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

[2024] SGHC 137

Originating Application No 1135 of 2023

Between

Star Engineering Pte Ltd

… *Applicant*

And

(1) Pollisum Engineering Pte Ltd
(2) Great Eastern General Insurance Limited

… *Respondents*

GROUNDS OF DECISION

[Arbitration — Stay of court proceedings — Court's discretion under Arbitration Act]
[Arbitration — Stay of court proceedings — Case management stay]

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Star Engineering Pte Ltd
v
Pollisum Engineering Pte Ltd and another

[2024] SGHC 137

General Division of the High Court — Originating Application No 1135 of 2023 (Registrar's Appeal No 4 of 2024)
Wong Li Kok, Alex JC
20 February 2024

24 May 2024

Wong Li Kok, Alex JC:

Introduction

1 This was the 1st respondent's appeal against the decision of the learned assistant registrar (the "learned AR") in HC/SUM 3431/2023 ("SUM 3431") to dismiss the 1st respondent's application for a stay of HC/OA 1135/2023 ("OA 1135") on the basis that the parties had agreed to submit the disputes between them to arbitration.

2 The appeal brought about the not uncommon tussle between parties where an agreement to arbitrate is being set against the court's discretion to allow a dispute between the parties to remain in the court's jurisdiction. I ruled in favour of keeping the parties to their promise to arbitrate. The applicant disagreed with my decision and appealed. I set out below the reasons for my decision.

Facts

Background to the dispute

3 The applicant and the 1st respondent are companies incorporated in Singapore and are in the business of building construction. On or around 25 September 2019, the 1st respondent engaged the applicant as its contractor for the design, construction, and maintenance of the works for a project titled "Proposed Design and Build New Erection of 4-Storey Building on Lot 01876W MK 13 at 41 Senoko Way".[1] This engagement was based on the REDAS Design and Built Conditions of Contract (3rd Ed, October 2010) (the "REDAS Conditions"), with agreed variations found in the Particular Conditions of Contract (the "Particular Conditions") (collectively, the "Contract").[2]

4 Under cl 2.1.1 of the REDAS Conditions, the applicant was to provide "an unconditional on-demand bond … in lieu of the cash deposit" of S$856,000.00.[3] In accordance with this clause, the applicant provided to the 1st respondent an unconditional on-demand performance bond, Performance Bond No 2019-A0688351-GPB dated 15 November 2019 (the "PB").[4] The 2nd respondent, an insurance company, was the party that issued or insured the PB.[5]

5 The Contract and the PB contained different dispute resolution clauses. Clause 9 of the PB provided that "the parties agree to submit to the non-

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1 1st affidavit of Hua Yu Song dated 3 November 2023 ("1HYS") at para 14.

2 1st respondent's Written Submissions dated 6 February 2024 ("RWS") at para 4.

3 1HYS at para 15 and p 88.

4 Applicant's Written Submissions dated 6 February 2024 ("AWS") at para 2.

5 AWS at para 2.

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exclusive jurisdiction of the Singapore Courts".[6] The Contract, on the other hand, contained a typical widely-worded arbitration agreement between the applicant and the 1st respondent. Clause 33.2.1 of the REDAS Conditions stated that "[i]n the event of any dispute between the [p]arties in connection with or arising out of the Contract or the execution of the [w]orks … the [p]arties shall refer the dispute for arbitration".[7] Further, cl 2.1.3C.2 of the Particular Conditions was specifically added to provide that "[a]ny dispute which the Contractor has in relation to such call, demand, receipt, payment … shall be resolved in accordance with clause 33 [of the REDAS Conditions]".[8] In other words, any disputes between the applicant and the 1st respondent relating to the PB were also to be referred to arbitration.

6 On 30 October 2023, the 1st respondent made a call on the PB (the "Payment Demand").[9] This was on the basis that the 1st respondent had incurred rectification costs and significant losses and expenses due to the applicant's alleged breach of the Contract. The 1st respondent alleged that there were substantial and numerous defects in the applicant's works, and that the applicant had failed to obtain the Temporary Occupation Permit on time.[10]

Procedural history

7 On 4 November 2023, the applicant made the application under OA 1135 for the following orders:

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6 1HYS at p 23.

7 1st affidavit of Ang Yong Jian dated 6 November 2023 ("AYJ") at p 13.

8 1HYS at p 91.

9 1HYS at para 27.

10 AYJ at paras 14–17 and 20.

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(a) that the 1st respondent be injuncted from receiving the sum of S$856,000.00 or any part thereof from the 2nd respondent pursuant to the Payment Demand;

(b) that the 2nd respondent be injuncted from making any payment under the PB of the sum of S$856,000.00 or any part thereof to the 1st respondent pursuant to the Payment Demand;

(c) that the 1st respondent be injuncted from making any further demand to the 2nd respondent for payment under the PB; and

(d) that in the event that the 1st respondent receives the sum of S$856,000.00 or any part thereof from the 2nd respondent, that the 1st respondent be injuncted from using, depleting and/or disposing the sums received, and for those sums to be paid back to the 2nd respondent.

8 On the same day, the applicant commenced HC/SUM 3408/2023 ("SUM 3408"). The applicant asked for interim injunctions to be ordered against the respondents pending the resolution of OA 1135. On 7 November 2023, Chan Seng Onn SJ allowed the applicant's application to temporarily injunct the respondents as stated at [7(a)]–[7(c)] above.[11]

9 On 6 November 2023, the 1st respondent commenced SUM 3431, seeking a stay of OA 1135 in favour of arbitration. The learned AR dismissed the stay application. On 5 January 2024, the 1st respondent brought the present application to appeal against the learned AR's decision. The parties agreed that cl 33 of the REDAS Conditions was an arbitration agreement for a domestic

[11] HC/ORC 5355/2023.

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arbitration. It was thus undisputed that the Arbitration Act 2001 (2020 Rev Ed) (the "AA") applied. In that regard, the parties also agreed that the court has a discretion on whether to stay a court proceeding in favour of arbitration, considering various factors including practical case management.

The parties' cases

10 The 1st respondent argued that the learned AR's decision should be overturned (and that OA 1135 should be stayed) for two main reasons.[12] First, there was an existing and valid arbitration agreement between the applicant and the 1st respondent. The applicant's objection to the call, demand and/or payment of the moneys under the PB fell squarely within the scope of cl 33 of the REDAS Conditions. The court should give effect to the parties' arbitration agreement which the applicant had breached by commencing OA 1135. Relatedly, while the 2nd respondent was not a party to the arbitration agreement, that was immaterial because the 2nd respondent was a mere functionary.[13] In other words, any injunctive order can be made against the 1st respondent alone (in the arbitration), and no order against the 2nd respondent was necessary.[14] Second, there was no sufficient reason why the matter should not be referred to arbitration.[15]

11 The applicant raised a number of arguments in favour of dismissing the appeal. The applicant did not dispute that the substantive disputes under the Contract should be referred to arbitration as agreed between the parties.

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12 RWS at para 2.

13 RWS at para 20.

14 RWS at para 21.

15 RWS at para 2c.

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However, the crux of the applicant's argument was that the urgency of the Payment Demand by the 1st respondent left the applicant with no choice but to seek injunctive relief from the court. In that regard, the AA gave the court the ability to assist in any arbitral process. The applicant further contended that even though the situation was no longer urgent, OA 1135 should still proceed in court. This was due to case management practicalities and the fact that no arbitration proceeding had yet been initiated by the 1st respondent.

12 The applicant also made the point that the court was the appropriate forum to seek injunctive relief, as the 2nd respondent was not a party to any arbitration agreement. Contrary to the 1st respondent's allegation, the 2nd respondent was not a mere bystander to the dispute. Rather, given its position as the issuer of the PB, the 2nd respondent was the party whom the applicant "primarily" sought to restrain through the injunctions.[16] In that regard, the PB (to which the 2nd respondent was a party) was a separate contract and referred disputes relating to the PB to court.[17] That being the case, an injunction issued by the court was the only way in which the applicant could seek an order that would bind both the 1st respondent and the 2nd respondent.

13 Finally, the applicant argued that there was a sufficient reason for the court to refuse to grant a stay. In particular, the learned AR was correct in finding that there was a related action against the 2nd respondent, which was not governed by an arbitration agreement and had clearly overlapping issues.[18]

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16 AWS at para 13.

17 AWS at para 8.

18 AWS at paras 11–12.

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14 The 2nd respondent did not take an active part in OA 1135, though it would also be subject to the orders given by the court. At the hearing below, counsel for the 2nd respondent expressly stated that the 2nd respondent was not taking any position on SUM 3431.

Decision below

15 The learned AR dismissed the 1st respondent's application to stay OA 1135 in favour of arbitration.

16 The learned AR found that the injunctive reliefs sought by the applicant against the 1st respondent in OA 1135 (see [7] above) fell within the scope of the arbitration agreement in cl 33 of the REDAS Conditions.[19] However, the 2nd respondent was not a party to the arbitration agreement.[20] This was significant, as the injunction sought against the 2nd respondent in OA 1135 was "closely related" to the dispute between the applicant and the 1st respondent – the 1st respondent's allegedly fraudulent Payment Demand formed the basis of the applicant's application to injunct the 2nd respondent.[21]

17 In light of the above, there was a sufficient reason to refuse the stay. The sufficient reason was "the existence of a related action against [the 2nd respondent] which [was] not governed by the arbitration agreement".[22] Further, given the "clear overlaps between the issues in dispute", there was "a real

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19 Transcript for SUM 3431 dated 22 December 2023 ("SUM 3431 Transcript") at p 10, lines 29–31.

20 SUM 3431 Transcript at p 11, lines 4–5.

21 SUM 3431 Transcript at p 11, lines 13–18.

22 SUM 3431 Transcript at p 12, lines 5–8.

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prospect of inconsistent finding[s]" by the arbitral tribunal and the court.[23] Hence, the stay was refused.

Issues to be determined

18 The sole issue for determination was whether OA 1135 ought to be stayed. This gave rise to the following two sub-issues:

(a) first, whether a stay should be granted in relation to the 1st respondent under s 6(1) of the AA, O 6 r 7(5) of the Rules of Court 2021 ("ROC") and/or the inherent jurisdiction of the court; and

(b) second, whether a stay should be granted in relation to the 2nd respondent pursuant to the court's inherent powers of case management.

Applicable law

19 I first set out the applicable principles for granting a stay under s 6 of the AA. Pursuant to s 6(1) of the AA, "[w]here a party to an arbitration agreement institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement", any party to the agreement may apply to that court to stay the proceedings. The court may grant a stay in favour of arbitration under s 6(2) of the AA which provides as follows:

> (2) The court to which an application has been made in accordance with subsection (1) may, if the court is satisfied that —
>
> (a) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and

[23] SUM 3431 Transcript at p 12, lines 8–16.

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> (b) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration,
>
> make an order, upon any terms that the court thinks fit, staying the proceedings so far as the proceedings relate to that matter.

As noted by the Court of Appeal in *CSY v CSZ* [2022] 2 SLR 622 ("*CSY*"), s 6(2) of the AA gives the court a discretion to refuse a stay of court proceedings (at [1]). In other words, the court may allow all claims, including those governed by the arbitration agreement, to proceed in the courts instead (*Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong and another* [2016] 3 SLR 431 ("*Maybank*") at [22]). This is an "important difference" from the legislative scheme governing international arbitrations (*CSY* at [1]). Pursuant to s 6(2) of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA"), a stay is *mandatory* unless the arbitration agreement is "null and void, inoperative or incapable of being performed".

20 Notwithstanding the broader latitude the court has under the AA, the Court of Appeal cautioned that the discretion to refuse a stay "is to be exercised in a guarded manner" (*CSY* at [23]). An appropriate situation to exercise this discretion is where "there is *sufficient reason* why the matter should not be referred to arbitration in accordance with the arbitration agreement or if the applicant seeking a stay was not ready and willing to do all things necessary for the proper conduct of the arbitration" [emphasis in original] (*CSY* at [1]). However, assuming that the counterparty is ready and willing to arbitrate, the court will only refuse a stay in "*exceptional* circumstances" [emphasis in original] (*CSY* at [24]).

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21 Further, in exercising its discretion under s 6 of the AA, the court must aim to strike a balance between these "higher-order concerns" that may pull in "different considerations" (*CSY* at [22] and [24], citing *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*") at [186]–[188]):

> (a) The first is a claimant's right to choose whom he wants to sue and where.
>
> (b) The second is the court's desire to prevent a claimant from circumventing the operation of an arbitration clause. Where there is an applicable arbitration agreement that the parties had freely entered into, the court will naturally seek to respect party autonomy and hold them to their agreement, at least as a starting position. To this extent, the above concern (*ie*, the claimant's right to choose where to bring proceedings) is curtailed by the claimant's agreement to submit certain disputes to arbitration.
>
> (c) The third is the court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes.

Even though *Tomolugen* dealt with a case management stay, the three higher-order concerns above are equally applicable to s 6 of the AA (*CSY* at [24]). Ultimately, the balance that is struck between those concerns must serve the ends of justice (*CSY* at [22]).

22 Turning to case management stays, the Court of Appeal in *Rex International Holding Ltd and another v Gulf Hibiscus Ltd* [2019] 2 SLR 682

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("*Rex International*") explained that the issue of case management arises "where there are overlapping issues that will have to be ventilated before different fora among different parties, some of whom are bound by an arbitration agreement, while others are not" (at [11]). A typical case which attracts case management concern is one with "(a) some overlap in the ***parties*** to the putative arbitration and the parties to the suit; and (b) some overlap in the ***issues*** that will be engaged in the putative arbitration and those in the suit" [emphasis in original] (*Rex International* at [11]). In such situations of overlapping proceedings, the court, as the final arbiter, must take the lead in ensuring the efficient and fair resolution of the dispute as a whole (*Tomolugen* at [186]). The facts of *Tomolugen* involved a mandatory stay under s 6 of the IAA. Nevertheless, the three higher-order concerns (at [21] above) are also instructive in guiding the court's exercise of discretion to grant a case management stay in cases concerning a stay under s 6 of the AA.

A stay of the proceedings in OA 1135 should be granted

23 I allowed the appeal.

A stay should be granted in relation to the 1st respondent pursuant to s 6 of the AA

The dispute over the Payment Demand fell within the scope of the arbitration agreement

24 The threshold requirement for a stay under s 6 of the AA is that the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement (*Crystal-Moveon Technologies Pte Ltd v Moveon Technologies Pte Ltd* [2024] SGHC 72 ("*Crystal-Moveon*") at [19]). This is based on s 6(1) of the AA which requires a stay applicant to show that the court

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proceedings involve a "matter which is the subject of the [arbitration] agreement". The arbitration agreement between the applicant and the 1st respondent was clear. Other than the overarching dispute resolution provision referring disputes under the Contract to arbitration (see cl 33 of the REDAS Conditions at [5] above), the parties had made a point to specifically refer all matters relating to the call on the PB to arbitration (see cl 2.1.3C.2 of the Particular Conditions at [5] above). The addition of cl 2.1.3C.2 was a specific amendment to the REDAS Conditions that was deliberate. It could not be clearer that the parties intended any disputes arising out of the PB to be referred to arbitration.

25 The applicant attempted to throw doubt on the reading of cl 2.1.3C.2 of the Particular Conditions by drawing the court's attention to the sentence immediately after the sentence referring to arbitration. It read as follows:[24]

> … In the event that it is *subsequently determined by any arbitrator or court* that the Employer [*ie*, the 1st respondent] has received cash proceeds greater than the amount of loss or damage actually incurred by the Employer, the Employer shall refund the over-payment to the Contractor [*ie*, the applicant] …
>
> [emphasis added]

Focusing on the italicised phrase above, the applicant argued that the clause explicitly envisages that issues arising from or in connection with the PB may subsequently be determined by a *court*.[25] The disputed Payment Demand was one such issue arising from or in connection with the PB (and not the Contract).[26]

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24 1HYS at p 91.

25 AWS at para 84.

26 AWS at para 82.

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26 The applicant's interpretation was unsustainable. The sentence relied on by the applicant should be read together with the preceding sentence that expressly provided that all disputes relating to the PB would be referred to arbitration. On the applicant's contrived reading, the part of the clause making reference to arbitration would be rendered entirely otiose. I agreed with the 1st respondent that the word "subsequently" suggested that the court may be involved *after* arbitration had taken place, if the parties consent to take the matter to court. Another situation where the court may be involved is to support a concluded arbitration by enforcing the award made by the tribunal.

27 The applicant also argued that the dispute relating to the PB fell outside the scope of the arbitration clause.[27] Reliance was made on *Maybank*. In that case, there was a claim against a party under a contract containing an arbitration clause, and a claim against another party under an indemnity with a non-exclusive jurisdiction clause. It was in this context that the court in *Maybank* mentioned that the claimant "must have known and intended that different forums govern the disputes arising under the different contracts" (at [2]). The applicant's reliance on *Maybank* was of no assistance to the applicant. This was not a situation where the applicant and the 1st respondent intended different forums to deal with disputes arising under the different contracts. In fact, it was to the contrary. It bears repeated emphasis that the REDAS Conditions was specially modified to provide that disputes relating to the PB would also be referred to arbitration.

28 The PB was a functional agreement that gave effect to the Contract. The PB – as is common in many such bonds in the construction industry – was a

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[27] AWS at para 85.

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clear "unconditional on-demand bond" with little or no room for manoeuvre by the 2nd respondent other than to make a binary decision of whether to pay under the PB (see [4] above). The purpose of the non-exclusive jurisdiction clause was to provide an easy method of enforcement as between the 1st respondent and the 2nd respondent. For instance, if the 2nd respondent refused to pay on demand (even where there is no objection from the applicant), the 1st respondent could rely on the dispute resolution clause and go to court to enforce the PB. But as between the applicant and the 1st respondent, it was abundantly clear that the issue of a fraudulent Payment Demand by the 1st respondent and the consequent injunctive reliefs sought against the 1st respondent fell squarely within the scope of the arbitration agreement between the applicant and the 1st respondent.

There was "sufficient reason" to allow a stay

29 Having determined that the dispute in the court proceedings falls within the arbitration agreement, the next issue was whether there was a "sufficient reason" why the matter should not be referred to arbitration in accordance with the arbitration agreement (*Crystal-Moveon* at [19]). In *CSY*, the Court of Appeal identified the following factors in determining whether there was a "sufficient reason" (at [25]):

(a) the existence of related actions and disputes, some of which are governed by an arbitration agreement and others which are not;

(b) the overlap between the issues in dispute such that there is a real prospect of inconsistent findings;

(c) the likely shape of the process for the resolution of the entire dispute;

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(d) the likelihood of injustice in having the same witnesses deal with the same factual issues before two different fora;

(e) the likelihood of disrepute to the administration of justice ensuing from the fact that overlapping issues may be differently determined in different actions;

(f) the relative prejudice to the parties; and

(g) the possibility of an abuse of process.

There would be a "sufficient reason" to refuse a stay where the applicable factors above are found to outweigh the significant consideration that the parties had voluntarily agreed to arbitration and therefore should be held to their agreement (*CSY* at [25]).

30 The first factor (see [29(a)] above) was applicable, as there were related actions, one which fell under an arbitration agreement and one which did not. To explain, under cll 2.1.3B and 2.1.3C of the Particular Conditions, the applicant was not entitled to enjoin or restrain either (a) the 1st respondent from "making any call or demand on the [PB] or receiving any cash proceeds under the [PB]", or (b) the 2nd respondent from "paying any cash proceeds under the [PB] to the [1st respondent]".[28] The only exception was "in the case of fraud".[29] Hence, as rightly noted by the learned AR, the injunction sought against the 2nd respondent was "premised on" an allegation of the 1st respondent's fraud.[30] The applicant's contentions against the 1st respondent and the 2nd respondent (who

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28 1HYS at pp 90–91.

29 1HYS at p 90.

30 SUM 3431 Transcript at p 11, lines 13–18.

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was not a party to any arbitration agreement with the applicant) were closely related. This was also one of the key reasons why the learned AR had refused to grant a stay (see [17] above). However, as stated in *CSY* at [28]–[29], this was not a decisive factor, and the case had to "go[] beyond" this to amount to a sufficient reason to refuse a stay in favour of arbitration.

31 The crux of the applicant's case was the second factor on inconsistent findings (see [29(b)]). A related concern was the likelihood of disrepute to the administration of justice ensuing from the potentially inconsistent findings (see [29(e)]). The applicant argued that the learned AR was correct to refuse a stay on the basis that there was a real prospect of inconsistent findings between the court and the arbitral tribunal on the issue of the fraudulent Payment Demand.[31] I agreed that the course adopted by the learned AR could eliminate the risk of inconsistent findings – the findings made by the court in OA 1135 would be binding on the parties in the arbitration. However, the risk of inconsistent findings could also be obviated by granting a stay and having the parties deal with the entire issue in arbitration. The law was clear that an arbitral tribunal's findings are not binding on the court (*CSY* at [33]). However, as pointed out in *Tomolugen* at [142], if the applicant and the 1st respondent return to court over the same issue in OA 1135, they would be re-litigating issues already decided in the arbitration. Hence, the risk of inconsistent findings could be mitigated whether or not a stay was granted.

32 The key question was which forum – the court or arbitration – was the more appropriate forum to decide the overlapping issue of whether the 1st respondent's Payment Demand on the PB was made fraudulently. I agreed with

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[31] AWS at para 12.

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the 1st respondent that it ought to be in arbitration. The "real dispute" in OA 1135 was between the applicant and the 1st respondent.[32] The 2nd respondent was a "mere functionary" or "a nominal party at best".[33] As noted at [28] above, the PB was a mechanical agreement. Additionally, it was significant that the 2nd respondent was agnostic as to whether or not the matter was stayed (see [14] above). This reinforced the point that the 2nd respondent had no substantive role to play in this dispute. Given this, the applicant adopts a very weak position if it insists that the court jurisdiction clause in the PB was the key reason why the dispute should be determined in court and the parties' express agreement to arbitrate should be ignored.

33 In that regard, the 1st respondent cautioned that a decision not to allow a stay may give a green light to other parties in the future to ignore freely agreed arbitration agreements. The applicant assured me that dismissing this appeal and the stay application would not open the floodgates. The applicant argued that considering the alarmist way in which the 1st respondent had called on the PB, the present case was unique. I nonetheless had to be cautious in exercising my discretion against a stay (see [20] above). The need to uphold the parties' arbitration agreement was an especially significant higher-order concern in this case.

34 Relatedly, I did not agree with the applicant that the urgency in the current case entitled it to unilaterally disapply the arbitration agreement and take its case straight to court. The Singapore International Arbitration Centre (SIAC)'s emergency arbitrator option is a widely-used mechanism (and is often

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32 RWS at para 20b.

33 RWS at paras 19 and 20a.

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available on an urgent basis, as its name entails). Rule 30.2 of the the Arbitration Rules of the Singapore International Arbitration Centre (6th Ed, 1 August 2016) (the "SIAC Rules") provides that a party may seek emergency interim relief prior to the constitution of a tribunal. The applicant conceded at the hearing that it could have sought relief from an emergency arbitrator under the SIAC Rules. Indeed, this should have been the applicant's first port of call. An order by an emergency arbitrator would have been as good as an order of court. Whilst it could not directly bind the 2nd respondent, it clearly would have bound the 1st respondent not to make further calls on the PB or receive any moneys under the PB, or if received, not to dispose of those moneys. There was no evidence that the 1st respondent would have flouted or ignored any such order. That would have given the applicant sufficient time to then seek a further court order to bind the 2nd respondent.

35 The applicant's explanation for not adopting this course of action was that it was not practical in the circumstances and would have taken longer than applying to court under OA 1135. Calls on bonds typically involve short time frames and immediate decisions. If the applicant was concerned that it would not have sufficient time to engage this issue through arbitration, it should not have agreed to arbitration under the Contract, and specifically, arbitration with respect to the call on the PB. In any event, given that the urgency of the situation had dissipated (with the grant of the interim injunctions by Chan SJ), the applicant could no longer object to the stay on the basis of any urgency.

36 The applicant further argued that OA 1135 ought to proceed notwithstanding that the situation was no longer urgent. This was due to the practicality of keeping this matter in court. In short, the applicant argued that since this matter was already in court, it was easier to address this self-contained

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matter under OA 1135. The applicant had, after all, already conceded that other substantive disputes under the Contract would be referred to arbitration.

37 The applicant was correct that OA 1135 was the quickest way to achieve a substantive resolution of whether there was a fraudulent Payment Demand on the PB. The 1st respondent accepted that even if I allowed the stay application, the parties would still have to take additional steps in court to deal with the interim injunctions granted in SUM 3408.[34] More specifically, counsel for the 1st respondent explained at the hearing his intention to ask the court to have those interim injunctions discharged after a specified timeframe for parties to commence arbitration. This subsequent step was necessary because a stay of a proceeding did not amount to "an automatic lifting of all interim injunctions" (*Multi-Code Electronics Industries (M) Bhd and another v Toh Chun Toh Gordon and others* [2009] 1 SLR(R) 1000 ("*Multi-Code*") at [90]). The court retained a jurisdiction to grant or continue the interim injunctions following a stay (*Multi-Code* at [90]). Hence, this was another matter that the applicant and the 1st respondent had to deal with in court. While the facts of *Multi-Code* concerned Mareva injunctions, the holding applied more broadly to interlocutory injunctions.

38 I was nonetheless troubled by the applicant's argument on practicality because it perpetuated the applicant's wrongful decision not to invoke the arbitration agreement in the first place. The final higher-order concern of ensuring an efficient *and* fair resolution of disputes was relevant here (see [21(c)] above). Efficiency may be compromised by granting a stay, but I considered the need to promote a fair resolution of the disputes. In that regard,

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[34] RWS at para 27.

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the applicant should not be rewarded for perpetuating a wrong that it had originated.

39 Finally, the factors of relative prejudice to the parties and the possibility of an abuse of process were relevant (see [29(f)]–[29(g)] above). The applicant submitted that the 1st respondent would not be prejudiced by the preservation of the status quo between the parties, whereas the applicant would suffer prejudice if payment was made under the PB before the dispute was arbitrated.[35] I was not convinced. The interim injunctions against the 1st respondent and the 2nd respondent would still remain in force even after I grant a stay (see [37] above). Given this, I failed to see what prejudice, if any, the applicant would suffer from the stay. By contrast, a refusal of a stay would defeat the 1st respondent's reasonable expectation that the agreed mode of dispute resolution would be upheld. To that extent, the factor of relative prejudice leaned in favour of granting a stay. The applicant also argued that there was no abuse of process. OA 1135 was not an attempt to circumvent the arbitration agreement, since the applicant accepted that the substantive claims should be resolved by arbitration.[36] I would not go so far as to label the applicant's conduct in bringing OA 1135 as an abuse of process. However, I was not persuaded that the applicant should be allowed to litigate the issue of the Payment Demand in court and thereby circumvent the arbitration agreement selectively.

40 To conclude, there was no "sufficient reason" to refuse a stay. The factors examined above did not outweigh the significant consideration that the parties should be held to their arbitration agreement (*CSY* at [25]).

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35 AWS at para 21.

36 AWS at para 20.

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41 For the sake of completeness, I also dealt with the applicant's argument on *res judicata*. The applicant argued that the 1st respondent was barred from contending that OA 1135 should be stayed, as Chan SJ's decision in SUM 3408 gave rise to a cause of action or issue estoppel.[37] In particular, the applicant pointed out that Chan SJ, in granting the interim injunction, had touched on the issues relating to the stay. The applicant argued that it should not be twice vexed with the same issue.[38]

42 I disagreed. The issue before Chan SJ was whether the court had jurisdiction to hear and grant the applicant's application for *interim* injunctions. Chan SJ's references to a stay in the hearing on the interim injunction were only made in passing, and no decision was made as to whether OA 1135 should be stayed. Specifically, Chan SJ noted that "a stay is normally granted for arbitration", but that did not prevent him from "grant[ing] interim assistance".[39] As rightly pointed out by the learned AR,[40] Chan SJ held that whether the proper forum for hearing the dispute was in court or in arbitration "makes no difference" to the court's ability to grant *interim* relief.[41] The issue before this court was what the proper forum for hearing the applicant's application for permanent injunctions was. There was no overlap between the issues in SUM 3408 and this appeal. Hence, the 1st respondent was not estopped from arguing that OA 1135 should be stayed.

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37 AWS at paras 24–25.

38 AWS at para 87.

39 Transcript for SUM 3408 dated 7 November 2023 ("SUM 3408 Transcript") at p 14, lines 18–22.

40 SUM 3431 Transcript at p 10, lines 16– 21.

41 SUM 3408 Transcript at p 15, lines 1–3.

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The 1st respondent was ready and willing to arbitrate

43 The applicant contended that the 1st respondent was not ready to arbitrate, as required under s 6(2)(*b*) of the AA for a stay to be granted.[42] The 1st respondent had not initiated any arbitration, nor formulated any claims against the applicant or quantified any of its losses.[43] This was notwithstanding all the defects it had alleged under the Contract, which led to the call on the PB.[44]

44 I agreed with the 1st respondent that there was nothing untoward with the 1st respondent invoking its contractual rights to call on the PB without specifying and quantifying its losses. The purpose of the PB was to grant the 1st respondent security over the applicant's "due performance and observance" of the Contract.[45] Instead of the applicant providing cash to the 1st respondent in this regard, the applicant had opted to provide a PB. Contractually, the PB was as good as cash. If the applicant was of the view that the 1st respondent was in breach of the Contract in wrongfully calling on the PB, the onus was on the applicant to restrain the call (as it did in the present case) or take action to recover any such amounts paid out under the PB. I saw no reason to doubt the 1st respondent's willingness and readiness to arbitrate on the basis that the 1st respondent had not indicated its alleged claims and losses to the applicant.

45 The need to give effect to the parties' agreement in this case outweighed the inconveniences and impracticalities created by granting a stay. It is not the

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42 AWS at para 19.

43 AWS at paras 73 and 75–76.

44 AWS at paras 74.

45 1HYS at para 15 and p 88.

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case that the court can never assist in a domestic arbitration in cases similar to the current case. The case has however not been made out here, particularly given the parties' strong and express preference to arbitrate (including specifically on PB calls). The applicant could have obtained the same result through engaging an emergency arbitrator and it did not even try to do so. As I have decided to grant a stay under s 6 of the AA, it was unnecessary for me to determine whether a stay should be granted pursuant to O 6 r 7(5) of the ROC and/or the court's inherent jurisdiction.

A stay should be granted in relation to the 2nd respondent pursuant to the court's inherent power of case management

46 Having determined that a stay should be granted in relation to the 1st respondent, the next issue was whether the applicant's application to injunct the 2nd respondent should also be stayed as a matter of case management.

47 I noted that the 2nd respondent was agonistic as to the outcome of the stay and was willing to abide by any order made by the court. Further, it was merely a functionary pursuant to the PB which was a mechanical agreement (see [28] and [32] above). In light of these, it was only logical to grant a stay in relation to the 2nd respondent.

48 The applicant argued that a stay should not be granted, relying on the following observation by the Court of Appeal in *Rex International* (at [10]):

> … [I]t was ill-conceived to stay the [claimant]'s claim against the [defendants], which was not subject to any arbitration agreement, on account of an arbitration agreement between the [claimant] and a non-party to the original dispute [*ie*, the defendants' subsidiary].

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The applicant's reliance on this case was misplaced. A crucial fact was that the claimant had "*no intention of commencing any proceedings in any forum* against [the defendant's subsidiary]" [emphasis in original] (*Rex International* at [10]). Because the putative arbitration was "largely illusory", there was no "real risk" of overlapping issues being ventilated before different fora among different parties (*Rex International* at [11]–[12]). In other words, the concern of a case management quandary did not even arise in the first place. It was in this context that the Court of Appeal remarked that there was no basis to stay the court proceedings between the two parties who were not subject to any arbitration agreement.

49 By contrast, the present case fell squarely to be addressed as a case management concern (see [22] above). First, there was a sufficient overlap in the parties to the putative arbitration between the applicant and the 1st respondent on one hand, and OA 1135 between the applicant and the 2nd respondent on the other. While the defendants in the two sets of proceedings were different, a complete overlap was unnecessary, as all that is required is "*some* overlap" [emphasis in original] (*JE Synergy Engineering Pte Ltd v Niu Ji Wei and another (Sinohydro Corp Ltd (Singapore Branch), third party; Vico Construction Pte Ltd, fourth party)* [2023] SGHC 281 ("*JE Synergy*") at [27], citing *Rex International* at [11]).

50 Second, the two sets of proceedings raised a real risk of overlapping issues being ventilated before different fora among different parties. As the Court of Appeal in *Rex International* explained, where there are overlapping issues and any of the issues in the court proceedings "*depended on* the resolution of the related putative arbitration[,] … a case management stay would be needed in order to achieve the efficient and fair resolution of the dispute as a whole" (at

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[11]). This gave effect to the third higher-order concern of ensuring an efficient and fair resolution of disputes (see [21(c)]). The case of *Parastate Labs Inc v Wang Li and others* [2023] SGHC 48 ("*Parastate*") illustrated this point. In *Parastate*, there was a mandatory stay of the claimant's claims against the third defendant pursuant to s 6 of the IAA. The issues in the arbitration included whether the third defendant had breached its trustee and/or fiduciary duties or had made fraudulent misrepresentations which induced the claimant to invest in a fund (*Parastate* at [29]). Crucially, the claimant's claims against the remaining defendants in court were "premised on" the claimant establishing those same allegations (*Parastate* at [28]). It was hence "logical to have all those issues … determined first in arbitration, before [the claimant] proceeds its claims against [the remaining defendants] in court" (*Parastate* at [30]).

51 The present case was similar. Whether the 2nd respondent ought to be restrained under OA 1135 turned on whether the Payment Demand was made fraudulently. This was an identical issue before the putative arbitration between the applicant and the 1st respondent. In other words, the outcome of OA 1135 in relation to the 2nd respondent would follow from the determination in the arbitration. It thus made eminent sense to grant a stay in relation to the 2nd respondent, pending the conclusion of the arbitration. This could minimise duplication arising from parallel proceedings and possibly prevent multiplicity of proceedings (since, depending on the tribunal's findings, it may be unnecessary for the applicant to pursue OA 1135 against the 2nd respondent).

52 Relatedly, granting a stay could mitigate the risk of inconsistent findings between the putative arbitration and OA 1135 (*JE Synergy* at [16(g)]). As explained in *JE Synergy* at [55], the court looking at the factor of inconsistent findings would need to consider two alternative situations: first where a stay is

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refused and second where a stay is granted. The court should adopt a course with a lower risk of inconsistent findings.

53 In the present case, I considered that the risk of inconsistent findings would be lower if a stay is granted. If a stay is refused, there would be parallel proceedings – one in court between the applicant and the 2nd respondent, and one in arbitration between the applicant and the 1st respondent. This, "by definition", meant that there was a risk of inconsistent findings between the tribunal and the court in relation to the allegedly fraudulent Payment Demand (*JE Synergy* at [56]). Such a risk "may possibly be mitigated insofar as any findings made by the court" would bind the applicant and the 1st respondent (*JE Synergy* at [56]). However, this would be on the assumption that the applicant and the 1st respondent would only proceed with arbitration proper *after* the conclusion of OA 1135. As cautioned in *JE Synergy*, "[s]uch an assumption could not readily be made" (at [56]). The 1st respondent was not bound to wait for the resolution of OA 1135 before commencing arbitration against the applicant.

54 I turn to the converse situation where a stay is granted. As noted above (see [31] above), the applicant would be re-litigating in OA 1135 the same issue determined in the arbitration. The 2nd respondent, being a non-party to the putative arbitration, would not be bound by the tribunal's findings. Nevertheless, this did not mean that the 2nd respondent would be free to challenge the tribunal's findings (whilst noting at [47] above that it has no intention of doing so). As explained in *Tomolugen* at [142], if the 2nd respondent does so, it "would, in the broad sense, be 're-litigating' issues already decided in the arbitration". The court would frown upon such re-

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litigation. I thus concluded that the risks of inconsistent findings would be sufficiently mitigated by granting a case management stay.

55 Additionally, a case management stay would give effect to the higher-order concern of upholding a valid arbitration agreement between the applicant and the 1st respondent (see [21(b)] above). If OA 1135 proceeds, the court would be making a determination on an issue that falls within the scope of the arbitration agreement. That would enable the applicant to indirectly circumvent the arbitration agreement (*Tomolugen* at [142]). However, at the same time, I also had to consider the countervailing higher-order concern of the applicant's right to choose where to sue its defendants (see [21(a)]). On this point, the guidance provided by *Tomolugen* was especially relevant. In *Tomolugen*, court proceedings between the plaintiff and the second defendant in relation to the Management Participation Allegation were stayed under s 6 of the IAA. The Management Participation Allegation was also raised in the court proceedings against the remaining defendants. In ordering a case management stay against those defendants, the Court of Appeal noted as follows (at [187]):

> … [The plaintiff] is the *sole plaintiff* in the Suit and is *bound to arbitrate* at least one of the issues that it intends to rely on in the court proceedings against [the second defendant] and the remaining defendants (namely, the Management Participation Allegation). The presence of the obligation to arbitrate this allegation diminishes the force of any objection that [the plaintiff] may raise that its rights of timely access to the court is being undermined.
>
> [emphasis in original]

The same reasoning applied to the present case. The applicant's right to sue the 2nd respondent in court was curtailed by the fact that the applicant had agreed to arbitrate the core issue – *ie*, whether the Payment Demand was tainted by

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fraud – in OA 1135. Hence, considering the three higher-order concerns in *Tomolugen*, a case management stay was appropriate in the present case.

Conclusion

56 In summary, a stay of OA 1135 was granted as between the applicant and the 1st respondent. A case management stay of OA 1135 was granted as between the applicant and the 2nd respondent.

57 I do not doubt that there will be more steps taken to dispose of the issue between the parties on the PB where a stay is allowed. It may well be that this matter would be disposed of more expeditiously if I just allowed OA 1135 to be substantively heard by the court. The exercise of the court's discretion under the AA sometimes involves not giving effect to the parties' arbitration agreement. In the present case, there were no exceptional circumstances to justify a stay. Convenience and expediency did not amount to a "sufficient reason" that outweighed the importance of ensuring the parties respect the integrity of their agreement to arbitrate and that any breach of such agreement was not perpetuated by the court in exercising its discretion under the AA.

Wong Li Kok, Alex
Judicial Commissioner

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Jawharilal Balachandran, Julia Emma Cruz, Li Shunhui Daniel (GH LLC) for the second respondent absent.

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