IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 251

Originating Summons No 496 of 2020
(Summons No 2633 of 2020)
(Registrar's Appeal No 185 of 2020)

Between

Silverlink Resorts Limited

… *Plaintiff*

And

MS First Capital Insurance Limited

… *Defendant*

GROUNDS OF DECISION

[Arbitration] — [Agreement] — [Scope] — [Carve outs]
[Arbitration] — [Agreement] — [Interpretation]
[Arbitration] — [Stay of court proceedings] — [Mandatory stay under International Arbitration Act]
[Arbitration] — [Stay of court proceedings] — [Mandatory stay under International Arbitration Act] — [International Arbitration Act (Cap 143A, 2002 Rev Ed)]

TABLE OF CONTENTS

INTRODUCTION.....1

BACKGROUND 2

THE ISSUE.....5

THE APPLICABLE LEGAL PRINCIPLES 8

APPLYING THE LEGAL PRINCIPLES TO THE PRESENT CASE....18

CONCLUSION.....21

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Silverlink Resorts Ltd
v
MS First Capital Insurance Ltd

[2020] SGHC 251

High Court — Originating Summons No 496 of 2020 (Summons No 2633 of 2020) (Registrar's Appeal No 185 of 2020)
Chua Lee Ming J
3, 10 September 2020

16 November 2020

Chua Lee Ming J:

Introduction

1 Businessmen should be familiar enough with arbitration by now to realise that arbitration is an *alternative* mechanism for dispute resolution. One cannot have recourse to both arbitration *and* the court for the same dispute. It is possible that parties may intend some types of disputes arising from an agreement to be resolved by arbitration and others by litigation in court. Obviously, such clauses need to be very carefully thought through and drafted. The irony is not lost; such dispute resolution clauses tend to lend themselves to dispute over which dispute resolution mechanism should apply. The present case is one such example.

2 The plaintiff, Silverlink Resorts Limited, is one of the insured parties under an Industrial All Risks Policy ("the Policy") issued by the defendant, MS First Capital Insurance Limited. The consequences of the COVID-19 pandemic led to the plaintiff making a claim under the Policy. The defendant disputed the claim and the plaintiff filed the present Originating Summons, seeking, among other things, a declaration that the plaintiff has a valid claim under the Policy.

3 By Summons No 2633 of 2020 ("SUM 2633"), the defendant applied to stay the proceedings in this Originating Summons in favour of arbitration, pursuant to s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). The learned Assistant Registrar ("AR") dismissed the application. I heard and dismissed the defendant's appeal against the AR's decision.

Background

4 The plaintiff is a company incorporated in the British Virgin Islands and is the ultimate holding company of a group of companies known as the "Aman Group" that owns and manages luxury hotels in various parts of the world, including the Amanpuri resort in Pansea Beach, Phuket, Thailand ("the Amanpuri").

5 The defendant is a company incorporated in Singapore and is in the business of writing and providing non-life insurance.

6 As stated earlier, the plaintiff was one of the insured parties under the Policy issued by the defendant. On 6 September 2019, the plaintiff renewed the Policy to cover the period from 1 July 2019 to 30 June 2020 (both dates

Version No 2: 08 Mar 2021 (16:10 hrs)

inclusive). The Policy covered various properties under the Aman Group, including the Amanpuri.

7 The Policy comprised a Renewal Certificate[1] and a set of terms and conditions.[2] Section I of the terms and conditions was entitled "Material Loss or Damage" and it dealt with damage to properties covered by the Policy. Section II of the terms and conditions was entitled "Business Interruption" and it dealt with interruption of or interference with the businesses covered by the Policy. The terms and conditions also included a set of General Conditions which were applicable to all Sections of the Policy unless specifically stated to the contrary ("the General Conditions").[3]

8 On 2 April 2020, in light of the COVID-19 pandemic, the Governor of the Province of Phuket ordered the closure of all hotels in Phuket. The Amanpuri had to be closed as a result of this order. In addition, the Civil Aviation Authority of Thailand banned all international flights to Thailand.

9 Section II of the Policy contained, among other things, the following provisions:

> CLOSURE BY PUBLIC AUTHORITIES (LIMIT: USD10,000,000)
>
> Loss resulting from interruption or interference with the Business directly or indirectly arising from closure denial of access or evacuation of the whole or part of the Premises by order of a competent public or civil authority due to the operation of a cause of peril not Excluded by this Policy shall be deemed to be a loss resulting from Damage to property used by the insured at the Premises.
>
> …
>
> CONTINGENT BUSINESS INTERRUPTION (LIMIT: 10% OF INSURED VALUES FOR RESPECTIVE LOCATIONS)
>
> This Policy is extended to cover the actual loss sustained and/or Extra Expenses incurred by the Insured which the

Version No 2: 08 Mar 2021 (16:10 hrs)

> Insured would have accounted for on an Accruals Basis during the Indemnity Period resulting from:
>
> Direct physical loss or physical damage
>
> OR
>
> Closure by Public Authorities due to perils insured under this Policy but not necessitating direct physical loss or physical damage
>
> to the following specified locations:
>
> a) …
>
> b) Phuket International Airport
> 222 Mai Khao, Thalang, Phuket, Thailand
>
> c) …
>
> …

10 The plaintiff therefore made a claim under the Policy based on the hotel closure order by the Governor of the Province of Phuket and the closure of the Phuket International Airport by the Civil Aviation Authority of Thailand.

11 However, the defendant rejected the plaintiff's claim on the ground that "in order for a claim to be admitted under Section II, a claim must have been made and accepted by Insurers under the corresponding Section I of the [Policy] for material damage loss". It concluded that as "there was no material damage whatsoever to any of the insured properties at the risk premises and/or other interested locations in this instance", the plaintiff's claims were hence not admissible.[4]

12 On 29 May 2020, the plaintiff commenced the present proceedings seeking the following:

> 1. A declaration that under the terms of the [Policy], it is not necessary for the Plaintiff to establish an admissible claim under Section I of the [Policy] for property damage before a

Version No 2: 08 Mar 2021 (16:10 hrs)

> claim may be admitted under Section II of the Policy for business interruption;
>
> 2. Consequently, a declaration that the Plaintiff has a valid clam under the [Policy] for business interruption suffered in respect of [the Amanpuri].

13 On 2 July 2020, the defendant filed SUM 2633 seeking to stay the present proceedings in favour of arbitration.

The issue

14 The defendant's application was made under s 6 of the IAA which states as follows:

> **Enforcement of international arbitration agreement**
>
> **6.**—(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to 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) shall make an order upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.
>
> …

15 It is well established that a court hearing such a stay application should grant a stay in favour of arbitration if the applicant is able to establish a *prima facie* case that:

> (a) there is a valid arbitration agreement between the parties to the court proceedings;

Version No 2: 08 Mar 2021 (16:10 hrs)

(b) the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and

(c) the arbitration agreement is not null and void, inoperative or incapable or being performed.

See *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*") at [63].

16 In the present case, the General Conditions provided for mediation, arbitration as well as the jurisdiction of the courts in Singapore. Clauses 10, 11 and 13 of the General Conditions provided as follows:[5]

> 10. Mediation
>
> (a) In the event of any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof ('the dispute"), arising between the two parties in connection with this Policy, the parties agree to meet in good faith to resolve the dispute before commencing any Arbitration proceedings.
>
> (b) If the dispute is not resolved within twenty one (21) days of commencement of the discussions described in (a) above, the parties agree to attempt to settle the dispute by mediation and to comply with the provisions outlined in (c) below.
>
> (c) The parties will commence the mediation process by agreeing a mediator. Should they be unable to agree the identity of a mediator within fourteen (14) days, or if the mediator agreed upon is unable or unwilling to act, the parties shall unless mutually agreed, use the best practice within the jurisdiction of this Policy to mediate the dispute.
>
> 11. Arbitration
>
> *Any dispute arising out of or in connection with this contract*, including any question regarding its existence, validity or termination, which is not settled pursuant to the Mediation General Condition within sixty (60) days of commencement of

Version No 2: 08 Mar 2021 (16:10 hrs)

> the discussions described in the Mediation General Condition (a) above, shall be referred to arbitration and the parties shall unless otherwise mutually agreed, use the best practice within the jurisdiction of this Policy to have the dispute arbitrated before legal action is commenced.
>
> …
>
> 13. Jurisdiction
>
> Should *any dispute arise between the Insured and the Insurers regarding the interpretation or the application of this Policy* the Insurers will, at the request of the Insured, submit to the jurisdiction of any competent Court in Singapore. Such a dispute shall be determined in accordance with the practical applicable to such Court and in accordance with the laws of Singapore.
>
> [emphasis added]

17 The Renewal Certificate included the following provision:

> Choice of Law and Jurisdiction : In the event of *any dispute over interpretation* of this Policy:
> Law : Singapore
> Jurisdiction : Courts of Singapore
>
> [emphasis added]

18 Clause 11 (the "Arbitration Clause") was expressed to apply to "any dispute arising out of or in connection with" the Policy which was not settled pursuant to cl 10 (the "Mediation Clause"). Clause 13 (the "Jurisdiction Clause") was expressed to apply to "any dispute … regarding the interpretation or the application of" the Policy. The scope of the jurisdiction clause in the Renewal Certificate (the "Renewal Certificate Jurisdiction Clause") was similar to that of the Jurisdiction Clause. On the face of the provisions, there was an overlap between the scope of the Arbitration Clauses on the one hand, and the scope of the Jurisdiction Clause and the Renewal Certificate Jurisdiction Clause on the other.

Version No 2: 08 Mar 2021 (16:10 hrs)

19 I pause to note that the Jurisdiction Clause referred to disputes regarding the "interpretation or the application" of the Policy whereas the Renewal Certificate Jurisdiction Clause referred only to disputes over the "interpretation" of the Policy. I did not think that the omission of the word "application' in the latter made much difference. After all, the application of the Policy would have to depend on its interpretation.

20 The dispute in these proceedings concerned the question whether the plaintiff had to establish an admissible claim for property damage under Section I of the Policy before a claim may be admitted under Section II for business interruption ("the Dispute"). It was clear that the Dispute could fall within the scope of the Arbitration Clause. However, as it related to the interpretation or application of the Policy, it could also fall within the scope of the Jurisdiction Clause.

21 The issue therefore was whether the Arbitration Clause or the Jurisdiction Clause applied to the Dispute. This in turn depended on how the two seemingly conflicting clauses fell to be interpreted.

The applicable legal principles

22 It is by now well settled that in construing an arbitration clause, the court does not adopt a technical approach but construes it based on the presumed intentions of the parties as rational commercial parties: *Tomolugen* at [124], citing *Fiona Trust & Holding Corporation v Privalov* [2007] 2 Lloyd's Rep 267, affirmed by the House of Lords *subnom Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2008] 1 Lloyd's Rep 254 ("*Fiona Trust*"). In this regard, parties are presumed to have "intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by

Version No 2: 08 Mar 2021 (16:10 hrs)

the same tribunal" unless the language shows otherwise: *Fiona Trust* at [13], *per* Lord Hoffmann.

23 Courts have thus taken a generous approach in construing arbitration clauses. As the Court of Appeal put it succinctly in *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 ("*Rals*"), at [32], "[e]ssentially, the rule of construction is that all disputes between parties are assumed to fall within the scope of the arbitration clause unless shown otherwise".

24 The operation of this generous approach is clearly demonstrated by the "*Paul Smith* approach", named after the decision in *Paul Smith Ltd v H&S International Holding Inc* [1991] 2 Lloyd's Rep 127 ("*Paul Smith*"). In that case, the plaintiff sued for unpaid royalties. The licensing agreement provided as follows:

> 13. SETTLEMENT OF DISPUTES If any dispute or difference shall arise between the parties hereto concerning the construction of this Agreement or the rights or liabilities of either party hereunder the parties shall strive to settle the same amicably but if they are unable to do so the dispute or difference shall be adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with those Rules.
>
> 14. LANGUAGE AND LAW This Agreement is written in the English language and shall be interpreted according to English Law. The Courts of England shall have exclusive jurisdiction over it to which jurisdiction the parties hereby submit.

25 On the face of it, the two clauses were inconsistent with each other. The plaintiff argued that the arbitration agreement in cl 13 was not effective as a result of this inconsistency. Steyn J (as he then was) resolved the inconsistency by interpreting cl 14 as applying to the arbitration itself. Disputes under the agreement therefore fell to be decided by arbitration pursuant to cl 13 whilst the

Version No 2: 08 Mar 2021 (16:10 hrs)

jurisdiction clause (cl 14) was interpreted to mean that it provided for the English courts' supervisory jurisdiction over the arbitration. His Honour was thus able to conclude that both cll 13 and 14 were valid and binding.

26 The *Paul Smith* approach has been adopted in Singapore. In *BXH v BXI* [2020] 1 SLR 1043 ("*BXH*"), the agreement contained the following clauses:

> 25.8 This Agreement shall be governed by and interpreted in accordance with the laws of Singapore, except for its rules regarding conflicts of laws. The jurisdiction and venue for any legal action between the parties hereto arising out of or connected with this Agreement, or the Services and Products furnished hereunder, shall be in a court located in Singapore. The 'United Nations Convention on Contracts for the International Sale of Goods' does not apply to this Agreement.
>
> 25.9 Disputes arising out of or in connection with this Agreement shall be finally settled by arbitration which shall be held in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules" then in effect….

27 The High Court noted (at [243]) that a dispute arising out of the agreement cannot obviously be the subject of both litigation and arbitration, and held as follows:

> … The only practical – thought [*sic*] not entirely satisfactory – solution is to adopt the *Paul Smith* approach and hold that the parties intended to resolve substantive disputes in arbitration under cl 25.9 and to resolve disputes arising out of any such arbitration in the Singapore courts in the exercise of their supervisory jurisdiction under cl 25.8.

28 The Court of Appeal agreed with the High Court, noting that "a generous and harmonious interpretation should be given to the purportedly conflicting clauses so as to give effect to the parties' true intention" (at [60]).

Version No 2: 08 Mar 2021 (16:10 hrs)

29 In *Paul Smith* and *BXH*, the arbitration and jurisdiction clauses were, on the face of the clauses, completely at odds with each other and could not co-exist with each other. The *Paul Smith* approach gave a generous interpretation to the arbitration clauses by giving them their full effect whilst the jurisdiction clauses were construed to refer to the court's supervisory jurisdiction over the arbitrations. Such a construction was seen to be preferable to rendering the clauses invalid on the ground that they conflicted with each other.

30 However, it is not the case that the *Paul Smith* approach applies whenever an agreement contains an arbitration clause and a jurisdiction clause. As the Court of Appeal pointed out in *Rals* (at [31]–[32]), there are limits to this generous approach to interpretation and ultimately, it all depends on the intention of the parties, objectively ascertained.

31 Parties to an agreement can decide to have certain types of disputes resolved by arbitration and others by litigation. One obvious reason for doing so is that certain types of disputes may be better suited for arbitration whilst others may be better suited for litigation. *Russell on Arbitration* (Sweet & Maxwell, 24th Ed, 2015) explains as follows (at para 2.038):

> Some contracts provide that particular disputes will be resolved by one form of dispute resolution and other types of dispute by some other method.…Some questions of default such as the failure to pay an instalment due, might be more effectively settled by litigation, whose summary procedures have no direct counterparty in arbitration, whilst valuation and/or technical questions in the same contract might be settled more simply by expert determination. Some clauses distinguish between resolving disputes as to liability, which fall within the arbitration agreement, and those as to damages, which do not. The key issue when dealing with such provisions is to ensure that it is clear precisely which types of disputes fall to be resolved by each mechanism.…

Version No 2: 08 Mar 2021 (16:10 hrs)

32 So long as the arbitration and jurisdiction clauses in an agreement evince the intention of the parties to have different disputes resolved by arbitration and litigation, that intention should be respected and given effect to. In such cases, there is also no reason to apply the *Paul Smith* approach since the arbitration and jurisdiction clauses are not inconsistent with each other; both clauses perform entirely separate functions and are independently enforceable. The key issue in such cases, as pointed out in the above passage, lies in determining the scope of each clause.

33 However, in some cases, the arbitration clause may be expressed to apply to all disputes whilst the jurisdiction clause is expressed to apply to certain specific disputes. In such cases, the courts have resolved the apparent inconsistency by interpreting the jurisdiction clause as having carved out the specific disputes from the scope of the arbitration clause. Three cases illustrate this.

34 In *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] SLR 821 ("*Transocean*"), the parties entered into an offshore drilling contract containing a condition precedent that both parties enter into an escrow agreement for the opening of an escrow account. The escrow agreement required the defendant to deposit an escrow amount into the escrow account. Failure to deposit the escrow moneys by the stipulated date entitled the plaintiff to terminate the drilling contract.

35 Article 25 of the drilling contract contained an arbitration clause, which

Version No 2: 08 Mar 2021 (16:10 hrs)

provided as follows:

> 25.1 Arbitration
>
> The following Dispute Resolution provision shall apply to this Contract.
>
> > (a) Any dispute, controversy or claim arising out of or in relation to or in connection with this Contract … shall be exclusively and finally settled by arbitration …
>
> …

36 However, cl 6.2(a) of the escrow agreement contained a non-exclusive jurisdiction clause, which provided as follows:

> Each of the Parties irrevocably submits to and accepts generally and unconditionally the non-exclusive jurisdiction of the courts and appellate courts of Singapore with respect to any legal action or proceedings which may be brought at any time relating in any way to this Agreement.

37 The defendant subsequently failed to deposit the escrow moneys and the plaintiff commenced an action claiming, *inter alia*, damages for the defendant's breach and/or repudiation of the escrow agreement. The High Court dismissed the defendant's application for a stay in favour of arbitration for the following reasons:

(a) The parties "had intentionally carved the [escrow agreement] out from the [drilling contract] and expressly subjected the former to a non-exclusive jurisdiction clause rather than an arbitration clause" (at [21]).

(b) Although the arbitration clause in the drilling contract referred to disputes arising "in connection with" the drilling contract, it was clear that the arbitration clause was principally concerned with disputes arising out of or in relation to the drilling contract and did not apply to a

Version No 2: 08 Mar 2021 (16:10 hrs)

dispute squarely under the escrow agreement and having at best a tenuous connection with the drilling contract (at [22]).

(c) Even if the escrow agreement was regarded as an extension of the drilling contract or as one with the latter, the jurisdiction clause in the escrow agreement did not purport to deal with any disputes arising out of the drilling contract. It focussed only on claims arising out of the escrow agreement. The jurisdiction clause (which was specific) overrode the arbitration clause (which was general) as the claim arose out of the escrow agreement (at [25]).

38 Although the arbitration clause and the jurisdiction clause were contained in separate agreements, it is clear that the High Court was of the view that even if the two agreements were regarded as one, the jurisdiction clause had carved out claims arising under the escrow agreement from the arbitration clause (see [37(c)] above).

39 In *Seeley International Pty Ltd v Electra Air Conditioning BV* [2008] FCA 29 ("*Seeley*"), an exclusive distribution agreement contained a dispute resolution clause that provided for disputes "between the parties concerning or arising out of this Agreement or its construction, meaning, operation or effect or concerning the rights, duties or liabilities of any party" to be referred to senior management of each party and if they fail to resolve the dispute, to arbitration. However, the clause also provided that "[n]othing in [the clause] prevents a party seeking injunctive or declaratory relief in the case of a material breach or threatened breach of" the agreement. The applicant commenced proceedings claiming declarations concerning the proper construction of the agreement, including a declaration that the respondent was in breach of the agreement. The

Version No 2: 08 Mar 2021 (16:10 hrs)

respondent applied for an order that the proceedings be stayed in favour of arbitration.

40 The Federal Court of Australia dismissed the respondent's stay application. The Court found that the dispute resolution clause had carved out disputes relating to the material or threatened breach of the exclusive distributorship agreement and that the parties' agreement was to treat such disputes differently from the regime for arbitration (at [31]–[32]). The Court noted (at [31]) that the dispute in question concerned what may be a material breach.

41 The Court was also of the view (at [37]) that:

> … it does not flaunt business common sense that the parties, having agreed upon arbitrating their disputes, should nevertheless agree upon an optional alternative dispute resolution process – by way of court proceedings – in certain circumstances. There is no inherent commercial reason why certain disputes where declaratory or injunctive relief is sought should not be agreed to be determined by a court. There is nothing to suggest such resolution would or should be less speedy or less efficacious or more expensive. Particularly where the parties have demonstrated such care in arriving at, and expressing, their bargain, the syntactical and semantic analysis of cl 20 as a whole should not be ignored because it suggests a preserved alternative but limited dispute resolution process by court proceedings. The availability of such access to the courts would not defeat the commercial purpose of the agreement; indeed it may serve it; cf per Kirby J in *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370 at 378. …

42 *Hi-Tech Investments Ltd v World Aviation Systems (Australia) Pty Ltd* [2006] NZHC 1228 ("*Hi-Tech*") involved a commercial building lease which provided for rent to be reviewed as at 1 October 2005. In accordance with the rent review mechanism in the lease, on 27 September 2005, the plaintiff (landlord) notified the defendant (tenant) of the new rent from 1 October 2005. The defendant accepted the increased rent and paid the new rent from 1 October

Version No 2: 08 Mar 2021 (16:10 hrs)

2005. However, in November 2005 and March 2006, the plaintiff claimed increases in rent in respect of two parts of the premises. The defendant disputed the further increases in rent on the basis that the rent review process had concluded with the defendant's acceptance of the increased rent in the 27 September 2005 notice.

43 The lease contained the following clauses:

> 44.1 UNLESS any dispute or difference is resolved by mediation or other agreement, the same shall be submitted to the arbitration of one arbitrator who shall conduct the arbitral proceedings in accordance with the Arbitration Act 1996 and any amendment thereof or any other statutory provision then relating to arbitration.
>
> …
>
> 44.3 The procedures prescribed in this clause shall not prevent the landlord from taking proceedings for the recovery of any rent or other monies payable hereunder which remain unpaid or from exercising the rights and remedies in the event of such default.

44 The High Court of New Zealand observed (at [15]) that there was "no question that it was open to the parties to agree that some disputes will be resolved by arbitration to the exclusion of the Courts, but that others can be resolved in Courts". The Court agreed with the parties (at [16]) that cl 44 was such a hybrid dispute resolution clause. The specific point in dispute in that case was whether cl 44.3 exempted from arbitration all disputes arising on a claim for rent (or other monies payable under the lease) including a determination of what the liability may be. The Court concluded (at [24]) that the jurisdiction clause allowed court proceedings for recovery of rent or other monies for which liability has been established under the lease or (if necessary) by arbitration.

Version No 2: 08 Mar 2021 (16:10 hrs)

45 In *Transocean*, *Seeley* and *Hi-Tech*, the courts resolved the apparent inconsistencies between the jurisdiction and arbitration clauses by giving an interpretation that favoured the jurisdiction clauses. The *Paul Smith* approach (which would have given an interpretation in favour of the arbitration clause) was not applied.

46 I respectfully agree with the carve out approach adopted in *Transocean*, *Seeley* and *Hi-Tech*; it gave effect to the intention of the parties. The jurisdiction clauses in these cases covered specific types of disputes only and were thus narrower in scope than the arbitration clauses. As pointed out in *Transocean* (at [25]), it is a rule of construction that the general should give way to the specific. The jurisdiction clauses evinced the parties' intention to carve out the specific disputes from the arbitration clauses.

47 Further, in my view, where the jurisdiction clause covers specific disputes only, the carve out approach makes sound commercial sense. Applying the *Paul Smith* approach to such cases would result in the jurisdiction clause being interpreted to mean that it provides for the court's supervisory jurisdiction over the arbitration in so far as it *relates to the specific disputes that fall within the scope of the jurisdiction clause*. The question that then arises is which courts would have supervisory jurisdiction over the arbitration with respect to disputes that do not fall within the jurisdiction clause?

48 Absent agreement between the parties, the seat of arbitration will be determined by the arbitral tribunal and the seat will determine the jurisdiction whose courts would exercise supervisory jurisdiction over the arbitration. This means that applying the *Paul Smith* approach could result in the arbitration being subject to the supervisory jurisdiction of different courts depending on

Version No 2: 08 Mar 2021 (16:10 hrs)

whether the issue in dispute falls within the jurisdiction clause or not. The problem would be exacerbated where the arbitration (as it is likely to) involves disputes which fall within the jurisdiction clause as well as disputes which do not. In my view, the parties could not have intended such a chaotic result. It would also be inconsistent with the *Fiona Trust* presumption that parties intend their disputes to be decided by the same tribunal.

Applying the legal principles to the present case

49 The defendant submitted that the *Paul Smith* approach should be applied to give the Jurisdiction Clause a harmonious interpretation, such that the Jurisdiction Clause is interpreted as providing for the Court's supervisory jurisdiction over arbitrations conducted pursuant to the Arbitration Clause. On the other hand, the plaintiff argued that the *Paul Smith* approach was not relevant because the Jurisdiction Clause carved out disputes regarding the interpretation or application of the Policy from the scope of the Arbitration Clause.

50 It bears reminding that this analytical exercise was all about ascertaining the intention of the parties. The question to be answered was whether the parties' intention, objectively ascertained, was for the Jurisdiction Clause to carve out disputes regarding the interpretation or application of the Policy, from the Arbitration Clause.

51 The defendant submitted that the parties could not have intended the Jurisdiction Clause to carve out disputes relating to the interpretation or application of the Policy, from the Arbitration Clause. The defendant argued that this was commercially illogical because it would leave the Arbitration Clause with a very narrow scope. I disagreed with the defendant. The scope of

Version No 2: 08 Mar 2021 (16:10 hrs)

the Jurisdiction Clause did not reduce the scope of the Arbitration Clause to such an extent as would lead to the conclusion that the parties could not have intended the result. As the plaintiff pointed out, the Jurisdiction Clause would not apply to disputes relating to, for example, the quantum of loss or the validity of the Policy (including disputes over whether there has been failure to give full and frank disclosure). Such disputes would fall to be dealt with under the Arbitration Clause if mediation failed.

52 The defendant next referred to the fact that the Arbitration Clause provided that "the parties shall unless otherwise mutually agreed, use the best practice within the jurisdiction of this Policy to *have the dispute arbitrated before legal action is commenced*" [emphasis added]. The defendant argued that the language used showed that the parties clearly agreed to go to court only after their dispute had been arbitrated. The clause seemed somewhat clumsily drafted in this regard but the expression "before legal action is commenced" could only have meant going to court to invoke its supervisory jurisdiction. It could not have meant commencing legal action over the same dispute that had already been adjudicated upon by arbitration.

53 I agreed with the plaintiff that this argument did not support the defendant's case. If the Arbitration Clause had already provided for the court's supervisory jurisdiction, then Jurisdiction Clause would be superfluous if it merely referred to the court's supervisory jurisdiction. This supported the plaintiff's case that the Jurisdiction Clause was not intended to refer only to the court's supervisory role. In construing agreements, the court should strive to give effect to all clauses in a contract: *Grains and Industrial Products Trading Pte Ltd and another v State Bank of India and others* [2019] SGHC 292 at [146].

Version No 2: 08 Mar 2021 (16:10 hrs)

54 The defendant also submitted that the Mediation Clause and the Arbitration Clause showed the parties' intention to resolve disputes through a multi-tiered dispute resolution mechanism. In my view, this submission did not take the defendant's case any further. The question remained whether the parties intended the Jurisdiction Clause to carve out disputes regarding the interpretation or application of the Policy, from the Arbitration Clause (which formed a part of the multi-tiered dispute resolution mechanism).

55 I saw no reason why the carve out approach adopted in *Transocean*, *Seeley* and *Hi-Tech* should not be applied to the present case. In my judgment, the parties' intention, objectively ascertained, was for the Jurisdiction Clause to carve out disputes regarding the interpretation or application of the Policy from the scope of the Arbitration Clause.

56 First, the Jurisdiction Clause did not apply to all disputes; its scope was clearly narrower than that of the Arbitration Clause. The defendant did not contend otherwise. That pointed to the parties' intention being to carve out the specific disputes in the Jurisdiction Clause from the Arbitration Clause.

57 Second, I agreed with the plaintiff that the Renewal Certificate Jurisdiction Clause confirmed the parties' intention that disputes relating to the interpretation of the Policy were to be resolved through court proceedings rather than arbitration.

58 Third, I also agreed with the plaintiff that reserving disputes relating to the interpretation or application of the Policy to be decided by the court made commercial sense because such disputes may be resolved effectively, efficaciously and efficiently through the originating summons procedure. This

Version No 2: 08 Mar 2021 (16:10 hrs)

supported the plaintiff's contention that the Jurisdiction Clause was intended to carve out such disputes from the Arbitration Clause.

59 Fourth, applying the *Paul Smith* approach in the present case would lead to the problems discussed at [47]–[48] above. The parties could not have intended those consequences.

60 I would add that the plaintiff had also submitted that even if the Jurisdiction Clause was inconsistent with the Arbitration Clause, the Renewal Certificate prevailed over the General Conditions, including the Arbitration Clause. I disagreed with this submission. There was nothing in the Renewal Certificate that warranted such a conclusion. At most, the Renewal Certificate Jurisdiction Clause would have merely amended the Jurisdiction Clause by making submission to the jurisdiction of the Courts of Singapore mandatory instead of being at the option of the insured party (as was the case under the Jurisdiction Clause). However, this did not change the analysis above.

Conclusion

61 In conclusion, the Jurisdiction Clause carved out disputes regarding the interpretation or application of the Policy from the scope of the Arbitration Clause. Accordingly, the Dispute did not fall within the scope of the Arbitration Clause and the defendant was therefore not entitled to an order to stay these proceedings in favour of arbitration.

Version No 2: 08 Mar 2021 (16:10 hrs)

62 I therefore dismissed the defendant's appeal. I also ordered that the defendant pay to the plaintiff, the costs of the appeal fixed at $6,000 plus disbursements, to be fixed by me if not agreed.

Chua Lee Ming
Judge

Nair Suresh Sukumara and Yeow Guan Wei, Joel (PK Wong & Nair LLC) for the plaintiff;
Lok Vi Ming *SC,* Lee Sien Liang, Joseph, Pak Waltan and Qabir Singh Sandhu (LVM Law Chambers LLC) for the defendant.

---

1 1st affidavit of Ashish P Kamani filed on 20 July 2020 ("Kamani's 1st Affidavit"), at pp 18–23
2 Kamani's 1st Affidavit, at pp 24–89.
3 Kamani's 1st Affidavit, at pp 79–85.
4 Kamani's 1st Affidavit, at pp 116–118.
5 Kamani's 1st Affidavit, at pp 84 to 85.

Version No 2: 08 Mar 2021 (16:10 hrs)