IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 77

Civil Appeal No 204 of 2020

Between

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

… *Appellants*

And

LVND Investments Pte. Ltd.

… *Respondent*

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

Between

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(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*

JUDGMENT

[Arbitration] — [Agreement]

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Cheung Teck Cheong Richard and others
v
LVND Investments Pte Ltd

[2021] SGCA 77

Court of Appeal — Civil Appeal No 204 of 2020
Sundaresh Menon CJ, Judith Prakash JCA and Steven Chong JCA
8 July 2021

10 August 2021 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 The history of this dispute as well as the exchange of correspondence reveal that both sides were at loggerheads on just about everything concerning the terms of an intended reference to arbitration for the resolution of the disputes between them. In the light of this conduct, a finding that the parties nonetheless made an *ad hoc* arbitration agreement which was independent of a clause in the contract that they had thought (incorrectly) was an arbitration agreement would intuitively appear to be questionable.

2 In *Cheung Teck Cheong Richard and others v LVND Investments Pte Ltd* [2021] SGHC 28 ("the GD"), the High Court judge ("the Judge") explained his decision to affirm the decision of the Assistant Registrar ("the AR") to stay the proceedings in favour of arbitration, finding that there was such an *ad hoc*

arbitration agreement. He also expressed the view in *obiter* that s 4(6) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") could operate to deem the formation of an arbitration agreement even if there was no such pre-existing arbitration agreement.

3 As we have indicated above, we are of the view that the Judge's finding as to the existence of an *ad hoc* arbitration agreement cannot be upheld. This appeal thus raised an interesting point of law as to whether s 4(6) of the AA, if it applied on the instant facts, can be relied upon to deem the existence of an arbitration agreement notwithstanding the court's finding that none existed as a matter of fact. For the reasons set out below, we decide the question in the negative. In our view, for parties who have not denied the existence of an arbitration agreement, s 4(6) of the AA serves the limited purpose of precluding them from relying on the absence of an agreement in writing to challenge the validity of such an arbitration agreement for the purposes of the AA. It cannot be construed to permit the creation or formation of a new arbitration agreement through the operation of its deeming effect.

4 Having set out our views in brief, we turn now to the facts, before elaborating on the reasons for our decision.

Facts

Parties

5 The respondent, LVND Investments Pte Ltd ("the Developer"), is the developer of Macpherson Mall ("the Mall"). The 16 plaintiffs ("the Purchasers") in HC/S 204/2020 ("the Suit") had purchased 12 shop units in the Mall pursuant to 12 separate sale and purchase agreements ("the SPAs") between 2013 and 2016. Of the 16 plaintiffs, nine of them had initially filed the

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present appeal. Pursuant to a consent order entered in CA/SUM 62/2021, a further four plaintiffs – co-owners of their respective units with some of the initial appellants – were added as parties to the appeal. Consequently, of the 16 plaintiffs below, 13 of them are parties to the appeal ("the Appellants"), who purchased a total of nine units under nine SPAs.

Background to the dispute

6 The underlying disputes between the Purchasers and the Developer arise out of allegations that the Developer had made fraudulent misrepresentations and suppressed material facts that induced the Purchasers into purchasing their respective units in the Mall. In particular, the Purchasers allege that the sizes of their units were smaller than the area that each of them had believed it was buying.

The first attempted arbitration

7 When the disputes arose, the Purchasers engaged a law firm (the "Former Solicitors") who advised them to seek recourse through arbitration. The Former Solicitors took the view that cl 20A.1 of the SPAs (which was identical in each SPA) was an arbitration agreement. On 6 May 2019, the Former Solicitors issued a Notice of Arbitration ("the 1st NOA") against the Developer to commence arbitration under the auspices of the Singapore International Arbitration Centre ("SIAC"). The Developer's solicitors, Rajah & Tann Singapore LLP ("R&T"), issued 12 responses, each dated 21 May 2019, objecting to the proposed arbitration because the Developer did not agree (a) that the arbitration should be administered by the SIAC; (b) that the arbitration should be conducted according to the SIAC Rules; and (c) that the disputes should be consolidated in a single arbitration. On 19 June 2019, the Court of Arbitration of the SIAC found that it was "not *prima facie* satisfied that

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the parties ha[d] agreed that [the] SIAC shall administer these arbitrations, or on the application of the SIAC Rules in these references". The SIAC accordingly terminated the arbitrations commenced by the 1st NOA. We refer to this as the "1st Attempted Arbitration".

The second attempted arbitration

8 On 28 June 2019, the Purchasers' Former Solicitors issued a second Notice of Arbitration ("the 2nd NOA"), constituting a request for the disputes to be referred to an arbitration to be commenced on an *ad hoc* basis in Singapore, and nominating a sole arbitrator. On 2 July 2019, in a letter from R&T to the Purchasers' Former Solicitors, the Developer objected to what it regarded as an attempt "to consolidate different arbitrations" in a single *ad hoc* arbitration. Further correspondence followed. On 29 July 2019, the Purchasers' Former Solicitors wrote to the President of the Court of Arbitration of the SIAC seeking the appointment of a single arbitrator. On 2 August 2019, R&T wrote to the SIAC stating the Developer's position that no *ad hoc* arbitration had been validly commenced as it was a defective attempt to commence a single consolidated arbitration, and in any event, if all the Purchasers wanted to commence any arbitration there would have to be 12 different *ad hoc* arbitrations and 12 arbitrators would need to be appointed. It also disagreed with the Purchasers' nomination of a sole arbitrator.

9 In September 2019, the Purchasers obtained different legal advice. They discharged the Former Solicitors and engaged their present counsel. On 3 February 2020, the Purchasers notified the SIAC that they did not wish to proceed against the Developer by way of the arbitration proceedings purportedly commenced by the 2nd NOA, and this attempt at arbitration was thus discontinued. We will refer to this as the "2nd Attempted Arbitration".

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Court proceedings

10 On 4 March 2020, the Purchasers filed the Suit claiming rescission of the SPAs or damages in lieu of rescission, as well as damages for any and all losses, costs and expenses suffered as a result of entering into the SPAs. On 25 March 2020, the Developer filed HC/SUM 1422/2020 seeking a stay of the Suit on the basis that the parties were bound by an arbitration agreement in cl 20A.1 of the SPAs, or, in the alternative, that the parties had entered into an arbitration agreement by their conduct.

11 On 10 June 2020, the AR held that cl 20A.1 of the SPAs was not an arbitration clause but found that the parties had entered into an arbitration agreement by their conduct. She ordered a stay of the Suit under s 6 of the AA. The parties then filed cross-appeals: (a) HC/RA 111/2020 ("RA 111") was the Developer's appeal against the AR's finding that cl 20A.1 was not an arbitration agreement; and (b) HC/RA 112/2020 ("RA 112") was the Purchasers' appeal against the decision to stay the Suit and the costs orders made against them.

The decision below

12 The Judge dismissed the Developer's appeal in RA 111, holding that cl 20A.1 of the SPAs was not an arbitration agreement within the definition of s 4(1) of the AA. He held that the clause "did not objectively evince any intention by the parties to be *bound* to submit their disputes arising from the SPAs to arbitration" [emphasis in original] (see the GD at [29]). All that cl 20A.1 required was that the parties consider mediation before referring the dispute to either "arbitration or court proceedings". Clause 20A.1 also could not be read as giving rise to the right to elect for arbitration unilaterally – the only imperative in cl 20A.1 was in relation to considering mediation, and not the

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submission to either arbitration or litigation (at [33]). No appeal arises from the Judge's dismissal of RA 111.

13 As for RA 112, the Judge identified five issues for his determination (see the GD at [24]):

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

(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 Purchasers 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 not to order a stay of the Suit?

14 In relation to the first issue, the Judge held that the parties *did* conclude a valid and binding arbitration agreement independent from cl 20A.1 of the SPAs (see the GD at [35]). In the Judge's view, this was clear from the 1st and 2nd NOAs, and the attendant correspondence exchanged in the course of the 1st and 2nd Attempted Arbitrations (at [36]–[37]). The Judge also found that the agreement was recorded in writing as required by s 4(3) of the AA, read with s 4(4) of the AA (at [39]–[43]).

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15 In relation to the second issue, the Judge also found that s 4(6) of the AA applied, and there was deemed to be an effective arbitration agreement as between the parties to the proceedings (see the GD at [45]). He found that there were two main sources of ambiguity in s 4(6) of the AA: (a) what constituted "any other document in circumstances in which the assertion calls for a reply"; and (b) what was meant by the deeming of an "effective arbitration agreement".

(a) Applying the *ejusdem generis* principle of statutory interpretation, the Judge held that "any other document in circumstances in which the assertion calls for a reply" referred to a document made in or for an arbitral or legal proceeding, and which involved participation in such proceeding or formed part of the record of that proceeding (see the GD at [60]). With this definition, the Judge found that notices of arbitration fell within the scope of s 4(6) of the AA and that if a response is given and no objection is raised to the arbitration, s 4(6) would deem there to be an effective arbitration agreement. However, if no response is given to the notice of arbitration at all, then s 4(6) would not apply (at [61]–[62]). On the facts of this case, this requirement was met (at [64]).

(b) On the effect of s 4(6) of the AA, the Judge expressed the tentative view (see the GD at [65]) that there was no need for a pre-existing arbitration agreement, and that s 4(6) can be used to deem the existence of an agreement to arbitrate, *ie*, it "creates the legal fiction that there is an existing arbitration agreement through that assertion and non-denial in that arbitral or legal proceeding" (at [70]).

16 The Judge then considered whether the arbitration agreement was vitiated by mistake. As a preliminary point, he noted that the Purchasers had not made clear whether they were relying on the doctrine of common mistake or

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mutual mistake (see GD at [74]). He then found that the Purchasers had not shown that they were labouring under a mistaken belief that cl 20A.1 was an arbitration agreement, or that the Developer was mistaken as to the effect of cl 20A.1 either (at [81]). They had also not shown that the parties held the mistaken belief that there was a separate, broader agreement to arbitrate apart from cl 20A.1 on an *ad hoc* basis (at [83]).

17 Having arrived at the above conclusions, there was no need to decide whether the Purchasers were estopped from denying the existence of a valid arbitration agreement. The Judge observed, however, that he would have struggled to accept the argument on the facts, as there was no reliance or detriment suffered by the Developer in this case (see the GD at [85]–[86]).

18 On the issue of whether the court should exercise its discretion not to grant a stay of the Suit, the Judge found that the situation was not so exceptional as to warrant refusal of a stay (see the GD at [92]). The Judge therefore upheld the AR's decision to grant a stay of the Suit in favour of arbitration proceedings.

Parties' submissions on appeal

Appellants' case

19 The Appellants contend that (a) the Judge erred in finding that the parties had entered into an arbitration agreement apart from cl 20A.1 of the SPAs; (b) the Judge erred in finding that an arbitration agreement was deemed to have arisen by virtue of s 4(6) of the AA; (c) even if there was an arbitration agreement, it was vitiated by the operation of the doctrine of mistake; and (d) even if there was an arbitration agreement that was not vitiated by mistake, the facts warranted an exercise of discretion not to stay the Suit.

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20 On whether the parties had entered into an arbitration agreement, the Appellants' position is: (a) first, that the 1st NOA was not an offer to arbitrate, hence there could also be no acceptance of any offer; (b) second, that there was in any event no final and unqualified expression of assent by the Developer to the 1st NOA; (c) third, that the Developer's response to the 1st NOA was in the context of the references to cl 20A.1 of the SPAs in the 1st NOA; (d) fourth, that there were no facts to show any separate offer to arbitrate, no facts to show any consideration, and no intention to create legal relations apart from the SPAs. These considerations also applied to the 2nd NOA. Even if the 1st and 2nd NOAs were offers, they were specific offers to arbitrate under the SIAC Rules (for the 1st NOA) and for a single *ad hoc* arbitration (for the 2nd NOA), both of which were rejected by the Developer.

21 In relation to s 4(6) of the AA, the Appellants first take issue with the Judge's finding that the 1st and 2nd NOAs fell within the scope of "any other document in which the assertion calls for a reply". The Appellants argue that notices of arbitration are not the sort of documents which trigger s 4(6) of the AA as (a) the issuance of a notice of arbitration does not necessarily initiate arbitrations; and (b) notices of arbitration are not, as required by s 4(6) of the AA, "issued in the course of arbitral or legal proceedings".

22 The Appellants also argue that the Judge erred in finding that s 4(6) of the AA deems a full and complete arbitration to be in existence, as opposed to merely deeming that such an agreement satisfies the writing requirement under s 4(3) of the AA. They submit that deeming provisions ought to be construed strictly and only for the purpose for which they are resorted to. In their view, s 4(6) of the AA shares the same purpose as Art 7(2) of the 1985 UNCITRAL Model Law on International Commercial Arbitration ("1985 Model Law") and, as such, would only operate to deem effective an arbitration agreement that was

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defective on account of non-compliance with the AA's writing requirement. Where there was no agreement in the first place, as contended by the Appellants, there was no agreement to be made effective.

23 As to the issue of mistake, the Appellants clarify that they are relying on common mistake in this case. They argue that the Judge's main reason for rejecting their earlier arguments was that "the Purchasers and Developers had not in their evidence stated that the [parties] were mistaken as to the effect of cl 20A.1". To this, the Appellant's contention is that the mistake was "plain to see" and that the entire body of conduct surrounding cl 20A.1 made it clear that the parties had been mistaken as to its legal effect.

24 The Appellants' final contention is that the court should exercise its discretion not to stay the Suit. They point in particular to the Developer's conduct, its unwillingness to arbitrate, public policy considerations, the costs of obtaining and enforcing an award, and the risk of multiplicity of proceedings.

Developer's case

25 The Developer initially took a preliminary point that the Purchasers who are co-owners with some of the original appellants and who did not appeal remained bound by the Judge's decision and had to arbitrate their disputes with the Developer. However, in the light of the joinder of the additional four co-owners to the appeal (see [5] above), the Developer's arguments have been rendered moot. While we note that there remain three plaintiffs in the Suit who are still not parties to the appeal, the Developer's point was restricted to the plaintiffs who were co-owners, which the remaining three plaintiffs are not. Hence, it does not appear to us that the Developers have an objection to these other plaintiffs being allowed to proceed with their claims against the Developer

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in the Suit in the event that the stay is lifted by virtue of our judgment in this appeal, and we do not go on to address this issue. That said, given our decision in this appeal, any application by the Developers to stay the Suit *vis-à-vis* the remaining three plaintiffs will inevitably fail with adverse costs consequences.

26 Turning then to the substantive issues, the Developer submits that there was an arbitration agreement between the parties on a *prima facie* standard of review. The parties were *ad idem* that the disputes should be submitted to arbitration, and the express pronouncements by the parties that they had agreed to arbitration could not be interpreted in any other way. In any event, there was also a valid arbitration agreement under s 4(6) of the AA. The Developer supports the Judge's interpretation of both the scope of documents that would suffice for s 4(6) of the AA to apply and the deeming effect of s 4(6). Further, the Developer also argues that the Appellants are estopped from taking the position that no valid arbitration agreement exists. It also submits that the arbitration agreement entered into was not vitiated by mistake, the allegation of mistake is a "red herring", and there is no evidential basis for the claim of mistake. Even if the parties were mistaken about the effect of cl 20A.1, this did not mean that the arbitration agreement was vitiated by mistake, as the 2nd NOA was premised not on cl 20A.1 but on the fact that the Developer had agreed to arbitrate.

27 If an arbitration agreement is found, then, the Developer argues, this court should uphold the stay, and the factors raised by the Appellants do not justify an exercise of discretion otherwise.

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Issues to be determined

28 Based on the foregoing, the issues that arise for our determination are as follows:

(a) Did the Judge err in finding that the parties had entered into an arbitration agreement apart from cl 20A.1 of the SPAs?

(b) Did the Judge err in holding that s 4(6) of the AA would deem there to be an arbitration agreement between the parties?

(c) If the answer to either (a) or (b) is "No", did the Judge err in holding that the arbitration agreement was not vitiated by a common mistake as to the effect of cl 20A.1 of the SPAs?

(d) Were the Appellants estopped from denying the existence of a valid arbitration agreement?

(e) If there was a valid arbitration agreement or the Appellants were estopped from denying the existence of such an agreement, did the Judge err in deciding to grant the stay of the Suit?

Clause 20A.1 of the SPAs

29 Before turning to each of these issues, we begin with a brief consideration of cl 20A.1 of the SPAs. We agree with the Judge that cl 20A.1 is not an arbitration agreement within the definition of s 4(1) of the AA, for the reasons set out by the Judge in the GD. Although there is no cross-appeal by the Developer against the Judge's finding, it remains relevant to determine whether the Judge's decision on this point was correct for the purposes of our analysis of s 4(6) of the AA (see [70] and [131] below).

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30 We set out cl 20A of the SPAs in full:

> **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.
>
> [emphasis in original in bold]

31 On a plain reading of cl 20A.1, it is clear that there was no agreement to submit the dispute to arbitration, which is the hallmark of an arbitration agreement: see s 4(1) of the AA and *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 ("*Dyna-Jet*") at [37]. It is significant that the heading for cl 20A is "Mediation". The clear purpose of cl 20A.1 is to require the parties to "consider resolving the dispute or difference through mediation" *before* referring any dispute to arbitration or court proceedings. Indeed, even this obligation to *consider* mediation did not rise to the level of an obligation to mediate.

32 Clause 20A.1 in itself does not require the parties to submit the dispute to arbitration. It merely provides that the parties are at liberty to refer the dispute to either arbitration or court proceedings after considering mediation. The options for dispute resolution available to the parties would have been no different absent this clause because the clause was only designed to encourage mediation, leaving the exact form of adjudicatory dispute resolution to be decided by the parties. Clause 20A.1 remains entirely neutral as to what dispute resolution mechanism is to be used after mediation is considered. It does not

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confer on any party the unilateral right to commence arbitration against the other party without the concurrence of the other party, since the parties have not agreed to arbitration as the binding form of dispute settlement. The Judge was therefore eminently correct to find that cl 20A.1 was not an arbitration agreement.

Did the parties enter into an arbitration agreement independent of cl 20A.1?

33 Given the absence of an arbitration agreement in the parties' SPAs, the question is whether the parties had otherwise entered into an arbitration agreement which would justify a stay under s 6 of the AA. With respect, we are unable to agree with the Judge on this point and find that the parties had not entered into an arbitration agreement independent of cl 20A.1 of the SPAs. We begin by explaining our approach to this question, before turning to apply that approach to the facts.

Our approach to this question

34 An "arbitration agreement" is defined by s 4(1) of the AA. However, even before one considers whether an agreement can be characterised as an *arbitration* agreement, it goes without saying that there must be an agreement in the first place. The question of whether there is a legally enforceable agreement is one of contract law, specifically, contract formation: see *Dyna-Jet* at [40].

35 The standard to be applied to this question, in an application for a stay under s 6 of the AA, is the *prima facie* standard. As this court held in *Sim Chay Koon and others v NTUC Income Insurance Co-operative Ltd* [2016] 2 SLR 871 at [5]:

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> In our judgment, the existence and applicability of the doctrine [of *kompetenz-kompetenz*] means that as a general rule, where a party seeks to avoid its obligation to arbitrate its dispute, the court should undertake a restrained review of the facts and circumstances before it in order to determine whether it appears on a *prima facie* basis that there is an arbitration clause and that the dispute is caught by that clause. …

36 The present dispute raises a specific question in relation to the formation of a contract. Have the parties proceeded simply on the basis of what they believed to be a *prior* arbitration agreement in cl 20A.1 of the SPAs, or have they agreed, independently of cl 20A.1 of the SPAs, to submit the disputes to arbitration? The problem can be simply restated as follows: if the parties had believed that they were acting in accordance with an *existing* contractual obligation, could the parties be taken to intend to enter into a *separate* contract to arbitrate by that same conduct? As a general principle, the answer should be in the negative, *unless* the evidence discloses an intention by the parties to be bound by a separate and independent agreement. As the learned authors of *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2018) summarise at para 2-191 ("*Chitty"*):

> A number of cases support the view that an arrangement which is believed simply to give effect to preexisting contractual rights is not a contract because the parties had no intention to enter into a *new* contract; this may be true even where the contract giving rise to those rights had been discharged, so long as the parties believed that it was still in existence. **But other cases show that contractual intention is not negatived where the conduct of the parties makes it clear that they intended not merely to give effect to their earlier contract but also to enter into a new contract containing additional terms**; or merely because the conduct of one party to the alleged new contract consisted of his performance of a contract between him and a third party. [emphasis in original in italics; emphasis added in bold]

37 The authority cited for the proposition emphasised in bold above is an arbitration case, *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK)*

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Ltd (The Amazonia) [1990] 1 Lloyd's Rep 236 ("*Furness*"), which also discussed an authority relied upon by the Appellants, *Altco Ltd v Sutherland* [1971] 2 Lloyd's Rep 515 ("*Altco*"). Although there is a line of authorities leading to *Furness*, it is sufficient for present purposes to focus on that case.

38 The dispute in *Furness* was between the disponent owners of *The Amazonia*, Furness Withy (Australia) Pty Ltd ("Furness"), and the sub-charterers of the vessel, Metal Distributors (UK) Ltd ("Metal Distributors"). Metal Distributors had commenced an arbitration on the basis of an arbitration clause in the contract, which, in truth, was void due to the incorporation of certain Australian legislation. Operating under the incorrect assumption that the arbitration clause was effective, however, Furness had agreed to the appointment of one Mr Davies as arbitrator, and the parties exchanged pleadings in the arbitration. When the possibility that the arbitration clause was invalid was brought to its attention, Furness then filed an application in court for a declaration that there were no valid arbitration proceedings between itself and Metal Distributors. The English High Court dismissed the application. On appeal, the Court of Appeal agreed that the arbitration clause was void. Staughton LJ then had to consider whether there was an *ad hoc* arbitration agreement, on the following factual premise, which, as our discussion of the facts will show, corresponds to the present appeal (*Furness* at 241):

> All that the case-handlers did with respect to the 'arbitration' was (a) based on the assumption that there was an arbitration agreement in force between the parties and (b) identical to what they would have done had there been a valid and binding arbitration clause.

39 Staughton LJ first considered the general law of contract, citing an earlier edition of *Chitty* which reflected the first proposition in the extract quoted at [36] above, before turning to consider *Beesly v Hallwood Estates*

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Ltd [1960] 1 WLR 549 and *Harvela Investments Ltd v Royal Trust Company of Canada (C.I.) Ltd* [1986] AC 207. He then turned to arbitration cases specifically, highlighting two decisions. First, he referred to *Westminster Chemicals & Produce Ltd v Eichholz & Loeser* [1954] 1 Lloyd's Rep 99 ("*Westminster Chemicals*"), in which the plaintiffs had argued that there was no contract between themselves and the defendants, although they had previously appointed an arbitrator and taken part in an arbitration. Devlin J held in that case that they were bound by the arbitration award (*Westminster Chemicals* at 105–106):

> All those fundamental doctrines flow from the principle, which I think is well established, that if a man does not protest, but if, as it is called, he submits to the jurisdiction of the arbitrator, he is then bound by the award. There is no doubt that that has always been the law, and I do not think that it is disputed, and the basis of it, as I say, I take to be this, that it is merely an illustration of the general principle that *by appearing before an arbitrator and submitting his case for settlement, his conduct necessarily leads to the inference that there is an agreement consenting to the award, unless there is something such as a protest to negative that agreement.* [emphasis added]

40 Second, Staughton LJ considered *Altco*, which the Appellants rely on in the appeal before us. As the parties before us have provided submissions on this case (albeit in the context of their arguments pertaining to the doctrine of mistake), we set out the facts and findings in some detail. In *Altco*, a dispute arose between one Mr Sutherland and Altco Ltd, commodity brokers. The contract between them provided that the agreement was to be governed by the laws of England, and any controversy was to be determined by the competent courts of London (see *Altco* at 516). However, at the outset, Mr Sutherland was of the view that the dispute had to be decided by the London Cocoa Terminal Market Association, and Altco Ltd did not dissent from this view. They then proceeded to submit statements of case and defence to the appointed arbitrators, and the arbitrators rendered an award. Mr Sutherland was dissatisfied with the

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award. The primary issue in *Altco* was whether Mr Sutherland was properly heard in relation to his arguments, and Donaldson J held that he was not (see *Altco* at 518). The question then was whether the award could be remitted or whether it had to be set aside. Donaldson J held that the award had to be set aside as there was no arbitration agreement at all in that case, as the contract between Mr Sutherland and Altco Ltd only included a reference to the *courts* of London and did not make any reference to any trade tribunal (see *Altco* at 519). Donaldson J also held that there was no *ad hoc* agreement between the parties to submit the dispute to arbitration (see *Altco* at 519–520):

> … 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.

41 Returning to *Furness* at 243, Staughton LJ was of the view that *Altco* and *Westminster Chemicals* could not be reconciled on the issue of whether there was an *ad hoc* agreement. Having considered other cases which approved *Westminster Chemicals*, Staughton LJ preferred the approach taken in that case. He then went on to consider how this could be understood in contractual terms, as he did not wish to "strain the general law of contract in order to achieve the desired result in arbitration cases" (*Furness* at 243). He concluded:

> … On the facts of this case I think that the parties by their correspondence certainly made and intended to make some alteration to the legal relationship between them. They agreed that Mr. Donald Davies should fulfil the role of sole arbitrator; and they agreed that in one respect there would be no reliance on the time bar (although the right to rely on it in another aspect of the case was preserved). So there was an intention to make *some* contract. That should suffice to uphold the contract which, from their conduct, they appear to have made – that

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> there would be an arbitration with Mr. Davies as arbitrator and that they would accept the result.
>
> But I would go further. Mr. Gilman accepts that the test for establishing intention to make a contract is, or at least may be, objective … If the parties' correspondence and conduct shows such an intention it will not, or may not, matter that neither privately intended to make a contract. … If one examines the correspondence and conduct of the parties and their solicitors, knowing what s. 9 of the Australian Act provides, one concludes in my judgment that they did intend to make a contract, for an arbitration before Mr. Davies. The owners' solicitors had said in plain terms that they had no wish to be thought to be challenging his jurisdiction.
>
> [emphasis in original]

42 However, having found that there was such an agreement, Staughton LJ found that the parties were operating under a common mistake of fact, *viz*, whether there was an impediment to arbitration by virtue of the Australian legislation, which had to be treated as a mistake of fact given that it was a matter of foreign law. As a result, the arbitration agreement was "vitiated by mistake of fact" (*Furness* at 246).

43 In a concurring judgment, Dillon LJ observed (*Furness* at 248):

> … In the present case cl. 34 of the charter-party does not mention Mr. Davies or appoint him to do anything, and the parties must therefore have intended to make a new agreement appointing him.

On an alternative analysis of a continuing agreement, which approached the issue as one of a continuing agreement to arbitrate which gave rise to a separate agreement by each particular submission to arbitration, Dillon LJ would have also found there to be a separate contract:

> … [W]here, against the background of a continuing agreement to submit their disputes to arbitration, parties concur in appointing a particular arbitrator to resolve a particular dispute, there is a separate contract between them in relation to that particular reference. …

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44 The following conclusions can be gleaned from the above authorities. Given the clear statement by the English Court of Appeal in *Furness*, we agree with the Developer that it is not appropriate to rely on the broad approach taken in *Altco* to invariably find the absence of an *ad hoc* agreement in such circumstances. Instead, as *Furness* shows, the question must be whether there is a sufficient factual basis on which to conclude that the parties had entered into a separate arbitration agreement notwithstanding their erroneous belief that there was an arbitration agreement or the absence of such an agreement in the underlying contract. In the following, we proceed on the basis of the general contractual analysis, rather than adopt any theory of a continuing agreement, given the absence of any arbitration agreement at all in the first place (in contrast to the arbitration clause which was *invalidated* in *Furness*).

45 On the basis of the foregoing, we adopt the following approach. At each stage, we determine whether the parties had acted exclusively on the assumption that cl 20A.1 was an arbitration agreement. If so, we then consider whether there was nevertheless evidence of an agreement to add terms to or depart from what cl 20A.1 of the SPAs already provided, such that it can be said that the parties were intending to enter into an agreement *apart from* cl 20A.1.

Application to the facts

46 In our view, the parties had at all times acted exclusively on the assumption that cl 20A.1 was an arbitration agreement. While the 1st and 2nd NOAs did contain offers to arbitrate that were on terms additional to cl 20A.1, and, therefore, could be construed as offers to enter into separate arbitration agreements apart from cl 20A.1, those offers were never accepted by the Developer. It follows that there was never any separate arbitration agreement on the facts of this case.

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The 1st Attempted Arbitration

47 We begin with the 1st NOA. In our view, it is clear that the Purchasers were referring to cl 20A.1 of the SPAs as the sole basis on which the arbitration was being brought. After all, cl 20A.1 was the only provision or agreement referred to under the heading "THE ARBITRATION AGREEMENT" (at para 62 of the 1st NOA) and was identified as the express basis of the submission to arbitration (at para 64). The Purchasers then set out their position at para 65 that the arbitration was to be administered by the SIAC, conducted by a single arbitrator jointly appointed by the parties, and conducted in Singapore in accordance with the SIAC Rules.

48 In its responses to the 1st NOA, the Developer objected to the proposal for the arbitrations to be administered by the SIAC and conducted in accordance with the SIAC Rules, and to the consolidation of the arbitrations. At para 5 of each of the responses, the Developer referred to cl 20A.1 of the SPAs and noted that it did not refer to the SIAC or the SIAC Rules. On the basis of cl 20A.1, the Developer argued against the SIAC's involvement and the application of the SIAC Rules. The Developer added that it agreed that the arbitration should be seated in Singapore and the AA applied. This reference to the seat of the arbitration appears to be a response to para 65(c) of the 1st NOA which stated that the "arbitration shall be conducted in Singapore".

49 From 28 to 30 May 2019, the parties engaged in correspondence with the SIAC (see also the GD at [9]). We note, in particular, the following:

(a) On 28 May 2019, the Purchasers' Former Solicitors summarised the position as follows:

> The matter is very simple really:

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

(b) That the Developer did not deny "that there is an arbitration agreement" was confirmed in passing on 29 May 2019 in an email sent by the Developer's solicitors to the SIAC.

50 In the context of the 1st NOA and the responses to the 1st NOA, it is clear that the reference to "arbitration agreement" in the correspondence was only to cl 20A.1 of the SPAs. There was no other basis for the arbitration to be invoked in any of the earlier documents or discussions. It would be entirely unrealistic to assume that the parties, after discussing cl 20A.1 exclusively, should then discuss an arbitration agreement independent of cl 20A.1 in the exchanges. Further, we observe that the statements were to the effect that the Developer had agreed that there was an existing arbitration agreement, not that the Developer was agreeing to arbitrate in the course of the exchange of the 1st NOA and the responses.

51 Having established that the parties were operating thus far under the assumption that cl 20A.1 was an arbitration agreement and that their conduct and correspondence was referable only to that assumption, the question we now consider is whether there was nonetheless a separate agreement concluded between the parties by virtue of this conduct and correspondence.

52 Contrary to the Appellants' submissions, we find that there *was* an offer to arbitrate independently of cl 20A.1 in the 1st NOA. An offer "must consist

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of a definite promise to be bound, provided that certain specified terms are accepted" (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [47]). We find that the Purchasers were offering to arbitrate their disputes in an arbitration (a) administered by the SIAC; (b) conducted by a single arbitrator; (c) conducted in accordance with the SIAC Rules; and (d) which consolidated all the disputes into a single arbitration. The Purchasers also nominated one Mr Kalvin Lee as sole arbitrator. These were terms *apart from* cl 20A.1, as cl 20A.1 only mentioned "arbitration" and did not refer to the SIAC, SIAC Rules, the number of arbitrators, or the identity of any arbitrator. It follows that the Purchasers were offering to alter their legal position and to be bound by terms *additional* to those set out in what they believed to be the arbitration agreement in cl 20A.1. In our view, it was clear that the Purchasers intended to be bound by these terms – they were promising to be bound by the offer to arbitrate on those terms if the terms were accepted, and for the arbitration to proceed accordingly.

53 In this regard, we are unable to accept the submission put forward by counsel for the Developer, Mr Lee Eng Beng SC ("Mr Lee"), that the offer was an unconditional offer to arbitrate coupled with additional terms proposed for consideration. First, if the 1st NOA were to be construed as an unconditional offer to arbitrate, we would have great difficulty in finding that this offer was made independently of what the Purchasers believed was their *entitlement* under cl 20A.1 of the SPAs, since their act of submitting the dispute to arbitration would have been equally consistent with a reliance on cl 20A.1. It would be entirely artificial to view the 1st NOA as an unconditional offer to arbitrate in this context, and something more (in this case, the additional terms referred to above) would be needed to establish a separate arbitration agreement. Second, Mr Lee's proposed approach to paras 64 and 65 of the 1st NOA was, with

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respect, unrealistic. The fact that the terms in para 65 were put forward at the same time as the proposal to arbitrate strongly suggests that the offer was put forward together as a complete package. Objectively construed, the Purchasers' intention in the 1st NOA was to arbitrate *on those terms* and there is no indication at all that the Purchasers would have been willing to forgo those terms as long as the Developer agreed to arbitration in the abstract.

54 This offer in the 1st NOA, however, was rejected by the Developer, as indicated in its responses to the 1st NOA. The Developer took issue with the administration of the proposed arbitration by the SIAC and the conduct of the arbitration according to the SIAC Rules. At para 16 of the responses, it also rejected the nomination of Mr Kalvin Lee as the sole arbitrator. While there was agreement that the arbitration should be seated in Singapore and the AA applied, this was clearly premised on the existence of an arbitration agreement and cannot possibly be construed as an unqualified acceptance of the offer since that very offer had in fact been expressly rejected by the Developer. In any event, the agreement on the seat of the arbitration and on the application of the AA are equally applicable to the parties' view of cl 20A.1, rather than grounding a separate agreement to arbitrate.

55 At this point, we clarify that the question of whether the parties had in fact entered into an agreement and the question of whether the agreement was an arbitration agreement should not be conflated. The Developer had argued, and the Judge had similarly reasoned in the GD at [38], that there were only three essential terms required for an arbitration agreement under s 4(1) of the AA: (a) the parties; (b) a defined legal relationship between these parties; and (c) the intention to be bound to submit disputes arising from this legal relationship to arbitration. There is no need for the parties to agree on the arbitral procedure, rules, or even the seat of arbitration, for an agreement to qualify as

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an arbitration agreement under s 4(1) of the AA: see the GD at [28], citing *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd and another suit* [2017] 4 SLR 182. While this is true for the purpose of determining whether an agreement should be characterised as an *arbitration* agreement under the AA, that is distinct from the logically anterior question of whether an agreement was formed in the first place. That prior issue turns on the question of contract formation, which in turn is a matter of offer and acceptance. Therefore if additional terms *including* the applicable rules and procedure are part of an offer, and there is no unqualified acceptance of that offer, there is accordingly no agreement to speak of. Hence, the fact that the Purchasers had made the offer to arbitrate *conditional* on the terms proposed in the 1st NOA and that the Developer did not accept those terms necessarily leads to the conclusion that there was no agreement, even if those terms would not have been necessary for an arbitration agreement to be found under s 4(1) of the AA. This vital distinction, with respect, was overlooked by the Judge.

The 2nd Attempted Arbitration

56 In the 2nd NOA, the Purchasers again referred to cl 20A.1 of the SPAs. It was at para 64, *after* repeating paras 62 and 63 of the 1st NOA, that the Purchasers "note[d] that the [Developer] has agreed on record that there is a valid arbitration agreement between the parties" in its email to the SIAC dated 29 May 2019. At para 65, the Purchasers then repeated para 64 of the 1st NOA, stating that they "elect[ed] 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." The difference here was that the 2nd NOA referred to an *ad hoc* arbitration seated in Singapore, noting the Developer's previous acceptance of a Singapore-seated *ad hoc* arbitration.

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57 On 2 July 2019, in response, R&T, on behalf of the Developer, replied objecting to the consolidation of the 12 claims into a single arbitration. This objection was repeated in correspondence dated 10 July 2019. In these letters, the Developer did not object to the assertion in the 2nd NOA that there was an arbitration agreement. On 11 July 2019, the Purchasers responded and summarised the position as follows:

> 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 …

58 On 29 July 2019, the Purchasers wrote to the Court of Arbitration of the SIAC seeking the appointment of an arbitrator. At para 3 of this letter, the Purchasers stated that "the Parties have agreed that there is a valid and binding arbitration agreement between them, and that the seat of arbitration is Singapore."

59 The Judge placed emphasis on para 64 of the 2nd NOA and the correspondence quoted at [57] above in finding that the parties had agreed to submit their disputes to an arbitration independently of cl 20A.1 (see the GD at [37]). With respect, however, we disagree with the Judge's view of the 2nd NOA and the correspondence and find, instead, that the parties were at all times only referring to cl 20A.1.

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(a) First, as we have found above, any prior discussion under the 1st NOA was entirely in the context of the Purchasers' invocation of cl 20A.1. Any agreement about the existence of an "arbitration agreement" arising from the correspondence surrounding the 1st NOA could only be read as referring to cl 20A.1, which the parties believed to be the arbitration agreement. There is no reason to suspect that the parties had in mind an "arbitration agreement" which was distinct from cl 20A.1. Hence, the email dated 29 May 2019 referred to at para 64 of the 2nd NOA can be construed only as a reference to cl 20A.1, not a separate arbitration agreement. Further, although the 2nd NOA referred to the parties' agreement that the arbitration would be an *ad hoc* arbitration seated in Singapore, these two "terms" were seen as consequences of cl 20A.1 rather than as part of a separate agreement. This is clear from para 67 of the 2nd NOA which identified these two as *consequences* of how cl 20A.1 of the SPAs was drafted. It follows that any reference to an arbitration agreement in the 2nd NOA was likewise a reference to cl 20A.1 of the SPAs.

(b) Second, a contextual analysis of the statement in para 64 of the 2nd NOA shows that this was a point intended to *supplement* the invocation of cl 20A.1 and not to establish a separate basis for arbitration. Paragraph 64 followed from the invocation of cl 20A.1 in para 63 of the 2nd NOA, which was in turn, identical to the invocation of that clause in para 63 of the 1st NOA. Following that, at para 65, the 2nd NOA stated that the Purchasers thereby elected to submit the dispute to arbitration "pursuant to Clause 20A.1". There was no reference to any other arbitration agreement.

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(c) Third, these statements in the 2nd NOA and the correspondence referred to an *agreement about an agreement* to arbitrate, *ie*, that the parties were agreed that there was an arbitration agreement, not that they had agreed in the course of the 1st Attempted Arbitration to arbitrate. If the latter was intended, the statements should have been that "parties have agreed to arbitrate", rather than that "the [Developer] has agreed on record that there is a valid arbitration agreement between the parties". This prevents these statements from being read as referring to a separate agreement to arbitrate arising from the 1st NOA and the subsequent correspondence. At the highest, this statement could be read to mean that the parties had agreed in the course of the 1st Attempted Arbitration that there *was* a prior arbitration agreement before the 1st NOA was issued, *ie*, that cl 20A.1 of the SPAs was an arbitration agreement, but does not go so far as to establish a separate, independent arbitration agreement

60 Accordingly, on the facts, there was no reference to an independent agreement apart from cl 20A.1. At the absolute highest, there may have been an agreement between the parties that cl 20A.1 was a valid arbitration agreement. However, as this is not the case run by the Developer on appeal and no cross-appeal has been brought against the Judge's finding that cl 20A.1 was not an arbitration agreement, we do not need to pursue this line of inquiry further. In any event, as we have observed at [32] above, any such cross-appeal would have failed.

61 Having established that the 2nd NOA and the subsequent correspondence do not refer to an arbitration agreement apart from cl 20A.1, the question is whether the parties nonetheless did enter into such an agreement by reason of an offer and acceptance of terms apart from cl 20A.1. For reasons that are similar to those given in relation to the 1st NOA (see [52] above), we are of

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the view that the 2nd NOA constituted an offer to arbitrate. The Purchasers proposed that the disputes between the Purchasers and the Developer were to be resolved in a *single* arbitration conducted by a single arbitrator, Mr Kalvin Lee, which were terms not found in cl 20A.1. Even if the Purchasers subsequently took the position in a letter dated 11 July 2019 that the issue of consolidation was to be considered by the arbitral tribunal, it is sufficiently clear that there was *at least* an offer to submit the dispute to a single arbitrator for arbitration and, further, that the tribunal should have the power to consider consolidating the disputes and to make the necessary orders.

62 This conditional offer to arbitrate was clearly rejected by the Developer. First, it did not agree to the appointment of Mr Kalvin Lee. Further, and perhaps more importantly, it never-proposed an alternative arbitrator for the Purchasers' consideration. This omission signalled its disagreement with even the proposal for a single arbitrator to hear the disputes. Second, it rejected the proposal for all 12 disputes to be heard in a single arbitration. In its view, there was therefore no valid commencement of an arbitration.

63 The rejection was then clearly restated in the Developer's letter to the Court of Arbitration of the SIAC dated 2 August 2019, which was in response to the Purchaser's request that the President appoint an arbitrator pursuant to s 13 of the AA. The primary position taken in that letter was that no arbitration had been validly commenced as the parties had entered into 12 SPAs, which required the commencement of 12 separate arbitrations by virtue of cl 20A.1 in each of the SPAs. As we pointed out to Mr Lee at the hearing, the letter was clear evidence that the Developer was proceeding on the basis of cl 20A.1 and not a separate arbitration agreement, and that it was a clear rejection of any offer by the Purchasers to arbitrate the disputes in a single arbitration. Indeed, the Developer made its views very clear: "[e]ach of [the] twelve different SPAs

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contains a separate and independent arbitration agreement [and] each of the Purchasers, to invoke arbitration against [the Developer], does so under a separate and independent arbitration agreement". Further, this letter raised two significant points. First, in relation to the appointment of an arbitrator, the Developer's position was that there was no validly commenced arbitration, and hence, that there should be no appointment of an arbitrator. This was a clear rejection of the Purchasers' nomination of Mr Kalvin Lee, and was also a refusal to accept that the President of the Court of Arbitration should make such an appointment. There was also no counter-proposal of an arbitrator.

64 Second, in relation to the consolidation of the 12 disputes, while the Purchasers were willing at that point for this issue to be resolved by the arbitral tribunal to be appointed, the Developer took the position that the tribunal would *not* have the power to consolidate the proceedings *unless* the parties agreed to confer that power on the tribunal. In this regard, the Developer stated clearly that it did not agree to any consolidation, and also *did not agree to confer any such power on any tribunals eventually constituted.* "Hence," in the Developer's words, "there [was] no agreement between the parties pursuant to which such arbitrations may be consolidated".

65 It is clear, therefore, even on a *prima facie* standard, that as late as 2 August 2019, there was no agreement at all on the submission of the disputes to arbitration based on the offers to arbitrate made by the Purchasers. While there was a broad agreement that there was a valid arbitration agreement, that was only in relation to cl 20A.1, and there was nothing to indicate an agreement independent of cl 20A.1. There were no further developments after 2 August 2019. On 3 February 2020, the Purchasers wrote to the SIAC stating that they did not wish to proceed with the second attempted arbitration. Therefore, on the

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facts, none of the specific offers to arbitrate were accepted, and no agreement to arbitrate was formed independently of cl 20A.1.

66 Having rejected the Appellants' two offers for arbitration (which was entirely within the Developer's prerogative), it seems incongruous for the Developer to then apply for a stay of the Suit on the basis of a purported *ad hoc* arbitration agreement. In truth, the Developer had spurned the opportunity to arbitrate. We therefore conclude that there was no basis on which to find an arbitration agreement apart from cl 20A.1 and reverse the Judge's finding on this point.

Did s 4(6) of the AA deem there to be an arbitration agreement in this case?

67 Given our finding that there was no separate arbitration agreement, the application and effect of s 4(6) of the AA become live issues for our determination in this appeal. Section 4(6) of the AA reads:

> (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.

We observe that s 4(6) of the AA is *in pari materia* with s 2A(6) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA").

68 We agree broadly with the Judge that there are three requirements for s 4(6) to apply (see the GD at [46]). First, as a threshold requirement, s 4(6) only applies in the context of "any arbitral or legal proceedings". Second, there must be an assertion of the existence of an arbitration agreement in a pleading, statement of case, or any other document in circumstances in which the assertion

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calls for a reply. Third, the assertion must not be denied by the other party. If these three requirements are met, then "there shall be deemed to be an effective arbitration agreement as between the parties to the proceedings". We turn to address the three requirements before turning to consider the effect of s 4(6).

Does s 4(6) apply?

69 In the first place, we are of the view that the threshold requirement, that s 4(6) only applies in "any arbitral or legal proceedings", is not satisfied in the present case. We note that this phrase is only found in our domestic legislation and not in the provisions in the UNCITRAL Model Law on International Commercial Arbitration on which s 4(6) of the AA is based, and further, that it has yet to receive judicial attention. Before us, Mr Lee argued that the phrase "arbitral or legal proceedings" could not be restricted to valid proceedings, as that would defeat the purpose of s 4(6) of the AA. His argument appears to have been that if s 4(6) of the AA was intended to cure an invalidity in the arbitration agreement, then, *ex hypothesi*, apart from s 4(6), any such arbitration proceedings would also be invalid, and to construe "arbitration … proceedings" as referring only to *valid* proceedings would render the provision otiose. While we accept as a matter of logic that the phrase "arbitral or legal proceedings" could not be taken to exclude arbitration proceedings where the underlying arbitration agreement is invalid and only cured by s 4(6) of the AA, this does not take Mr Lee far enough. Regardless of how one construes the phrase in terms of the validity of the proceedings, it is clear to us that in the present case, there were simply *no* arbitration proceedings to speak of, valid or otherwise. In the 1st Attempted Arbitration, all that was done was a response to the 1st NOA (*rejecting* the commencement of arbitration) and correspondence with the SIAC, which eventually resulted in the SIAC terminating the nascent proceedings. In the 2nd Attempted Arbitration, the matter ended before the

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President of the SIAC Court of Arbitration appointed an arbitrator. In both instances, no substantive steps were taken and the matters ended with both parties at loggerheads on whether arbitration was even validly commenced. We are unable to see how there were any "arbitration … proceedings" at all in the present case.

70 Turning to the second requirement, we are also of the view that there was never an assertion of an arbitration agreement. In the context of s 4 of the AA, it is clear that "arbitration agreement" must have the meaning given to it in s 4(1) of the AA. As noted above at [32], the Judge found, and we agree, that cl 20A.1 of the SPAs is not in and of itself an arbitration agreement. There has also been no appeal against that finding. Hence, although the parties did at various times refer to cl 20A.1 as though it was an arbitration agreement, that is irrelevant to the present analysis, which is concerned with whether the existence of some other arbitration agreement was asserted and not denied in circumstances where it ought to have been. On the facts, we have explained that there was never any such assertion, there being, at highest, conditional offers to arbitrate made by the Purchasers in the 1st and 2nd NOAs which were then rejected by the Developer. It follows that s 4(6) cannot apply in the present case.

71 If, speaking hypothetically, there were arbitral proceedings and if there were an assertion of an arbitration agreement apart from cl 20A.1 of the SPAs, we express the tentative view here that assertions in notices of arbitration generally would be sufficient for s 4(6) of the AA to apply. The express language of s 4(6) of the AA clearly takes a broad view of the documents that would suffice, expanding beyond "statement of claim" to "pleading, statement of case or *any other document*" [emphasis added]. Given the characteristics of a "pleading" and "statement of case", we agree with the Judge that a notice of arbitration (if it is taken up and the arbitration proceeds) would fall within the

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category of "any other document". This is also consistent with the view expressed in the 36th session of the Working Group of the 1985 UNCITRAL Model Law on International Commercial Arbitration as amended in 2006 (the "2006 Model Law") when it was suggested that the reference to "an exchange of statements of claim and defence" was vague and potentially misleading, as "reference to the existence of an arbitration agreement was often made at an earlier stage of arbitral proceedings, such as in a notice of arbitration within the meaning of article 3 of the UNCITRAL Arbitration Rules" (United Nations Commission on International Trade Law, *Report of the Working Group on Arbitration on the work of its thirty-sixth session* (*New York, 4-8 March 2002*), UN GAOR, 35th Sess, at para 32, UN Doc A/CN.9/508 (2002)). In response, it was pointed out by other members of the Working Group (at para 35) that:

> … [T]he draft paragraph [which included what became Art 7(5)] had a precedent in the application of article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States ('the Washington Convention'), which, in practice, had been construed to the effect that the *notice of arbitration* submitted by a foreign investor to the International Centre for the Settlement of Investment Disputes under certain circumstances dispensed with the need for a special arbitration agreement. [emphasis added]

This suggests that it was anticipated in Art 7(5) of the 2006 Model Law that the phrase "statement of claim and defence" would extend to a notice of arbitration. Given that s 4(6) of the AA is broader than Art 7(5) of the 2006 Model Law in the language used to describe the class of documents that the assertion can be made in, it appears to us to follow that a notice of arbitration could also fall within s 4(6) of the AA.

72 In this regard, we also tentatively express our agreement with the distinction drawn by the Judge between a situation where the respondent responds to the notice of arbitration and when the respondent does not, such a

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distinction being drawn from the phrase "in circumstances in which the assertion calls for a reply". A respondent does *not* have a duty to reply to a notice of arbitration: *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [73]–[77]. However, if the respondent does reply but does not deny the assertion of an arbitration agreement, and if the arbitral proceedings do proceed, then we accept that the assertion of an arbitration agreement in the notice of arbitration and the non-denial of that assertion would be sufficient for s 4(6) of the AA to apply. We agree with the Judge that this is a sensible result and is fitting given the character and role of a notice of arbitration: see the GD at [61] and *Vitol Asia Pte Ltd v Machlogic Singapore Pte Ltd* [2021] 4 SLR 464 ("*Machlogic*") at [70]–[71]. This, however, is a tentative view and we leave it for determination in a suitable case, as it is not necessary for our determination of this appeal, given our findings that there were no arbitral proceedings at all, no assertion of an arbitration agreement, and, as we will come now to elaborate, s 4(6) of the AA would not have the effect contended for by the Developer in any event.

Does s 4(6) deem there to be an arbitration agreement between the parties when there is no agreement otherwise?

73 The central issue concerning s 4(6) of the AA as argued before us turns on the interpretation of the last clause in s 4(6): "there shall be deemed to be an effective arbitration agreement as between the parties to the proceedings". As cl 20A.1 of the SPAs was not an arbitration agreement (for the reasons set out above at [32]) and there was no arbitration agreement independent of cl 20A.1, s 4(6) should thus be examined on the basis that there was neither a valid arbitration clause in cl 20A.1 nor an *ad hoc* arbitration agreement independent of cl 20A.1. The question is whether s 4(6) can nonetheless *deem* an effective

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arbitration agreement to be in existence notwithstanding this finding. The Judge in *obiter* observed that it could. We hold a contrary view.

74 As the Judge did, we also adopt the purposive approach identified by this court in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [37]: (a) first, to ascertain the possible interpretations of the provision having regard to text and context; (b) second, to ascertain the legislative purpose or object of the statute; and (c) third, to compare the possible interpretations against the purposes or objects of the statute.

Possible interpretations based on text and context

75 We first set out s 4 of the AA to provide the context for the discussion below:

> **Definition and form of an 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.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.
>
> (4) 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.
>
> (5) The requirement that an arbitration agreement shall be in writing is satisfied by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.
>
> (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

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> denied, there shall be deemed to be an effective arbitration agreement as between the parties to the proceedings.
>
> (7) A reference in a contract to any document containing an arbitration clause shall constitute an arbitration agreement in writing if the reference is such as to make the clause part of the contract.
>
> (8) A reference in a bill of lading to a charterparty or other document containing an arbitration clause shall constitute an arbitration agreement in writing if the reference is such as to make that clause part of the bill of lading.
>
> …
>
> [emphasis in original in bold]

76 Section 4 of the AA can be understood as a gateway for the AA to apply to a particular agreement. The first hurdle is to establish the existence of an arbitration agreement that qualifies under the AA – these requirements must be satisfied for the agreement to be enforced as an arbitration agreement in Singapore: see *Arbitration in Singapore: A Practical Guide* (Sundaresh Menon editor-in-chief) (Sweet & Maxwell, 2nd Ed, 2018) at para 7.006. The primary requirement is that such an agreement must satisfy the conditions set out in s 4(1) of the AA. Section 4(2) clarifies that the arbitration agreement can be an agreement on its own or a clause in a broader agreement. In addition, the AA imposes a formality requirement in s 4(3) that the arbitration agreement shall be in writing. Section 4(4) further defines what being "in writing" means. When we speak of formal validity in this context, we are therefore referring to the writing requirement imposed under s 4(3) of the AA, which is the only formality requirement mandated by the AA for an arbitration agreement to be given effect to under the legislation.

77 Turning then to the specific phrase in dispute, there are three possible layers of meaning contained in the phrase, "effective arbitration agreement": (a) that there is an agreement, *ie*, a contract; (b) that the agreement is an

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arbitration agreement as defined by s 4(1) of the AA; and (c) that the arbitration agreement is a formally valid agreement which can be given effect to under the AA. The Judge's view was that all three of these are in view when s 4(6) of the AA deems there to be an "effective arbitration agreement", which the Developer also submits is the case. In contrast, the Appellants argue that only the third is in view, and the first two aspects must be established independently of s 4(6) of the AA. We refer to these as the "broad" and "narrow" views respectively. The crux of the difference between the parties is whether s 4(6) of the AA can deem there to be an arbitration agreement even if the parties did not actually enter into such an agreement.

78 In our view, the context of s 4(6) leans in favour of the narrow view. First, s 4(6) of the AA is found in a series of sub-sections (sections 4(3) to 4(8) of the AA) that deal *only* with the issue of whether an agreement is *in writing*. The words "effective arbitration agreement" in s 4(6) of the AA, found in the midst of this discussion (about what constitutes an arbitration agreement in writing), should likewise be interpreted in a manner consistent with those subsections. The Judge favoured the broad view as he took the view that "effective" could not be read as equivalent to the words "in writing" (see the GD at [69]). He instead concluded that "effective arbitration agreement" suggested "an arbitration agreement that is valid, complete and enforceable". With respect, this argument does not account for the fact that what is considered "effective" depends on the context in which the issue is raised. In the present context, s 4(6) of the AA is not only found among provisions dealing exclusively with what constitutes an arbitration agreement in writing, but is also part of a clear statutory sequence and structure that focuses the later parts of s 4 of the AA on the writing requirement for an arbitration agreement. Section 4(1) starts at the greatest level of generality: what is an arbitration agreement?

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Section 4(2) of the AA provides for the different forms that such an agreement can take: it can be a standalone agreement or a clause in another. And from s 4(3) onwards, s 4 of the AA concerns itself with a specific requirement, that the arbitration agreement be in writing. Understood in that light, "effective" in s 4(6) of the AA appears to be limited to the writing requirement, *ie*, that the agreement would be "effective" for the purposes of qualifying under the AA in relation to this formality requirement.

79 Second, we also find it significant that s 4(6) is situated in s 4 of the AA, which is a definition provision and opens with the heading, "Definition and form of arbitration agreement". It would be surprising to us if a definition provision should be interpreted to create substantive rights, which would be the consequence if we find that s 4(6) of the AA can be used to deem the existence of an arbitration agreement notwithstanding the court's finding that none exists as a matter of fact. However, to address any residual ambiguity, we proceed to consider the legislative purpose or object of s 4(6) of the AA.

Legislative purpose or object

80 To uncover the legislative purpose or object of s 4(6) of the AA as it now stands, it is necessary to consider the legislative history of this provision, in particular, its relationship with the 1985 Model Law and the 2006 Model Law. In the following, we undertake a chronological analysis of this history.

(1) The 1985 Model Law

81 Section 4(6) of the AA traces its origins to Art 7(2) of the 1985 Model Law. Article 7 reads as follows:

> Article 7. Definition and form of arbitration agreement

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> (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]

It is worth noting here that the requirement in Art 7(2) "is not merely a requirement that there be written *evidence* of an agreement; the agreement itself must be in writing" [emphasis in original]: Howard M Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 1989) ("*Guide to the 1985 Model Law*") at p 260.

82 The introduction of the material parts of Art 7(2) of the 1985 Model Law came about in the following manner, as recounted in the *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session*, UN GAOR, 40th Sess, Supp No 17, at para 87, UN Doc A/40/17 (1985):

> 87. A more limited suggestion was to include those cases where parties who had not concluded an arbitration agreement in the form required under paragraph (2) none the less 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. … The Commission, after deliberation, decided to extend the scope of

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> paragraph (2) along the lines of the suggestion. [emphasis added]

83 The purpose of the material part of Art 7(2) of the 1985 Model Law was hence to ensure that parties could not rely on the fact that such an agreement, constituted through conduct or orally, was not in writing in order to attack the validity of arbitration proceedings which the parties participated in. This was summarised as follows in *Guide to the 1985 Model Law* at pp 262–263:

> … In addition, the Commission sought to clarify that *a written arbitration agreement could be created* by an exchange of statements of claim and defence in which one party alleged and the other did not deny the existence of an arbitration agreement. This 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]

84 Put another way, Art 7(2) of the 1985 Model Law was concerned with formal validity, in this context, compliance with the writing requirement: see Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) at p 739. For an arbitration agreement to be enforced under Art 7 of the 1985 Model Law, it had to meet the formality requirement of being in writing. However, an agreement arising from the parties' conduct, in particular, by way of tacit or implied consent, would not be an agreement in writing. If the national law provides that such tacit or implied consent would give rise to a legally enforceable agreement, Art 7(2) then enables that agreement to be recognised as valid *despite* not being in writing. These materials show that Art 7(2) of the 1985 Model Law is not itself a legal basis for recognising that tacit or implied consent as *giving rise* to an agreement – it only responds once an agreement is found by other means and prevents parties from challenging the reliance on that agreement on the basis that it was not in writing.

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85 In this regard, we disagree with the Judge's approach to the rationale of Art 7(2) of the 1985 Model Law (see the GD at [54]–[55]), where he suggested that it was "eminently sensible" for the parties to be treated as having *concluded* an arbitration agreement in the exchange of documents, so as to prevent parties who participated in an arbitration, without complaining of the absence of an arbitration agreement, from subsequently claiming that the tribunal lacked jurisdiction. In the first place, this appears to be at odds with the Judge's earlier finding in the GD at [52], where he stated that Art 7(2)'s effect was only in respect of formal validity, a conclusion which we agree with. Second, while we agree that it is eminently sensible for such a result to be reached, the question remains whether Art 7(2) of the 1985 Model Law is the correct means by which that result is reached, or whether other doctrines of contract law are more appropriate to achieve that result, which Art 7(2) ensures would not be *hindered* by the formality requirement. While we agree with the Judge, in broad terms, that the provision was "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" (GD at [55]), this does not mean that Art 7(2) provides a basis for finding there to be such an agreement where the parties in fact did not agree. That same purpose could be achieved by construing Art 7(2) to prevent a party from seeking to resile from the agreement, established independently of Art 7(2), on the basis of formal invalidity. Indeed, we find on the basis of the above materials that Art 7(2) was intended only to prevent a party from claiming that the writing requirement was not fulfilled in such cases.

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(2) Introduction into domestic legislation and amendments to the IAA

86 Domestically, what is now s 4(6) of the AA was first introduced as s 4(4) of the Arbitration Act 2001 (Act 37 of 2001) ("2001 AA"). The material parts of s 4 of the 2001 AA read:

> **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 whether contractual or not.
>
> …
>
> (3) An arbitration agreement shall, except as provided for in subsection (4), be in writing, being contained in —
>
> (*a*) a document signed by the parties; or
>
> (*b*) an exchange of letters, telex, telefacsimile or other means of communication which provide a record of the agreement.
>
> (4) 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.
>
> …

87 The origin of the 2001 AA lay in the recommendations made by the Review of Arbitration Laws Committee ("RALC") within what was then known as the Law Reform and Revision Division of the Attorney-General's Chambers, in consultation with various bodies. At the introduction of the 2001 AA, it was explained in Parliament that the introduction of this legislation was to "align our domestic laws with the Model Law" (see *Singapore Parliamentary Debates, Official Report* (5 October 2001), vol 73 at col 2214 (Assoc Prof Ho Peng Kee, Minister of State for Law)). The Minister explained that the 2001 AA was largely based on the Model Law and also incorporated provisions from the

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United Kingdom's Arbitration Act 1996 (c 23). Following that, the Minister explained the key features of the bill, highlighting especially where the legislation differed from the 1985 Model Law. However, there was no specific discussion of what became s 4(4) of the 2001 AA in Parliament.

88 The key differences between s 4(4) of the 2001 AA and Art 7(2) of the 1985 Model Law lay in (a) the express requirement that s 4(4) only applied in "arbitral or legal proceedings"; (b) the scope of documents triggering s 4(4); and (c) the language used to describe the effect of the provision. In respect of the last-mentioned difference, whereas Art 7(2) applies to define an "agreement in writing" to include an agreement contained in the exchange of statements of claim and defence in the situation described, s 4(4) of the 2001 AA (like the later s 4(6) of the AA) provided that there was deemed to be an "effective arbitration agreement". Despite this difference in language, however, we are of the view that there was no intention to depart from the specific purpose of Art 7(2) of the 1985 Model Law in the introduction of s 4(4) of the 2001 AA.

89 First, s 4(4) of the 2001 AA needs to be read in its context. The starting point was s 4(3) of the 2001 AA, which set out the basic requirement that an arbitration agreement shall be in writing. Sections 4(3)(*a*) and (*b*) set out what it meant for the agreement to be "in writing". Section 4(3) was however subject to an *exception* in s 4(4) of the 2001 AA which deemed an "effective arbitration agreement" if the conditions stated therein were met. Hence, even if the arbitration agreement that the parties had entered into was not in writing, the agreement would nevertheless be valid by virtue of s 4(4) of the 2001 AA because s 4(4) deemed there to be an effective agreement in a situation where the writing requirement had not been complied with. Put another way, s 4(4) of the 2001 AA was entirely referable to the writing requirement set out in s 4(3) of the 2001 AA. The logic of s 4(3) and s 4(4) therefore suggests that s 4(4),

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like Art 7(2) of the 1985 Model Law, was concerned with formal validity. As an *exception* to the formality requirement in s 4(3), it would be odd if s 4(4) also had the broader effect of bringing into existence a separate agreement through its deeming operation. The difference in language between s 4(4) of the 2001 AA and Art 7(2) of the 1985 Model Law can be attributed to a subtle difference in approach – whereas Art 7(2) treats an agreement in those circumstances to be in writing, the drafters of s 4(4) of the 2001 AA adopted the view that although such an agreement could not be said to be in writing (as it was in fact not in writing) it should be treated as "effective" nonetheless. However, this was a difference only in approach because the purpose of both provisions was to ensure that such an agreement would not be treated as formally invalid.

90 Second, the approach taken as regards a similar and simultaneous amendment to the IAA is revealing. In the International Arbitration Act (Cap 143A, 1995 Rev Ed), s 2(1) originally defined an "arbitration agreement" as:

> … [A]n agreement in writing referred to in Article 7 of the Model Law and includes an arbitration clause contained or incorporated by reference in a bill of lading;

91 By the International Arbitration (Amendment) Act 2001 (Act 38 of 2001), which was passed in Parliament on the same day as the 2001 AA, s 2 was amended to provide for the following definition of an "arbitration agreement":

> **2.**—(1) In this Part, unless the context otherwise requires —
>
> **…**
>
> 'arbitration agreement' means an agreement in writing referred to in Article 7 of the Model Law and includes an agreement deemed or constituted under subsection (3) or (4);
>
> …

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> (3) 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.
>
> …

92 At first glance, it seems that s 2(1) of the IAA as amended in 2001 (the "2001 IAA") provided that s 2(3) had the effect of deeming there to be an *agreement* ("an agreement deemed … under subsection (3)"). However, a closer examination reveals that the same logic which governed the relationship between ss 4(3) and 4(4) of the 2001 AA also operated in the relationship between ss 2(1) and 2(3) of the 2001 IAA. The similarity lies in the implicit understanding of the drafters that the situations covered by s 4(4) of the 2001 AA and s 2(3) of the 2001 IAA were ones in which the arbitration agreement could *not* be said to be in writing and for which the writing requirement was therefore not appropriate. This explains the use of the phrase "except as provided for in subsection (4)" in s 4(3) of the AA and the distinction in s 2(1) of the 2001 IAA between an "agreement in writing" and the deemed agreement under s 2(3) of the 2001 IAA. As such, what was needed in s 2(3) of the 2001 IAA (as in s 4(4) of the 2001 AA) was a manner of drafting to reach the conclusion that despite the fact that the agreement was not in writing, it would still be treated as a valid arbitration agreement for the purposes of the IAA – the language adopted was that it was an "effective" arbitration agreement.

93 Hence, in s 2(1) of the 2001 IAA, an arbitration agreement meant either (a) an agreement in writing referred to in Art 7 of the Model Law; or (b) an agreement which is not otherwise in writing but would be treated as effective nonetheless under s 2(3) of the 2001 IAA (leaving aside for the moment s 2(4) of the 2001 IAA). Both of these were intended to govern the validity of an

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arbitration agreement for the purpose of the 2001 IAA and not to deem the existence of an arbitration agreement where there was none to begin with.

94 This emphasis on formal validity is borne out by the report of the RALC, which drafted the bills that became the 2001 AA and that introduced the amendments which were incorporated into the 2001 IAA. In the Law Reform and Revision Division, Attorney-General's Chambers, *Review of Arbitration Laws: Report* (LRRD No 3/2001, 2001) at p 4, it was stated 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. [emphasis added]

No intention to depart from the 1985 Model Law can be gleaned from this report, and the reference to a "waiver" of the writing requirement is consistent with the approach taken in both the 2001 AA and 2001 IAA which assumed that the situation covered by s 4(4) and s 2(3) respectively was one in which the agreement was not in writing, but was treated as formally valid and effective anyway.

(3) The 2006 Model Law

95 We turn to the 2006 Model Law, which provided for two options which States could choose between – Option I and Option II. Article 7(2) of the 1985 Model Law was reintroduced as a separate provision in Art 7(5) of Option I. The material parts of Option I of Art 7 of the 2006 Model Law read 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

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> 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.
>
> (3) 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.
>
> …
>
> (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 in original]

96 Option II reads:

> *Article 7. Definition of arbitration agreement*
>
> '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.
>
> [emphasis in original]

97 Both Options I and II departed from Art 7(2) of the 1985 Model Law in different ways. Option II was a more drastic departure from the writing requirement in Art 7(2), while the departure under Option I was less drastic, but nonetheless significant. In particular, Art 7(3) of Option I only requires the "content" of the arbitration to be in writing, as opposed to requiring the arbitration agreement itself to be in writing, while leaving the question of "whether the alleged parties to an agreement to arbitrate actually reached an agreement" to the national laws (Howard M Holtzmann, Joseph Neuhaus *et al*, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 2015) ("*Guide to 2006 Amendments*") at p 33).

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There was a debate concerning whether what became Arts 7(5) and (6) of the 2006 Model Law ought to be deleted in the light of that shift in Art 7(3), as it was suggested that Arts 7(5) and (6) were covered by Art 7(3) and were therefore redundant. The Working Group declined to do so as it considered that deleting those provisions may give the wrong impression of a substantive change (*Guide to 2006 Amendments* at p 39).

98 There is a further explanation for the retention of Art 7(5) of the 2006 Model Law in the background materials. In the 44th session of the Working Group, the following discussions were noted concerning paragraph (4) of a draft Art 7 (identical to what is now Art 7(5) of the 2006 Model Law) (United Nations Commission on International Trade Law, *Report of the Working Group on Arbitration and Conciliation on the work of its forty-fourth session (New York, 23-27 January 2006)* UN GAOR, 39th Sess, at paras 66, 68, UN Doc A/CN.9/592 (2006)):

> 66. Questions were raised whether paragraph (4) should be maintained given that paragraph (3) of the above proposal … already included arbitration agreements concluded by conduct. *In support of its retention, it was said that paragraph (4) provided an illustration of a specific situation, namely where the arbitration agreement was alleged by one party and not denied by the other. The view was expressed that at least the situation where an exchange of statements would evidence an arbitration agreement concluded elsewhere was not covered by paragraph (3) of the above proposal …*
>
> …
>
> 68. After discussion, the Working Group agreed to retain paragraph (4) of the revised draft article 7 without modification notwithstanding some reservations that it might cover some of the situations dealt with under articles 4 and 16, paragraph (2) of the Arbitration Model Law as well as paragraph (3) of the above proposal … *It was said that paragraph (4) was useful, since the narrow scope of article 4 of the Arbitration Model Law did not allow it to 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

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> and defence and since paragraph (4) was more specific than article 16, paragraph (2) of the Arbitration Model Law.
>
> [emphasis added]

99 To summarise, despite the possibility of overlap given the broadened definition of the writing requirement, Art 7(5) was kept without modification for at least the following reasons. First, Art 7(5) was retained to prevent any possible confusion over whether any change in the law was intended by reason of its deletion. Second, it was also retained to provide an illustration of cases that fell within Art 7(3) (*ie*, an agreement concluded otherwise than in writing but for which a record has been made), and potentially to cover the situation where the exchange of the statement of claim and defence evidenced an agreement concluded elsewhere. What is clear is that there is no indication at all that Art 7(5) of the 2006 Model Law was intended to have any broader effect than the equivalent parts of Art 7(2) of the 1985 Model Law.

100 Third, Art 7(5) was intended to provide 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", which Art 4 (not being concerned with the *existence* of the arbitration agreement) did not furnish. This last point was also highlighted by the Judge (see the GD at [53]), but, with respect, we do not agree with the Judge's interpretation of this statement. The Judge appears to have taken the phrase "existence of an arbitration agreement" to refer to the fact that the parties *agreed* to arbitration, *ie*, that Art 7(5) was a presumption of an agreement. However, it seems to us that this statement is better understood as being directed at the question of proof or evidence of the arbitration agreement, rather than a presumption of an agreement. This much is clear from the words "absence of material evidence", which suggests that Art 7(5) was in truth, concerned with questions of proof and

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that the reference to that agreement in the exchange of the statement of claim and defence is to be taken as *proof* of the existence of the arbitration agreement that was entered into. On that reading, Article 7(5) does not purport to set out an *independent* basis for determining if the facts give rise to a legally enforceable agreement or whether the parties had agreed to arbitrate.

101 This interpretation addresses the Judge's reliance on the words "positive presumption" in advancing the broad view of s 4(6) of the AA. But beyond this, the Judge further reasoned at [71] of the GD as follows:

> … 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. … [emphasis in original in italics; emphasis added in bold]

102 We are unable to agree with this additional argument. The link that the Judge drew between the written nature of the agreement (or the agreement in writing) and the existence of the arbitration agreement itself is not a necessary one. If a *written* arbitration agreement is deemed to exist, it does *not* necessarily follow that the arbitration agreement itself must also be deemed to exist by a legal fiction. The Judge's argument is only plausible if one assumes that Art 7(5) of the 2006 Model Law deems not just that the arbitration agreement is in writing, but that there is an arbitration agreement at all. However, this is the very issue that we are attempting to resolve in our analysis of the legislative history of s 4(6) of the AA. With respect, it appears to us that the Judge's reasoning assumed the result that he was seeking to justify. In the light of the

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materials canvassed above, we consider instead that the operation of the Model Law provisions is more plausibly described as follows: *if* it is established, independently, that there was an arbitration agreement, whether pre-existing or arising in the course of the exchange of the requisite documents, *then*, if the requirements of Arts 7(2) or 7(5) of the respective Model Laws are met, the agreement found would be an agreement in writing and therefore effective for the purposes of the respective Model Laws.

(4) The 2012 amendments

103 Following the 2006 Model Law, the International Arbitration (Amendment) Act 2012 (Act 12 of 2012) amended *both* the IAA and the AA to adopt Option I. The versions of s 4 of the AA and s 2A of the IAA arising from these amendments are the provisions that are currently in force. In relation to the IAA, the Minister for Law stated during the Second Reading that the intent of s 2A of the IAA was to incorporate Option I of Art 7 of the 2006 Model Law (*Singapore Parliamentary Debates, Official Report* (9 April 2012), vol 89 at p 65 (K Shanmugam, Minister for Law)). There were discussions as regards the scope of the requirement that the agreement be recorded in writing, *eg*, whether a unilateral record would suffice. The central point of the Minister's statement, however, was that the amendments were intended to incorporate Option I of the 2006 Model Law. There was no indication at all that Parliament intended to depart from Option I of the 2006 Model Law in the amendments to the IAA and AA.

104 We have already explained our view that the differences between s 4(4) of the 2001 AA and Art 7(2) of the 1985 Model Law did not indicate that s 4(4) of the 2001 AA was to have a broader role in deeming the existence of an arbitration agreement when there was none. We have also established that

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Art 7(5) of the 2006 Model Law also maintained the same purpose as Art 7(2) of the 1985 Model Law in preventing parties from challenging an arbitration agreement on the basis that such an agreement was not in writing, provided that the relevant conditions were met. As such, the remaining question is whether the changes made *via* the 2012 amendments can be understood to effect any change in the purpose of s 4(4) of the 2001 AA when it was reintroduced as s 4(6) of the AA.

105 We do not think so. In the first place, s 4(6) of the AA is identical to s 4(4) of the 2001 AA – the text of s 4(4) of the 2001 AA was not amended. It follows, therefore, that nothing in the text suggests that s 4(6) of the AA was intended to depart from s 4(4) of the 2001 AA. The only significant difference is in the structure of s 4 of the AA. Structurally, unlike ss 4(3) and 4(4) of the 2001 AA, ss 4(3)–(4) of the AA no longer refers to s 4(6) as an "exception". However, s 4(6) of the AA remains positioned in the midst of other provisions dealing only with the question of when an arbitration agreement can be said to be in writing (*viz*, ss 4(4) to 4(8)). There is therefore nothing to suggest that s 4(6) of the AA was intended to depart from s 4(4) of the 2001 AA. If Parliament had intended to effect a substantive change in the law by restructuring the provisions, one would have expected some explanation to this effect but there was none. Hence, as with s 4(4) of the 2001 AA, the specific purpose of s 4(6) of the AA remains to prevent a party from attempting to resile from an *existing* arbitration agreement on the ground that it was not in writing and hence formally invalid for the purposes of the AA. This remains consistent with the purpose of Art 7(5) of the 2006 Model Law.

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(5) Foreign authorities

106 We were referred by the Developer to a number of foreign authorities dealing with the provisions embodying Arts 7(2) and 7(5) of the 1985 and 2006 Model Laws respectively. At the outset, we observe that these authorities are of relatively limited value given that, as the Judge observed at [57] of the GD, it does not appear that any other jurisdiction has implemented the Model Law provisions domestically in the way that Singapore has done in s 4(6) of the AA and s 2A(6) of the IAA. However, for completeness, we go on to discuss these authorities that have been cited to us.

107 In *Gay Constructions Pty Ltd & anor v Caledonian Techmore (Building) Ltd (Hanison Construction Co Ltd, Third Party)* [1994] 2 HKC 562 ("*Gay Constructions*"), a dispute arose between two subcontractors (the plaintiffs) and their employer (the defendant), which was in turn a subcontractor of the main contractor, Hanison. The contract between the defendant and Hanison was signed by Hanison but not by the defendant. This contract contained an arbitration clause (see *Gay Constructions* at 564). Upon Hanison's application for the third party proceedings against it to be stayed in favour of arbitration, it was argued by the defendant that Art 7(2) of the 1985 Model Law was not satisfied, as the agreement was not signed by the defendant. The High Court in Hong Kong found however that Art 7(2) was satisfied, *inter alia*, by the defendant sending a claim document to Hanison which included the arbitration clause, which Hanison did not deny in subsequent correspondence (see *Gay Constructions* at 566). This was a case where there was clearly a *separate* arbitration agreement, the only question being whether it was in writing. Far from supporting the Developer's arguments, the approach taken in *Gay Constructions* reflects our conclusions on the nature of Art 7(2) of the 1985 Model Law.

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108 In *William Co v Chu Kong Agency Co Ltd & anor* [1993] 2 HKC 377 ("*William*") at 382, the plaintiff commenced a suit in Hong Kong to recover damages caused to cargo, which was shipped under a bill of lading. A clause in the bill of lading, however, provided that all disputes were to be resolved in the courts of the People's Republic of China or be arbitrated in that country. The first defendant had signed the bill of lading, but not the plaintiff. As a starting point, therefore, the writing requirement in Art 7(2) of the 1985 Model Law was not strictly satisfied, and the question was whether the other provisions in Art 7(2) applied. There was correspondence between the parties in which the defendant's solicitors stated that the bill of lading provided that all disputes arising thereunder shall be "resolved in PRC courts or by arbitration in PRC". The plaintiff's solicitors did not deny that there was such a clause, but replied that it was of no effect under the Hague-Visby Rules. Kaplan J held that Art 7(2) of the Model Law was satisfied, finding, *inter alia*, that Art 7(2) could be satisfied by documents which post-dated the agreement. Further, the agreement (*ie*, the bill of lading) was in writing, and the assent to that written agreement was found in the correspondence (see *William* at 384). Kaplan J considered that "[a]t the end of the day, the court has to be satisfied that these parties agreed on arbitration or litigation in China", and the material presented, *ie*, the bill of lading and the correspondence between the parties, showed that this was the case (*William* at 385). While it is not necessary for us to comment on the correctness of the decision, what is clear to us that is that the approach adopted in *William* is, again, consistent with our view in that the court had to be satisfied that the parties had in fact agreed to arbitration, and the material part of Art 7(2) was merely a means of satisfying the formality requirement.

109 The Indian authorities also do not support the Judge's view or the Developer's argument. *SN Prasad, Hitek Industries (Bihar) Limited v Monnet*

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Finance Limited and others (2011) 1 SCC 320, a decision of the Supreme Court of India, simply did not discuss the issue which arises in the appeal before us. The relevant part of that decision centred on whether there had been an assertion of an arbitration agreement at all (at [11]–[17]). It was not concerned with the legal *effect* of the Indian equivalent of Art 7(2) of the 1985 Model Law, and not directed at whether such a provision deems the existence of an arbitration agreement or merely deems that an existing arbitration agreement satisfies the formal writing requirement.

110 *Shyamraju & Company (India) Pvt Ltd v City Municipal Council Hosapete* (2019) 2 AKR 272 does not assist the Developer either. There, the plaintiff claimed that the defendant was in breach of contract, and sent a statement of claim asserting the existence of an arbitration agreement and seeking submission to arbitration. The defendant did not deny the existence of the arbitration agreement or submission to arbitration in its statement of defence. The contract itself did not contain an arbitration clause, but the plaintiff argued that "if a party asserts the existence of an arbitration agreement and the other party does not deny the same[,] the same would [be] tantamount to an implied agreement" (at [5]). The High Court of Karnataka noted at [8] the *general proposition* that an agreement could be implied by the parties' conduct, and then considered s 7(4)(*c*) of the domestic legislation which provided that an arbitration agreement would be considered to be in writing if it was contained in an exchange of statement of claim and defence in which the existence of the agreement alleged by one party was not denied by the other. The court concluded at [11] that there was an implied agreement "in view of" s 7(4)(*c*). With all due respect, it is not clear what "in view of" was intended to mean. The court's approach suggested that the principle of implying an agreement was based on a more general legal proposition apart from s 7(4)(*c*) of the domestic

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legislation. Indeed, its reasoning (stated at [8] and reaffirmed at [11]) was couched in the ordinary language of objective contractual formation:

> 8 … Where a party denies that it has entered into an agreement to arbitrate, the court will consider whether a reasonable person, knowing the relevant background and observing matters from the perspective of the party asserting the existence of the arbitration agreement, would have concluded from the other party's conduct that it was agreeing to participate in the proposed arbitration …

On a plain reading of this case, it appears to support the view above that the agreement must be established independently. In any event, the distinction that is under consideration in the case before us (*ie* whether s 4(6) of the AA deems the existence of an arbitration agreement or merely deems that an arbitration agreement is formally valid) does not appear to have been considered by the Indian court, and we are unable to derive much assistance from that case for the present appeal.

111 We therefore find that far from supporting the Developer's case, these authorities support our views on the scope of the purpose of the Model Law provisions or, at the very least, do not support the contrary view.

(6) Conclusion on legislative purpose or object

112 Based on the legislative history described above, we conclude that the general purpose (see *Tan Cheng Bock* at [40]) of the enactment of the 2001 AA and the amendments in 2012 was to bring the AA in line with the 1985 and 2006 Model Laws respectively, with some modifications for local practice and usage. In this regard, however, there is no indication in the legislative history that we have recounted that those modifications for local needs were intended to broaden the *effect* of s 4(4) of the 2001 AA or s 4(6) of the AA in deeming the existence of an arbitration agreement when there was none.

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113 In terms of the specific purpose, we summarise our findings as follows:

(a) Article 7(2) of the 1985 Model Law was concerned with formal validity with respect to the writing requirement. It was intended to prevent a party who had entered into an arbitration agreement which was not written, *ie*, concluded orally or by conduct in the exchange of documents, from denying the agreement on the basis that it was formally invalid because it was not an agreement in writing.

(b) Section 4(4) of the 2001 AA was also concerned with validity under the 2001 AA, as is apparent from its relationship with s 4(3) of the 2001 AA and the absence of any indication to depart from Art 7(2) of the 1985 Model Law. The use of the phrase "effective arbitration agreement" was a reflection of the drafter's intention that where an agreement is not *in writing*, the agreement would nonetheless be treated as a valid arbitration agreement if the conditions are met, and the use of the word "effective" was used to reflect this position.

(c) Article 7(5) of the 2006 Model Law followed essentially the same approach as Art 7(2) of the 1985 Model Law. The reasons for its retention despite the departure from the strict formality requirement in Art 7(3) of the 2006 Model Law did not indicate a broader role to be ascribed to Art 7(5) of the 2006 Model Law.

(d) When s 4(6) of the AA was introduced together with s 2A of the IAA, the avowed intention of Parliament was to implement Option I of Art 7 of the 2006 Model Law. In addition, when compared with s 4(4) of the 2001 AA, there was no significant change. For these reasons, s 4(6) of the AA retained the same specific purpose as s 4(4) of the 2001

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AA, Art 7(2) of the 1985 Model Law, and Art 7(5) of the 2006 Model Law.

(e) The foreign authorities canvassed above do not contradict or undermine our views of the purpose of the Model Law provisions.

114 Hence, we conclude that s 4(6) of the AA is consistent with the Model Law provisions and s 4(4) of the 2001 AA. It follows that, like these other provisions, the specific purpose of s 4(6) is to ensure that an arbitration agreement would be treated as effective for the purposes of the AA even if the writing requirement is not met. In other words, the specific purpose of s 4(6) of the AA is to prevent a party who has not denied the existence of the arbitration agreement in circumstances in which the assertion of the existence of an arbitration agreement in a pleading, statement of case or any other document calls for a reply, from arguing that the agreement (whether pre-existing or arising in the course of the assertion and non-denial) is not in writing and is hence formally invalid in order to escape the consequences of that agreement.

Comparison of the possible interpretations against the purposes of the statute

115 We turn then to the third step in the *Tan Cheng Bock* framework to compare the possible interpretations against the purposes of the provision identified.

116 At the outset, we agree with the Appellants that, in principle, a deeming provision should be construed strictly according to its purpose. As stated by the Federal Court of Australia in *Federal Commissioner of Taxation v Comber* (1986) 64 ALR 451 at 458 (and quoted in *ACC v Comptroller of Income Tax* [2011] 1 SLR 1217 ("*ACC*") at [22]):

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> … deeming provisions are required by their nature to be construed strictly and only for the purpose for which they are resorted to (*Ex parte Walton* (1881) 17 Ch D 746 per James LJ at 756). It is improper … to extend by implication the express application of such a statutory fiction. It is even more improper so to do if such an extension is unnecessary, the express provision being capable by itself of sensible and rational application. …

In *ACC* at [24], the High Court also considered how this approach ought to relate to the purposive approach taken in the Interpretation Act (Cap 1, 2002 Rev Ed), concluding that the "common law principle [of strict construction in favour of the taxpayer] may be applied when such application coincides with the purpose underlying the statutory provision in question or when ambiguity persists even after purposive interpretation has been properly attempted". Put another way, a deeming provision should not be understood to deem more than is necessary to accomplish its purpose. Otherwise, the law may stray too far from reality and arrive at results that are not consistent with the facts or with other legal doctrines. This is, in the context of the *Tan Cheng Bock* framework, not an entirely different principle, but simply a reminder that in assessing which of the possible interpretations are preferable, the interpretation that would involve the least inroads into established legal doctrines or would require the least drastic departure from reality should be preferred if this is consistent with the legislative purpose or object.

117 In our judgment, the narrow view, *ie*, that s 4(6) of the AA only serves to deem an arbitration agreement that is separately found to exist between the parties to be valid even if it is not in writing, best reflects the specific purpose of that provision. The narrow view corresponds to the specific purpose that we have identified above by providing for the validity and effectiveness of the agreement for the purposes of the AA, without stepping further into matters that are not required for s 4(6) to achieve its limited intended purpose. Here, the

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purposive approach and the strict approach in construing a deeming provision are aligned. The narrow view is also most consistent with the broad legislative purpose in seeking to bring our domestic laws into conformity with the Model Laws. Finally, the narrow view is the most consistent with the legislative history, as outlined above.

118 While the broad view would also satisfy the purpose of s 4(6) of the AA, insofar as it would also prevent a party from resiling from an agreement on the basis of formal invalidity, it does so with a number of additional implications which were not intended by Parliament. The Judge's approach, with respect, takes s 4(6) of the AA too far and encroaches (without any real need or basis in the statute or legislative history) into the domain of substantive contract law. This is apparent from his conclusion in the GD at [70] that:

> … 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. … [emphasis in original]

119 When the Judge explained this reasoning on the basis that "[i]t 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" (GD at [70]), he did not, with respect, sufficiently account for the solutions already offered by contract law, including the doctrine of promissory estoppel or estoppel by representation: see, *eg*, *Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532 at [6] (where the High Court found that estoppel by representation prevented a party from insisting that the dispute resolution mechanism was not arbitration), or even the general rules of contract formation. Those doctrines can be employed in such cases, with the

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necessary safeguards including specific requirements like detrimental reliance or consideration. Given that the law already has doctrines which can sufficiently address these "abhorrent" situations while preserving parties' freedom to act, we are unable to find any strong reason to read s 4(6) of the AA as an independent basis for the formation of a legally enforceable agreement.

120 Mr Lee also argued, in this regard, that the broad view would not make a significant inroad into contract law or the consensual nature of arbitration because it would not be a significant departure from the normal inferences that the court will apply. With respect, we do not find this argument persuasive. As we indicated at the hearing, once the court arrived at a view that the evidence did not justify a finding that the parties had entered into an agreement, the court was no longer operating in the realm of inferences or findings of fact. Instead, the court had to proceed on the basis that there was *no* agreement and that the inferences could not be drawn. The only question then was whether s 4(6) of the AA would deem there to be an agreement despite the absence of evidence indicating any such agreement.

121 We therefore conclude that if s 4(6) of the AA applies, it only has the effect of deeming an existing arbitration agreement to be formally valid and therefore effective despite not being in writing. It does not have the effect of deeming there to be an agreement between the parties when such an agreement does not otherwise exist, nor does it deem any such agreement to meet the definition of s 4(1) of the AA if it does not otherwise satisfy the requirements stated therein.

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The decision in Machlogic

122 In arriving at our decision, we also have had regard to a decision of the High Court in *Machlogic* (which was not cited by the Judge below or by the parties on appeal) where Vinodh Coomaraswamy J took essentially the same position in relation to s 2A(6) of the IAA as the Judge did in relation to s 4(6) of the AA. Although the appeal before us concerns the proper interpretation of s 4(6) of the AA, we believe it would be useful for us to express our views of this decision since the wording of s 2A(6) of the IAA is *in pari materia* with s 4(6) of the AA.

123 In that case, Vitol Asia Pte Ltd ("Vitol Asia") and Machlogic Singapore Pte Ltd ("Machlogic Singapore") were parties to a Singapore-seated arbitration. Vitol Asia obtained an award in its favour and obtained leave to enforce the award as a judgment of the High Court under s 19 of the IAA. Machlogic Singapore then applied to set aside the order granting leave. One of the grounds relied upon was that the arbitration agreement was not in truth an arbitration agreement under s 2A(1) of the IAA, and, in the alternative, it was vitiated by corruption and fraud. Vitol Asia submitted in response that "it [was] immaterial whether or not the final clause [was], strictly speaking, an arbitration agreement", as s 2A(6) of the IAA deemed there to be an effective arbitration agreement between the parties (see *Machlogic* at [50]). Coomaraswamy J agreed.

124 The first issue was whether the general denial of the existence of a contract between the parties sufficed for s 2A(6) of the IAA. Coomaraswamy J held that it was not (see *Machlogic* at [55]). While this specific holding is not relevant to the present appeal, Coomaraswamy J's reasoning touched on the

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scope of s 2A(6) of the IAA. He identified the twin purposes of s 2A(6) of the IAA as follows (see *Machlogic* at [58]):

> … (a) to promote efficiency in the allocation of dispute-resolution resources; and (b) to avoid defeating the reasonable expectations of stakeholders in dispute-resolution proceedings. These twin purposes are why s 2A(6) applies not only in arbitration but generally in all dispute-resolution proceedings.

125 He held that requiring a specific denial of the existence of an arbitration agreement would serve these two purposes. Coomaraswamy J also held that requiring such specific denial was necessitated by the range of situations in which s 2A(6) of the IAA could apply (*Machlogic* at [63]). In the course of this reasoning, Coomaraswamy J made the following observation about s 2A(6) (*Machlogic* at [66]):

> 66 In that sense, the parties' historical conduct underlying their dispute is irrelevant for the purposes of s 2A(6). It is the claimant's *present* assertion of an arbitration agreement which must be denied, not the existence of a putative arbitration agreement in the *past*. If a respondent fails to deny *now* the claimant's assertion *now* of an arbitration agreement when the assertion calls for a reply, s 2A(6) will achieve its twin purposes by deeming there *now* to be an effective arbitration agreement between the parties. This deemed arbitration agreement does not arise from a past contract but from the parties' present conduct. [emphasis in original]

However, with respect, it is not clear how he derived this observation and how it could be justified. Coomaraswamy J appears to have *assumed* that the effect of s 2A(6) was to deem an arbitration agreement into existence.

126 Coomaraswamy J held that s 2A(6) of the IAA applied on the facts. He then went on to hold that although he had doubts as to whether the clause in the contract was an arbitration agreement as defined by s 2A(1) of the IAA, it was unnecessary to consider this *because* of s 2A(6) of the IAA (see *Machlogic* at

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[81]–[84]), which he considered would deem there to be an arbitration agreement between the parties.

127 As regards Machlogic Singapore's contention that the arbitration agreement was vitiated by reason of fraud and corruption, Coomaraswamy J held that the application of s 2A(6) of the IAA meant that any fraud or corruption in the formation of the contract could not have an effect on the arbitration agreement which was deemed to be effective. Recalling his interpretation of s 2A(6) of the IAA at [66] (quoted at [125] above), Coomaraswamy J took the view that if there was any fraud or corruption, that was a matter that lay in the past. Section 2A(6) of the IAA, which was concerned with the *present* conduct of the parties, could not "reach into the past to cure or validate the defect" (*Machlogic* at [86]). Further, as the basis of arbitration was the acts giving rise to the deemed agreement in s 2A(6) of the IAA, that would have occurred *after* any alleged fraud or corruption and would therefore be untainted (at [87]). He summarised the views above in the following manner:

> 90 The result is that [Machlogic Singapore] is bound to arbitrate its substantive dispute with [Vitol Asia] by the operation of s 2A(6) [of the IAA] even if it is assumed that: (a) [Machlogic Singapore] has never consented to arbitration, whether in the subjective sense or even in the objective contractual sense; and (b) the contract is tainted by fraud or corruption. That is undoubtedly an inroad on the consensual nature of arbitration. That is an especially serious inroad given that the allegations of fraud and corruption are made directly against [Vitol Asia] and not just against Mr Saiful. An observer could justifiably take the view that the approach I have taken to s 2A(6) must be wrong because it demonstrates nothing so much as the proposition that fraud unravels everything except arbitration agreements.
>
> 91 I do not think that view would be correct. I consider the inroad on the consensual nature of arbitration created by my approach to s 2A(6) to be a justified inroad in terms of policy and a moderate inroad in terms of effect.
>
> 92 I consider the inroad justified in terms of policy because of the twin purposes of s 2A(6) of the [IAA] … To advance those

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> twin purposes, s 2A(6) does nothing more than to provide that a respondent who fails to deny a claimant's assertion of an arbitration agreement in the circumstances envisaged by s 2A(6) is precluded permanently from denying the arbitration agreement and from having recourse to litigation. Seen in that light, s 2A(6) merely establishes a statutory waiver or estoppel which binds the respondent. Whether it is correctly analysed as a waiver or an estoppel is immaterial for present purposes.
>
> 93 I consider this inroad to be a moderate inroad because it relates only to the mode of dispute resolution. Section 2A(6) says nothing about the parties' substantive rights and obligations. … In that sense, s 2A(6) is merely the mirror image of the rule in s 6 of the [IAA] that delivering a pleading or taking a step in litigation extinguishes permanently a defendant's right to have recourse to arbitration even if there is an arbitration agreement between the parties within the meaning of s 2A(1). Both provisions affect only the mode of dispute resolution and not its outcome. It is true that the operation of s 2A(6) does, at least in an arbitration governed by the [IAA], deprive a respondent of a right of an appeal against the outcome on the merits. But a respondent which finds itself bound by s 2A(6) has only itself to blame for its predicament.

128 While we acknowledge the intuitive appeal of the position that Coomaraswamy J was putting forward, we are unable to agree with his approach to s 2A(6) of the IAA. First, with respect, insufficient attention was paid to the background of s 2A(6) of the IAA and how it related to Art 7(5) of the 2006 Model Law, as well as prior provisions and the AA. Second, Coomaraswamy J did not appear to explicate his reasons for his view of the effect of s 2A(6), and most of his reasoning appears to assume that his view of that provision's effect was self-evidently correct. This is especially clear at [58], [66], [86]–[88], and [90] of *Machlogic*. It appears that the only reason he offered for why s 2A(6) could be read as having that broad an effect was that this would give effect to the "twin purposes" identified in *Machlogic* at [58]. However, assuming for present purposes that s 2A(6) has these twin purposes, these do not necessarily dictate that s 2A(6) would bring into existence a separate agreement that did not otherwise exist and deem that agreement to be an arbitration agreement. The

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question must be, as we have previously discussed, how the statute is intended to address those concerns, which requires attention to the specific language, context, and background of the provision. For the reasons we have canvassed above in relation to s 4(6) of the AA, which appear to us to apply with equal force to s 2A(6) of the IAA, we would express the view that when s 2A(6) applies, it is intended to simply deem that an arbitration agreement, independently established, would be effective for the purpose of the IAA even if it was not in writing.

129 Given our view on the scope of s 4(6) of the AA and the fact that s 2A(6) of the IAA is *in pari materia* with that provision, and given our doubts as to the reasoning employed in *Machlogic*, we are provisionally of the view that s 2A(6) of the IAA is also intended to have this limited effect. We will leave it for a definitive determination when the issue is squarely before us with the benefit of the parties' arguments.

Conclusion on s 4(6) of the AA

130 In the present case, we find that the threshold requirements for s 4(6) of the AA are not met, as the assertion was not made in arbitral or legal proceedings, and there was in fact no assertion of an arbitration agreement at all. In any event, we also find that s 4(6) of the AA does not have the effect of deeming there to be an arbitration agreement when there is no such agreement between the parties. Section 4(6) of the AA merely precludes a party who has not denied the existence of an arbitration agreement in the requisite circumstances from relying on formal invalidity (*ie*, non-compliance with the writing requirement) to challenge the validity and enforceability of such an arbitration agreement under the AA. It does not deem the existence of an arbitration agreement which has to be established independently of s 4(6).

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131 The Judge found correctly that cl 20A.1 of the SPAs is not an arbitration agreement. We have found on appeal that the parties had not entered into a separate arbitration agreement. Given our views on s 4(6) of the AA, it follows that s 4(6) of the AA has no effect in the present case. Hence, there is no arbitration agreement at all between the Purchasers and the Developer in this case. In the light of this, it is no longer relevant or necessary to address the arguments on common mistake, and we proceed to consider the issue of estoppel.

Are the Appellants estopped from denying the existence of an arbitration agreement?

132 The Developer makes a further argument that the Appellants are nevertheless estopped from denying the existence of an arbitration agreement between them. We are unable to agree.

133 In the first place, based on our analysis of the evidence discussed at [47]–[66] above, it is clear that the only representation or assumption made in the course of the 1st and 2nd Attempted Arbitrations was that cl 20A.1 was a valid arbitration agreement, not, more generally, that the parties had a valid arbitration agreement *irrespective* of the source of that agreement. At highest, therefore, regardless of what type of estoppel is relied upon (which is not clear from the Respondent's Case), any estoppel would only be to prevent the Appellants from denying that cl 20A.1 of the SPAs was not an arbitration agreement. Since no issue has been taken with the Judge's findings on cl 20A.1 on appeal, it is not an estoppel that is relevant for this appeal.

134 In any event, we agree with the Judge that no detrimental reliance has been proved and it is not unconscionable for the Appellants to be allowed to resile from any representation that there was a valid arbitration agreement.

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There has been no reliance whatsoever on the representation since no steps were ever taken in any purported arbitration. As the Judge observed at [87]–[88] of the GD, the Developer's expenses were not incurred *on the basis* of the representation or assumption, but, in fact, to *dispute* the specific assertions made by the Appellants. Indeed, the Developer's position in response to both the 1st and 2nd NOAs was that there was no validly commenced arbitration. The fact that the Developer expended costs in the course of that refusal does not seem to us to be sufficient to establish detrimental reliance. If anything, the Developer was *refusing* to act in reliance on the representation and was in fact successful in doing so.

Should the Suit be stayed?

135 In the absence of any arbitration agreement between the parties or an estoppel preventing the Appellants from disputing the existence of such an agreement, there is simply no basis for a stay of the Suit under s 6(1) of the AA.

Conclusion

136 For the reasons above, we allow the appeal and lift the stay on the Suit.

137 We note that in the course of the hearing below, the Developer through its counsel offered to resolve the dispute in a single arbitration before a tribunal of three arbitrators to be governed by the SIAC Rules. This was essentially no different in substance from the Appellants' initial attempt to commence arbitration proceedings. The only difference is that it should be heard by three arbitrators instead of one. Had both parties engaged in constructive discussion at the outset on how best to move the arbitration forward, all of these proceedings, together with their attendant costs, could have been avoided. Unfortunately, the Developer's offer came too late and in the same way that the

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Developer was entitled to reject the Appellants' initial proposal for arbitration, it was likewise within the Appellants' prerogative to reject the same and to pursue the present appeal.

138 While both parties share some responsibility for causing this state of affairs, let this be a lesson for lawyers in the future that it does not pay to play hardball in a situation where both parties are *ad idem* that the dispute *should* be referred to arbitration, but cannot agree on the precise terms. Just to be clear, counsel are entitled to adopt strategic positions in the best interests of their clients. However, at times, such tactical decisions can backfire, as they appear to have done in this case as regards the Developer. It would have been more constructive for parties to negotiate in order to reach common ground particularly since all parties, at least at the time of the 1st and 2nd Attempted Arbitrations, were in principle agreeable to arbitration as the preferred forum. Regrettably, the entire matter started on the wrong note with the Appellants' insistence on conditions for the proposed arbitration which clearly required the concurrence of the other party. Thereafter, it was downhill all the way leading to the present appeal.

139 It will be apparent from the foregoing that we are not minded, despite the Appellants' submissions, to impose indemnity costs against the Developer. The threshold for indemnity costs has not been met, and, as far as the overall position is concerned, both parties have contributed to this present state of affairs. We therefore order the Developer to pay the costs of the appeal fixed at

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$50,000 (all-in) to the Appellants. The costs order below is reversed in favour of the Appellants. The usual consequential orders will apply.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Chan Wah Teck Jeffrey SC, Hannah Alysha binte Mohamed Ashiq and Uday Duggal (TSMP Law Corporation) for the appellants;
Lee Eng Beng SC, Sim Chee Siong and Koh En Da Matthew (Rajah & Tann Singapore LLP) for the respondent.

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