texts on this issue. Some authors take the position that s 4(6) only satisfies the writing requirement in s 4(3), but it was not explained in these publications as to why this view is taken. For instance, it is stated in Nish Shetty, "The Arbitration Agreement" in *Arbitration in Singapore* at para 7.013 that s 4(6) of the AA is a scenario where an arbitration agreement "is considered to be in writing". Similarly, Leslie KH Chew, *Singapore Arbitration Handbook: Arbitration Act (Cap 10), International Arbitration Act (Cap 143A)* (LexisNexis, 2003) at p 12

states that the effect of s 4(6) of the AA (then s 4(4)) is that "[t]he requirement for the arbitration agreement to be 'in writing' is expressly dispensed with". In Charles Lim Aeng Cheng and Chiu Hse Yu, *Review of Arbitration Laws* (2001) at p 4, the Attorney-General's Chambers' Law Reform and Revision Division stated that "Article 7 of the [1985 Model Law] is adopted in the [Arbitration Bill 2001]" and that the "requirement for writing could also be waived if the existence of such an agreement was alleged and not denied by the other in their exchange of statements of claim and defence following the commencement of arbitral proceedings".

67 On the other hand, in David Joseph QC and David Foxton QC, *Singapore International Arbitration: Law and Practice* (LexisNexis, 2018) at para 3.29, it is stated that an arbitration agreement is "deemed to exist" if s 4(6) of the AA is satisfied. This suggests that s 4(6) satisfies not only s 4(3) but also s 4(1) of the AA.

68 Given the lack of analysis in the academic texts on the differences between the text of s 4(6) of the AA and Art 7(2) of the 1985 Model Law, I considered the effect of s 4(6) of the AA from first principles. Under Art 7(2) (and Art 7(5) of the 2006 Model Law), it is explicitly stated that the purpose of the deeming provision is to satisfy the writing requirement for the arbitration agreement. However, when Parliament enacted s 4(6) of the AA (then s 4(4)), for reasons which are unexplained in the Explanatory Statement to the Arbitration Bill 2001, and at the second reading or the debate that followed, the drafters chose not to follow the words in Art 7(2) exactly. The words "[a]n [arbitration] agreement is in writing" were omitted from s 4(6) of the AA. Instead, the words "there shall be deemed to be an effective arbitration agreement" are used in the text of s 4(6). *Prima facie*, this suggests that a different outcome was intended.

69 To hold otherwise, one would have to conclude that "effective" is to be equated to the words "in writing". On a plain textual reading of the word "effective", it conveys more than just that. "Effective arbitration agreement" suggests an arbitration agreement that is valid, complete and enforceable. It bears reiterating that statutory interpretation, while purposive, must still accord primacy to the text, and extraneous material should not contradict the express text of the provision except in very limited circumstances: see *Tan Cheng Bock* at [50] (see [48] above).

70 As such, my tentative view is that there does not need to be a pre-existing arbitration agreement before s 4(6) can operate. When s 4(6) applies, Parliament must have intended that the agreement to arbitrate is deemed to be formed *during* the process of filing the statement of case/pleading/other document containing the assertion of the existence of the arbitration agreement, and the statement of defence or response wherein the respondent does not deny the assertion of the arbitration agreement. This also coheres with the intent of s 4(6) of the AA, which I find must be to deal with "submission-type" situations. In other words, if parties submit to arbitration by participation in the process without reserving their rights as to the lack of an arbitration agreement, it must be taken to be that the parties have, through their conduct, concluded an arbitration agreement. It would be abhorrent in such a situation if one party can subsequently withdraw from the process by raising the issue of the lack of an actual arbitration agreement. In my view, s 4(6) creates the legal fiction that there is an existing arbitration agreement through that assertion and non-denial in that arbitral or legal proceeding, even though, as a matter of contract law, the exchanges *might* not strictly amount to an unequivocal offer and acceptance and thus a contract to arbitrate the disputes.

71 In fact, it is arguable that a closer scrutiny of Art 7(2) and Art 7(5) of the 1985 and 2006 Model Law respectively would show that this is also how it is meant to operate. As aforementioned, the Working Group explained that one of the reasons it chose to retain the deeming provision in Art 7(2) of the 1985 Model Law in identical terms in the 2006 Model Law (as Art 7(5)) was because the deeming provision is the *only* provision that provides a "*positive presumption of the existence* of an arbitration agreement, in the absence of material evidence" [emphasis added] (see [53] above). When the deeming provision is viewed practically, rather than theoretically, it is perhaps easy to understand why such a "positive presumption" flows by virtue of Art 7(5) of the 2006 Model Law: if a *written* arbitration agreement is deemed to exist, that necessarily means that the *logical prerequisite* to such a deemed written arbitration agreement – the arbitration agreement itself – must also, by some legal fiction, be deemed to exist. Thus, while not explicitly spelt out in this way, the deeming provision in Art 7(2) of the 1985 Model Law (and Art 7(5) of the 2006 Model Law) arguably encapsulates both the written requirement and the arbitration agreement requirement – it deems a fully "effective" arbitration agreement. This explains the Working Group's comments as just highlighted. When seen in this light, an interpretation of s 4(6) of the AA that its fulfilment would satisfy not only s 4(3) but also s 4(1) of the AA is in fact consistent with Art 7 of the Model Law.

72 Finally, the question might also arise as to whether the deeming of an effective arbitration agreement pursuant to s 4(6) of the AA creates an arbitration agreement that binds the parties even outside of the specific arbitral/legal proceedings in which the assertion and non-denial of the existence of the arbitration agreement was made. For instance, in this case, if an effective arbitration agreement is deemed after the defendant did not deny, in its responses, the plaintiffs' assertion in the 1st NOA that there existed an

arbitration agreement, does the arbitration agreement bind the parties outside of this first attempted arbitration, *eg*, in the second attempted arbitration? Given my view that s 4(6) does not merely satisfy the writing requirement under s 4(3) of the AA, but in fact *deems* a fully effective arbitration agreement, both formally and substantively, I think that the answer to this question must be yes. Section 4(6) states that an "effective arbitration agreement as between the parties to the proceedings" is deemed. Section 4(6) does not state that the arbitration agreement is only deemed "for" or "in" the proceedings. This conclusion would also be consistent with the deeming provision in Art 7(2) of the 1985 Model Law (and Art 7(5) of the 2006 Model Law), since that provision does not confine its effect to the specific arbitral/legal proceedings in which the assertion and non-denial of the existence of an arbitration agreement was made.

Was the arbitration agreement vitiated by mistake?

73 I now turn to the issue of mistake. The plaintiffs submitted that, if any agreement to arbitrate had been reached, such agreement arose pursuant to the parties' mistaken belief that Clause 20A.1 was a valid and binding arbitration clause, and that such a purported agreement should be set aside.

74 It first bears highlighting that, while it was evident that the plaintiffs were not relying on the doctrine of unilateral mistake, the plaintiffs were not clear as to whether they were relying on the doctrine of common or mutual mistake. In a common mistake, the parties are mistaken as to the basis upon which they contracted: *Olivine Capital Pte Ltd and another v Chia Chin Yan and another matter* [2014] 2 SLR 1371 at [62]. In other words, in a common mistake, both parties make the same mistake. In a mutual mistake, the parties misunderstand each other and are at cross-purposes: *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 at [33]. At certain

points of the plaintiffs' written submissions, the plaintiffs stated that the doctrine of "common mistake" applied in this case.[20] At another point, however, the plaintiffs submitted that the parties had a "fundamental mutual mistake" as to the meaning of Clause 20A.1.[21] Nevertheless, for reasons which I shall explain below, I was satisfied that neither doctrine was satisfied in this case.

75 The plaintiffs relied on *Dyna-Jet* at [177],[22] where Vinodh Coomaraswamy J observed that:

> Vitiating factors recognised under the proper law of the arbitration agreement, or its putative proper law, will render an arbitration agreement devoid of legal effect. Prof Gary Born in *International Commercial Arbitration* at p 841 observes that typical examples of defences rendering an arbitration agreement "null and void" include fraud or fraudulent inducement, unconscionability, illegality and mistake. A controversial issue is whether the term "null and void" encompasses a putative arbitration agreement which never in fact came into existence as a result of defects in formation or consent, as opposed to an actual arbitration agreement which did come into existence but for some other reason is vitiated or vulnerable to vitiation. I need say nothing further on that controversy since it does not arise in the case before me.

76 I noted that Coomaraswamy J made those observations in the context of the issue of whether the arbitration agreement in that case was "null and void" within the meaning of s 6(2) of the IAA, which provides that, where s 6(1) of the IAA is satisfied, the court shall stay proceedings "unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed." While s 4 of the AA does not have a similar provision, I see no

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20 Plaintiff's written submissions dated 20 July 2020 ("PWS") at [95] and [98].

21 PWS at [102].

22 PWS at [98].

reason in principle why the doctrine of mistake cannot apply, in appropriate cases, to vitiate an arbitration agreement.

77 The plaintiffs relied on the case of *Altco Ltd v Sutherland* [1971] 2 Lloyd's Rep 515 ("*Altco*"), which was decided by the English High Court.[23] In that case, the parties submitted their dispute to arbitration on a mistaken belief that their contract – the "Customers Agreement" – contained an arbitration clause, even though the pertinent dispute resolution clause actually stated that (see *Altco* at 516):

> This agreement shall be governed by the laws of [England] and any controversy arising out of it or its alleged breach *will be settled by the competent courts* of [London] … [emphasis added]

78 The foregoing clause was clearly not an arbitration clause. After the parties had fully participated in arbitration and an arbitral award had been made, the defendant applied to the English High Court to set aside the arbitral award. Donaldson J (as he then was) allowed the application. First, Donaldson J found that the parties had misconstrued the Customers Agreement, since the pertinent clause highlighted above showed that the dispute should have been referred to the courts rather than arbitration. Second, the parties did not reach a separate *ad hoc* agreement to arbitrate. Third, even if there had been such an independent *ad hoc* agreement to arbitrate, this agreement was also vitiated by mutual mistake since it was linked to the pre-existing purported arbitration agreement (see *Altco* at 519–520):

> Then, of course, I have had to consider whether there might not have been some *ad hoc* agreement made perhaps by conduct. It is perfectly true that such an agreement would be a parol agreement to which the Arbitration Act, 1950, would not apply. But I have come to the conclusion that there was no such

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[23] PWS at [99]–[103].

> agreement. What the parties were both doing was conducting themselves on the basis of a mutual mistake that there had already been an agreement. Neither party was making an agreement. Even if I were wrong about that, I think that the pre-existing agreement was so fundamental to their actions that if anything they did subsequently can be construed as making another agreement it is vitiated by the fundamental mutual mistake as to the position in relation to the customer agreement.

79 The plaintiffs submitted that the present facts were analogous to *Altco*, and that any independent *ad hoc* agreement to arbitrate should be vitiated by the parties' fundamental mutual mistake as to the position in relation to Clause 20A.1.

80 *Altco* has been criticised in Gary B. Born, *International Commercial Arbitration*, vol I (Wolters Kluwer, 2nd Ed, 2014) at p 808 ("*Born*"):

> … Under these authorities, a party's tacit acceptance of its counterparty's initiation of arbitration, through participation in the arbitral proceedings without raising a jurisdictional objection, will generally provide the basis for a valid agreement to arbitrate.
>
> A contrary approach was suggested by [*Altco*], which required inquiry into 'mistake' as to a party's obligation to arbitrate …
>
> …
>
> This analysis is contrary to that reflected in the UNCITRAL Model Law and most other national legal systems. It has also been emphatically rejected by subsequent, well-reasoned English authority [citing *Furness Withy Pty Ltd v Metal Distrib. Ltd, The Amazonia* [1990] 1 Lloyd's Rep 236 at 243]:
>
> > 'There are enough hazards in the process of obtaining and enforcing an arbitral award without the additional prospect that the respondent, having taken part all along, without a murmur of protest, may at the end argue that there never was an arbitration agreement in the first place. Nor would I wish him to be allowed to do so half way through when time has elapsed and money has been spent on pleadings, discovery and such like. The rule ought to be that if a person wishes to preserve his rights by taking part in an arbitration under protest, he must make his objection clear at the start – or at least

> at a very early stage. Otherwise, he ought to be bound. Practitioners have acted on that view of the law for many years.'
>
> This analysis is consistent with approaches in other jurisdictions. It also reflects notions of estoppel, as distinguished from pure contract analysis, which subject a party to an agreement to arbitrate, regardless of its subjective intentions, based on its objective conduct.

81 Leaving aside such criticism, I found that there were some important differences between the facts of *Altco* (see [77] above) and those in this case. First, unlike in *Altco*, the plaintiffs had not proven to me that the parties in this case were labouring under a mistaken belief that Clause 20A.1 is an arbitration agreement.

(a) The plaintiffs started the first arbitration on the basis that Clause 20A.1 is an arbitration agreement. That was what was stated in the 1st NOA. However, there was no evidence before me that this was due to a misapprehension or mistake as to the effect of Clause 20A.1 which operated on the minds of the plaintiffs. It might very well have been a considered decision on the part of the plaintiffs to assert that Clause 20A.1 is an arbitration clause, so as to be able to launch an arbitration. This appears to be a distinct possibility, given the plaintiffs' former solicitors' apparent eagerness to emphasise in their correspondence with SIAC that the defendant's solicitors' responses did not deny that there was a valid arbitration agreement between the parties. But, later, the plaintiffs evidently came to a different view as to the desirability of resolving the dispute with the defendant through arbitration. This might have been due to new legal advice, since the plaintiffs only abandoned their second attempted arbitration after they changed solicitors (see [17] above).

(b) Given the state of the evidence, I granted the plaintiffs an opportunity to file a further affidavit for the RAs to explain exactly what the parties' mistake was. But, the first plaintiff, who filed the further affidavit on behalf of the plaintiffs, did not even attest in that further affidavit that *the plaintiffs* were mistaken about the agreement to arbitrate the parties' disputes regarding the SPAs. All he stated was that the plaintiffs' *former solicitors* were mistaken that Clause 20A.1 is an arbitration agreement.[24] In his affidavit, the first plaintiff also did not go further to say that the plaintiffs were given advice by their former solicitors about the effect of Clause 20A.1, what that advice was, or what exactly operated on the minds of the plaintiffs when they started the first arbitration.

(c) There was also no evidence that *the defendant* was mistaken as to the effect of Clause 20A.1. While the defendant took the position in these proceedings that Clause 20A.1 is an arbitration agreement, it does not necessarily follow that they were mistaken as to the effect of that clause. The defendant might well have been of the view that Clause 20A.1 is, on balance, *probably* not an arbitration agreement, but chose to adopt the contrary position in these proceedings because it was *arguable* that the clause might be found to be an arbitration agreement. There was simply no evidence before me to point either way.

82 That I had found that Clause 20A.1 is not an arbitration agreement did not *ipso facto* mean that *the parties* were mistaken as to its legal effect. As explained, the parties themselves might not have been mistaken about the true

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24 Cheung's 2nd Affidavit at [7].

effect of Clause 20A.1 but, despite this, still decided to proceed, for reasons best known to themselves, as though the clause constituted an arbitration agreement. The plaintiffs did not adduce evidence to persuade me either way. As such, unlike in *Altco*, I was unable to conclude that there was any operative mistake on either the plaintiffs' or the defendant's part as to the effect of Clause 20A.1.

83 Second, the plaintiffs had also not demonstrated to me that the parties were labouring under a mistake that there was a separate, broader agreement to arbitrate the dispute arising under the SPAs on an *ad hoc* basis. As mentioned at [11] above, in the 2nd NOA, the plaintiffs effectively asserted that, apart from Clause 20A.1, there was an agreement to arbitrate the disputes arising from the SPAs on an *ad hoc* basis. This broader agreement between the plaintiffs and the defendant to arbitrate their disputes regarding the SPAs was formed during and through their conduct and correspondence during the first arbitration before it was terminated. The plaintiffs acted on this when they started the second arbitration. So, unlike in *Altco*, where the parties proceeded straight to arbitration without a course of written correspondence detailing at length the parties' positions on the appropriate dispute resolution process, there was clear evidence in this case, from the parties' lengthy correspondence, that the parties agreed, quite separately from whatever may be the proper interpretation of Clause 20A.1, to arbitrate their disputes on an *ad hoc* basis. That being the case, it is this broader agreement that must be shown to be vitiated by reason of mistake. However, there was no affidavit evidence before me to show that this consensus was affected by any mistake on the part of either the plaintiffs or the defendant. The first plaintiff did not attest that the plaintiffs only proceeded to assert the existence of an agreement to arbitrate on an *ad hoc* basis because they were mistaken as to the effect of Clause 20A.1. In my view, the parties were always *ad idem* that the disputes between them regarding the SPAs should be submitted to arbitration. There was no mistake in that regard.

84 As such, I found that the arbitration agreement concluded by the parties was not vitiated by common or mutual mistake.

Were the plaintiffs estopped from resiling from the agreement to arbitrate?

85 Since I had already found that there was a valid agreement to arbitrate between the parties, there was no need for me to decide if the plaintiffs were estopped from taking the position that there was no valid arbitration agreement. It suffices for present purposes for me to observe that I had difficulty accepting the defendant's estoppel argument on the facts of this case. The defendant relied on *BXH v BXI* [2020] 3 SLR 1368 ("*BXH v BXI*") at [109]–[110] to submit that a party may be estopped from denying the existence of an arbitration agreement.[25]

86 The problem with the defendant's argument on estoppel was the fact that there was no reliance or detriment by the defendant in this case, and reliance and detriment are two of the three fundamental requirements for any estoppel to arise (the other requirement being a representation by the person against whom the estoppel is sought to be raised): see *The "Bunga Melati 5"* [2016] 2 SLR 1114 at [12]. While the defendant referred me to *BXH v BXI*, that decision in fact reiterates that the requirements of reliance and detriment are necessary, since the High Court in that case found (at [109]) that:

> … It makes no difference in the present case whether the statements confirming the continuation of the Distributor Agreement in the preamble to the Assignment and Novation Agreement and in the Debt Transfer Agreement are interpreted as being legally binding terms which both parties are precluded as a matter of contract from denying or as an extrinsic state of affairs which the defendant acted upon. Either characterisation

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25 Defendant's skeletal submissions dated 20 July 2020 ("DSS") at [79].

> leads to the conclusion that the plaintiff is estopped from denying that the Distributor Agreement's terms continued to bind it after 26 December 2012. The defendant supplied goods to the plaintiff in 2013 and 2014 on the basis that the parties continued to be bound by the terms set out in the Distributor Agreement. *The plaintiff accepted those goods*. It would be unconscionable for the plaintiff to assert now, in a claim by the defendant on unpaid invoices for those goods, *that such reliance was mistaken*. [emphasis added]

87 On our facts, the defendant submitted that the plaintiffs represented that there was an arbitration agreement in the 1st and 2nd NOAs, and there was detrimental reliance on the defendant's part as it responded to the two NOAs and incurred considerable time and cost in doing so.[26] I found this submission to be misconceived. For there to be detrimental reliance, the party must act in a manner to *give effect* to the representation made. For instance, if purchaser A tells seller B that a contract of sale between them would not expire after its contractually stipulated expiry date, and seller B then prepares and sends the goods pursuant to this contract of sale after the aforesaid expiry date, it would then be unconscionable for purchaser A to resile from his earlier representation because seller B had already acted on and given effect to the representation by duly sending the goods pursuant to what would otherwise have been an expired contract. Those were the facts of *BXH v BXI*, which was why an estoppel arose in that case.

88 On the other hand, there is no detrimental reliance if the party is merely *responding* to the representation made. This was the situation in this case, because all the defendant did was to respond to the plaintiffs' assertions of an arbitration agreement by pointing out that, although there was an agreement to arbitrate, the parties had not agreed to arbitration under the SIAC rules and/or

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26 DSS at [80].

SIAC acting as the administering arbitral institution in the case of the 1st NOA, and to insist on 12 separate arbitrations in the case of the 2nd NOA. Such responses cannot qualify as detrimental reliance on any representation. In any event, I failed to understand how there could be any reliance when it was the defendant's own case all along that the matter should proceed to arbitration. That being so, the defendant's position did not change as a result of the plaintiffs' "representations" that it wanted to arbitrate the disputes.

89 As such, I did not find that an estoppel arose in this case.

Should the court exercise its discretion not to stay Suit 204?

90 The next issue is whether the Court should nonetheless exercise its discretion not to stay Suit 204 in favour of arbitration. The plaintiffs outlined four main points to submit that a stay should be refused in this case. First, the defendant's conduct was "reprehensible" because the defendant continuously objected to the plaintiffs' previous attempts at arbitration on "technical" points, only to now seek to compel the parties to arbitrate the dispute. Second, there was as yet still no agreement on how the arbitration was to be conducted, which meant that the defendant could continue to stymie the arbitral process by simply refusing to agree to any proposal made to move the arbitration proceedings forward. Third, the remedy sought by the plaintiffs is rescission of all their respective SPAs plus damages for all costs incurred by them in respect of their respective purchases, and the Singapore High Court should adjudicate the dispute because enforcement of any successful arbitral award via court proceedings would be a long and costly process, since it is not likely that the defendant would comply voluntarily with an arbitral award against it. Fourth, there is another action against the defendant by two other purchasers of units in the Mall in High Court Suit No 285 of 2020 ("Suit 285"). Staying Suit 204

would mean that, in respect of what is essentially the same dispute, one set of claimants are compelled to arbitrate the dispute while the other would have their dispute heard by the Courts. This, it was submitted, was not desirable.

91 On the other hand, the defendant submitted that a court should only refuse a stay under s 6(2) of the AA in exceptional cases, and this was not such a case. By giving effect to the parties' freedom to contract and ordering a stay, the court would be showing that it does not condone the plaintiffs "vacillating between first invoking arbitration … and now attempting to disavow their previous actions."[27] The plaintiffs have not acted in good faith, and the plaintiffs have also not compensated the defendant for its wasted expenses for the two abortive arbitrations.

92 The law is clear that the court's discretion to refuse a stay under s 6(1) of the AA must be exercised sparingly and in a principled way, and that a stay would only be denied in exceptional circumstances: see, *eg*, *Sim Chay Koon and others v NTUC Income Insurance Co-operative Ltd* [2016] 2 SLR 871 ("*Sim Chay Koon*") at [7]; *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong and another* [2016] 3 SLR 431 at [23]. I found that the present circumstances were not sufficiently exceptional for me to refuse a stay. I turn to the grounds put forward by the plaintiffs.

93 First, the plaintiffs' submission that the defendant's conduct was "reprehensible" did not take them far. It was, to a large extent, unfair to call the defendant's conduct "reprehensible" simply because it did not agree with the plaintiffs in the first and second arbitrations that the SIAC should administer the

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27 DSS at [107].

arbitration(s), that the SIAC Rules should apply and/or that the arbitrations should all be consolidated – the defendant was not obliged to agree to these proposals *in the first place*. Furthermore, there was some sense of irony in that characterisation of the defendant's conduct, because it was *the plaintiffs* who were seeking to resile from *their* prior position (that the dispute should be resolved by arbitration) in these proceedings, not the defendant. Not only that, the defendant had expended irrecoverable costs in relation to both the abortive arbitrations.

94 Second, the fact that there was thus far no agreement as to the details of how the arbitration should be conducted was certainly not a factor that weighed against granting a stay. It is not uncommon (though it is not ideal) that many arbitration agreements do not contain these details. If a stay is to be refused every time, for example, the procedure for the conduct of the arbitration has not been agreed, then most stays would have to be refused under s 6(2) of the AA. That is not the intent of s 6(2). In any event, as I highlight at [101] below, in the course of the hearing of the RAs, the defendant had shown its willingness to cooperate and had proposed some terms for the conduct of the arbitration. So, one could say that the ball is now in the plaintiffs' court.

95 Third, contrary to the plaintiffs' insinuation otherwise,[28] the remedies sought by the plaintiffs – rescission and damages – can be granted by an arbitral tribunal. For instance, in *Gutnick and another v Indian Farmers Fertiliser Cooperative Ltd and another* [2016] VSCA 5, the Victorian Court of Appeal in Australia upheld an arbitral award which declared certain agreements involving the sale of shares to be rescinded and ordered the return of the purchase price

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28 PWS at [126].

with interests and costs. As for the plaintiffs' submission that arbitration might be more costly, this argument was, as rightly pointed out by the defendant,[29] roundly rejected by the Court of Appeal in *Sim Chay Koon* at [10(a)]:

> In our judgment, it is firstly not a legitimate ground to say that arbitration will be more costly. Even if true, the parties may be taken to have already factored that when they nonetheless chose to arbitrate their disputes. But moreover, we actually have no way knowing if it will or will not be more expensive to arbitrate this matter. As we observed during Mr Choo's arguments, we expect and would encourage the respondent to adopt measures to control costs in the interests of all the parties.

96 Finally, I found that there is no risk of multiplicity of proceedings. Suit 285 concerns a separate claim by different plaintiffs against the defendant. There was not even evidence before me as to whether the claims brought against the defendant in that suit are the same as in this Suit 204. As such, I found Suit 285 to be immaterial.

97 For the reasons set out above, I agreed with the AR that the court should exercise its discretion to stay Suit 204.

Costs of Summons No 1422

98 For completeness, I highlight that, in RA 112, the plaintiffs also appealed against the AR's decision that the plaintiffs pay the defendant the costs of SUM 1422 fixed at $8,000 plus reasonable disbursements. The plaintiffs submitted that the costs of SUM 1422 should be apportioned equally between the plaintiffs and the defendant. The defendant submitted that there is no reason to disturb the AR's costs order since I had upheld her decision on the merits.

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29 DSS at [115].

99 After considering the parties' submissions, I held that the costs order made by the AR should be allowed to stand. It is trite that costs are in the discretion of the court and costs should generally follow the event. An appellate court will not lightly disturb a lower court's discretionary decision as to the appropriate costs order unless the discretion was exercised manifestly wrongly or on wrong principles: see *Tullio Planeta v Maoro Andrea G* [1994] 2 SLR(R) 501 at [22] and [24].

100 The AR exercised her discretion to award costs to the defendant given the outcome of the stay application in SUM 1422. Given that the defendant prevailed, the AR's decision on costs was quite obviously not one that was manifestly wrong. I also did not think that her decision could be said to have proceeded on some wrong principle, or was based on some irrelevant considerations, or that there was a failure to take into account relevant considerations. As such, I did not disturb the costs order made by the AR below.

Conclusion

101 For the above reasons, I dismissed both RAs 111 and 112. For completeness, I highlight that, in the course of the hearing of these RAs, the defendant confirmed, through its counsel, that it was agreeable to resolving the disputes with the plaintiffs *in a single arbitration before a tribunal of three arbitrators and that the SIAC Rules will apply to the arbitration*. In my view, which I informed counsel for the plaintiffs at the conclusion of the hearing, these proposals for the conduct of the arbitration are sensible and merit serious consideration.

Ang Cheng Hock
Judge of the High Court

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