Piallo GmbH
v
Yafriro International Pte Ltd

[2013] SGHC 260

High Court — Suit No 354 of 2013 (Registrar's Appeal No 222 of 2013)
Belinda Ang Saw Ean J
30 August; 26 November 2013

Arbitration *— Stay of court proceedings — Claims on dishonoured cheques — Whether claims "in respect of any matter which is the subject of the agreement" — Whether "dispute" existed within meaning of arbitration clause — Section 6 International Arbitration Act (Cap 143A, 2002 Rev Ed)*

Facts

The plaintiff, Piallo GmbH ("Piallo"), entered into a distributorship agreement ("Distributorship Agreement") with the defendant, Yafriro International Pte Ltd ("Yafriro"), under which the latter had the exclusive right to market, distribute and sell all collections of deLaCour-branded watches, jewellery and accessories ("deLaCour products") in various Asian markets for a period of five years. Article 20 of the Distributorship Agreement ("Art 20") contained an arbitration provision.

Piallo terminated the Distributorship Agreement with immediate effect before the end of the five-year term by a letter of November 2012. In that letter, Piallo cited non-compliance with the terms of the Distributorship Agreement as a reason for early termination.

Apparently, after Piallo's termination of the Distributorship Agreement the parties engaged in negotiations in an attempt to resolve the disputes between them amicably. In the course of these negotiations, Yafriro indicated that it might be prepared not to insist on its strict contractual rights and instead accept a non-exclusive distributorship arrangement after the termination of the Distributorship Agreement, on condition that the deLaCour products would be ordered from Piallo, and be directly supplied by Piallo to Yafriro, without the involvement of any intermediary. Piallo invited Yafriro to make payment of the then latest batch of time pieces by way of post-dated cheques.

Yafriro issued 15 post-dated cheques ("Cheques") totalling a sum of CHF511,210 (or S$680,198) in favour of Piallo, the dates of which ranged from 10 January to 30 April 2013.

According to Piallo, the Cheques were intended to be partial payment of deLaCour products supplied to Yafriro, and as at 21 December 2012, the total amount invoiced was CHF570,333.45 for the deLaCour products supplied between May and December 2012. Yafriro on its part acknowledged that it owed some money to Piallo, but it countered that Piallo had separately breached the terms of the Distributorship Agreement.

Yafriro subsequently countermanded the Cheques after giving notice to do so in a letter dated 8 January 2013. Ultimately, all but three of the Cheques were presented for payment, but Piallo and its bankers were unable to get payment.

Piallo sued Yafriro on the Cheques on 19 April 2013. Yafriro entered appearance and, on 9 May 2013, filed an application to stay the proceedings in favour of arbitration under Art 20.1, reliance being placed on s 6(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). An assistant registrar allowed the stay application, whereupon Piallo appealed.

Held, dismissing the appeal:

(1) In the context of s 6(1) of the IAA, the first question was whether the present proceedings were "in respect of any matter which is the subject of the agreement [to arbitrate]" (*ie*, Art 20.1). This question was answered by examining the true nature of the claim, the defences and the cross-claims raised in the arguments: at [16] and [37].

(2) Article 20.1 was apt to cover the claim on the dishonoured Cheques in these proceedings in that the claim (*ie*, the subject "matter" of these proceedings) was a dispute arising out of or in connection with the Distributorship Agreement. Generally, Piallo's claim on the dishonoured Cheques and Yafriro's cross-claim for damages for breach of the Distributorship Agreement arose out of the "same incident" in the sense that the circumstances that led to the Cheques being handed over to Piallo after the termination of the Distributorship Agreement had to do with the understanding reached between the parties following their negotiations on the same. In this type of situation, it was not difficult to accept that it was the intention of parties that such claims arising out of the same incident be resolved by the same process, that was, by arbitration alone rather than by arbitration and litigation for different disputes: at [31] and [38].

(3) In this case, the resolution of the contractual issue (*ie*, the cross-claims) was necessary for a decision on the bill of exchange issue, so that it could be said that the contractual issue and the bill of exchange issue were so closely connected together on the facts that an agreement to arbitrate on one could properly be construed as covering the other given the sufficiently wide and general words chosen in Art 20.1. Based on the evidence, if the present proceedings were not stayed, Yafriro would at the very least raise the defence of estoppel to the claim on the dishonoured Cheques and a cross-claim for damages for misrepresentation that would exceed the amount of the dishonoured Cheques. All these issues (estoppel and misrepresentation) were intricately tied up with the circumstances surrounding the performance of and negotiations over the Distributorship Agreement: at [38], [40], [46] and [48].

(4) Even accepting that the Cheques were initially a clear and unequivocal admission of Piallo's claim, the circumstances before and after the Cheques were issued showed that Yafriro subsequently *denied* the claim. At the very least there was a dispute over whether the Cheques had been rightly countermanded by Yafriro, which was a dispute that should be referred to arbitration: at [54] to [57].

Case(s) referred to

CA Pacific Forex Ltd v Lei Kuan Ieong [1999] 2 HKC 571 (refd)

Fiona Trust & Holding Corp v Privalov [2007] Bus LR 686; [2007] 2 Lloyd's Rep 267, CA (refd)

Fiona Trust & Holding Corp v Privalov [2007] Bus LR 1719; [2008] 1 Lloyd's Rep 254, HL (refd)

Getwick Engineers Ltd v Pilecon Engineering Ltd [2002] HKCFI 189 (refd)

Halki Shipping Corp v Sopex Oils Ltd [1998] 1 WLR 726 (refd)

International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd [2014] 1 SLR 130 (refd)

Larsen Oil and Gas Pte Ltd v Petroprod Ltd [2011] 3 SLR 414 (refd)

Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH [1977] 1 WLR 713 (refd)

Safa Ltd v Banque du Caire [2000] 2 Lloyd's Rep 600 (refd)

Tjong Very Sumito v Antig Investments Pte Ltd [2009] 4 SLR(R) 732; [2009] 4 SLR 732 (folld)

Wong Fook Heng v Amixco Asia Pte Ltd [1992] 1 SLR(R) 654; [1992] 2 SLR 342 (refd)

Legislation referred to

International Arbitration Act (Cap 143A, 2002 Rev Ed) ss 6(1), 6(2) (consd); s 6

Arbitration Act 1975 (c 3) (UK) ss 1, 1(1)

Arbitration Act 1996 (c 23) (UK) s 9

Peter Doraisamy and Nur Rafizah Binte Mohamed Abdul Gaffoor (Selvam LLC) for the appellant;
Sim Chong and Loo Chieh Ling Kate (JLC Advisors LLP) for the respondent.

26 November 2013

Belinda Ang Saw Ean J:

1 The plaintiff, Piallo GmbH ("Piallo"), sued the defendant, Yafriro International Pte Ltd ("Yafriro"), on several dishonoured cheques on 19 April 2013. Yafriro successfully applied before an assistant registrar to stay the proceedings in favour of arbitration pursuant to s 6(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") (see [2013] SGHCR 20). Piallo appealed *vide* Registrar's Appeal No 222 of 2013. I dismissed the appeal on 30 August 2013, and now give the reasons for my decision.

The facts

2 Piallo, an Austrian company, manufactures timepieces, jewellery and accessories under the "deLaCour" brand. On 17 September 2008, it entered into a five-year distributorship agreement with Yafriro ("Distributorship Agreement"), under which the latter had the exclusive right to market,

distribute and sell all collections of deLaCour watches, jewellery and accessories ("deLaCour products") in various Asian markets for a period of five years. Article 20 of the Distributorship Agreement ("Art 20") contained the following arbitration provision:

Article 20 Arbitration / Governing Law

20.1 Any dispute arising out of or in connection with the present contract shall be finally settled under the rules of Arbitration of the ICC Paris by one arbitrator appointed in accordance with said Rules.

20.2 The seat of arbitration is Geneva.

20.3 This contract is governed by the laws of the [*sic*] Switzerland.

20.4 The language of arbitration is English.

3 Piallo terminated the Distributorship Agreement with immediate effect before the end of the five-year term. It was, however, unclear as to when the termination notice was given. According to Yafriro's former lawyers, Rajah & Tann ("R&T"), the purported termination was on or about 30 October 2012. However, Piallo's termination letter of November 2012 was undated. In that November 2012 letter, Piallo cited non-compliance with the terms of the Distributorship Agreement as a reason for early termination, but Piallo stated that it would continue a working relationship with Yafriro and, as such, it would send 15 to 20 watches every month to the latter.

4 R&T's letter of 4 April 2013 to Piallo's lawyers, Selvam LLC ("the April letter") most conveniently summarises Yafriro's version of the events that developed after Piallo's purported termination of the Distributorship Agreement. R&T's narrative touched on how, when and why 15 post-dated cheques ("Cheques") totalling a sum of S$680,198 (Singapore dollar equivalent of CHF511,210) were issued and handed over to Piallo despite Yafriro's contentions that Piallo had breached the Distributorship Agreement in several respects. The dates of the post-dated Cheques ranged from 10 January to 30 April 2013. Paragraph 4 of the April letter reads as follows:

> Further, and without prejudice to the above, our clients had issued the cheques even before they had received all the time pieces which they ordered because they were misled by your clients into doing so. Your clients purported to wrongfully terminate the Agreement on or about 30 October 2012, which greatly aggrieved our clients. Our respective clients then engaged in negotiations in an attempt to resolve the disputes between them amicably. In the course of these negotiations, our clients indicated that, while they would insist on their exclusive right to market, distribute and sell the DE LACOUR products for the remaining term of the Agreement, they might be prepared to accept a non-exclusive distributorship arrangement after the termination of the Agreement on 17 September 2013. This was on condition that the DE LACOUR products would be ordered from, and be directly

> supplied by your clients to our clients, without the involvement of any intermediary. Further, the payment arrangements between our respective clients would remain the same as per the usual practice. Your clients' Mr Alfred Terzibachian confirmed to our clients that your clients are agreeable to such an arrangement, and invited our clients to make payment of the then latest batch of time pieces by way of post-dated cheques (so that these could be presented to your clients' bankers to free up further credit lines). As our clients were misled to believe that your clients would continue to honour their obligations for the remaining term of the Agreement and there was a consensus on the arrangement moving forward, our clients obliged and issued the post-dated cheques. However, shortly after our clients did so, your clients reneged on their position and informed our clients that, with immediate effect, all further orders for the DE LACOUR products would have to be placed through a new distributor and that payment would have to be made to the new distributor on an immediate basis (i.e. with no credit terms). In the circumstances, our clients were perfectly entitled to countermand payment on these cheques, which would not have been issued but for your clients' misrepresentations and/or deceit.

5 According to Piallo, the Cheques were intended to be partial payment of deLaCour products supplied to Yafriro, and as at 21 December 2012, the total amount invoiced was CHF570,333.45 for the deLaCour products supplied between May and December 2012. Yafriro on its part acknowledged that it owed some money to Piallo, but it further countered that Piallo had separately breached the terms of the Distributorship Agreement, brief particulars of which were referred to in R&T's letter of 8 March 2013 to Selvam LLC. The brief details of the alleged breaches are set out in [56] below.

6 Yafriro subsequently countermanded the Cheques. On 8 January 2013, before the date of the earliest post-dated cheque, Yafriro's managing director, Mr Hew Kim Choong ("Mr Hew") wrote:

> Please be informed that Yafriro will proceed to terminate the following cheques that were handed over to you:

Date	Cheque Number	Amount SGD
10 January 2013	UOB 104329	34,666
15 January 2013	BOC 322187	19,000
24 January 2013	UOB 636489	124,000
24 January 2013	UOB 724666	22,500
30 January 2013	BOC 322193	38,400
10 February 2013	UOB 104330	34,666
15 February 2013	BOC 322188	19,000
24 February 2013	UOB 724667	112,500
28 February 2013	BOC 322194	38,400
10 March 2013	UOB 104331	34,666
15 March 2013	BOC 322189	19,000
20 March 2013	BOC 322191	62,000

30 March 2013	BOC 322200	38,400
15 April 2013	BOC 322190	19,000
30 April 2013	BOC 322192	64,000

In replacement, Yafriro will make transfer of CHF50,000 within the last week of each month, starting from January 2013, as payment against outstanding amounts due.

I had personally agreed to the substantial payment schedule through series of post dated cheques over a very short period of time to support our partnership and deLaCour's arrangement of financial facilities with banks. Unfortunately, your unexpected and premature alteration to our existing Exclusive Distribution [*sic*] Agreement signed on 17th September 2008 had resulted in significant damage to the sales of the brand in Yafriro as well as our credibility to our customers, making the payment schedule highly impossible.

Due to the current situation, I am obliged to make the necessary changes.

7 Piallo's director, Mr Alfred Terzibachian, replied to Mr Hew in an e-mail dated 10 January 2013:

As I have always mentioned during all my visits, we always said that we want to continue to work with you even though:

- Your purchases have decreased during the last 3 years:
  - 2010: 1450700
  - 2011: 1124600 (-22%)
  - 2012: 687000 (-39%)
- You never paid us on time and as per today you still owe us CHF 598413.--. (87% of 2012 purchases). This brought us to an untenable situation in 2012 which obliged us to sell all your cheques to our bank as I mentioned to you yesterday.

…

And to show you once more our interest to continue working with you, we have been renegotiating your cheques this whole morning with our banks. They confirmed that they cannot cancel January and February cheques but they are ready to return the cheques of March and April against new cheques as following to settle your debts:

- March 20th : CHF 50000
- April 20th : CHF 50000
- May 20th : CHF 50000
- June 20th : CHF 50000
- July 20th : CHF 44503,45.—

Total : CHF 244503,45

> As soon as we receive your new cheques the old ones dated march and april will be returned (6 cheques). I hope that our efforts are appreciated in order to maintain our commercial relationship and friendship.
>
> …
>
> [emphasis in original in bold]

8 Piallo's letter revealed that the Cheques were "sold" to its bankers. It is also apparent from an e-mail dated 31 January 2013, this time from Piallo's financial controller, that Piallo's bankers had presented some of the Cheques to Yafriro's banks for payment as they became due but were unable to get payment – no doubt due to the fact that all the Cheques had been countermanded earlier. Notably, Piallo presented all but three of the remaining Cheques for payment notwithstanding Yafriro's countermand. There was no presentation of Cheques numbered "BOC 322200", "BOC 322190" and "BOC 322192", and Piallo's stance is that Yafriro's countermand amounted to a waiver or dispensation of presentation for payment.

9 Piallo sued Yafriro on the dishonoured Cheques on 19 April 2013.

Application to stay the proceedings

10 On 9 May 2013, Yafriro filed an application to stay the proceedings in favour of arbitration under Art 20.1, reliance being placed on s 6(1) of the IAA.

11 The power of the court to stay proceedings in favour of arbitration is found expressly in s 6 of the IAA, the relevant subsections of which state:

> **Enforcement of international arbitration agreement**
>
> **6.**—(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.
>
> …

12 It is common ground that the arbitration agreement contained in Art 20 is not null and void, inoperative or incapable of being performed. Accordingly, the court must stay the present proceedings unless it is shown

that the proceedings are not "in respect of any matter which is the subject of the [arbitration] agreement": s 6(1) of the IAA.

13 Counsel for Yafriro, Mr Sim Chong ("Mr Sim"), relied on *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong*") for the principles applicable to a stay application brought under s 6 of the IAA (see *Tjong* at [22]). Yafriro submitted that applying those principles, the present proceedings should be stayed under s 6(2) of the IAA.

14 Piallo opposed the stay application on two grounds. First, the claim on the dishonoured Cheques did not fall within the scope of Art 20.1. It was argued that clear words were needed for claims involving dishonoured cheques to be caught by an arbitration clause such as Art 20.1. Second, even if the claim fell within the scope of Art 20.1, there was no dispute between the parties to refer to arbitration because there was no defence to the claim.

15 It is convenient to mention at this juncture that shortly after filing the stay application, Yafriro submitted on 11 June 2013 a request for arbitration to the Secretariat of the International Court of Arbitration of the International Chamber of Commerce in Paris, France, seeking, amongst other things, a declaration that Yafriro was entitled to stop payment on the Cheques. Piallo is disputing the jurisdiction of the arbitral tribunal to make the declaration sought by Yafriro.

The issues

16 Putting Piallo's two objections in the context of s 6(1) of the IAA, the first question for this court's determination was whether the present proceedings were "in respect of any matter which is the subject of the agreement [to arbitrate]". The "matter" which is the subject of the arbitration agreement (*ie*, the claim on dishonoured cheques), is not (so Piallo contended) a "dispute" referred to in the arbitration agreement, not having arisen from or in connection with the Distributorship Agreement within the meaning of Art 20.1. If the answer to the first question is to the contrary in that the claim on the dishonoured Cheques fell within Art 20.1, the next question for determination was whether such a claim, which is indisputable because there is no arguable defence, was outside the scope of s 6(1).

17 The characterisation of the objections is important bearing in mind Piallo's strong reliance on *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713 ("*Nova*"). I make three points. First, the reasoning of the House of Lords in *Nova* was in the context of the English company's second argument (see [23] below), and that case concerned the construction of the words that "there [was] not in fact any dispute between the parties with regard to the matter agreed to be referred" within the meaning of s 1 of the UK Arbitration Act 1975 (c 3) ("the 1975 Act") (hereafter referred to as "the qualifying words"). In other words, the

reasoning of the House of Lords in *Nova* was in the context of the 1975 Act which contained the qualifying words. Although the speeches did not make a distinction between the meaning of the word "dispute" in the 1975 Act and its meaning in the arbitration clause, the result of the second argument was reached by a construction of the qualifying words in the 1975 Act. Henry LJ in *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 WLR 726 ("*Halki*") (with whom Swinton Thomas LJ concurred) observed (at 752) that the speeches in *Nova* were based on the meaning of the word "dispute" in the 1975 Act, rather than on the meaning of that word in the arbitration clause.

18 Second, the qualifying words were removed in s 9 of the UK Arbitration Act 1996 (c 23) ("the 1996 Act"). As to the effect of the exclusion, it is sufficient to quote the headnote summary of Henry and Swinton Thomas LJJ's words in *Halki* (at 727):

> The intention of the Act of 1996, by removing the court's power under the Arbitration Act 1975 to refuse to stay legal proceedings where it was satisfied that 'there is not in fact any dispute between the parties with regard to the matter agreed to be referred', was to exclude the jurisdiction to give summary judgment under R.S.C., Ord. 14 based on an investigation of what was in fact disputable.

19 Third, there are no similar qualifying words in s 6(1) of the IAA. Piallo's second objection must be considered in the light of the principles set out in *Tjong*. I will come to this aspect of the arguments later.

The scope of the arbitration agreement between the parties

Conflict of laws issue

20 Article 20.3 of the Distributorship Agreement states that the governing law of that agreement is Swiss law. Therefore, the scope of the arbitration agreement contained in Art 20.1 stands properly to be decided under Swiss law. It is stated in *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell, 15th Ed, 2012) (at para 16-075) that:

> The question whether an arbitration agreement is wide enough to cover the dispute between the parties depends on the principles of interpretation of the law applicable to the arbitration agreement. Before granting a stay under s.9 of the UK Arbitration Act 1996, the court must be satisfied that there is an arbitration agreement between the parties and that the subject of the action is within the scope of the agreement.

21 The majority of the House of Lords in *Nova* ([17] *supra*) said (at 718 and 730) that the scope of the arbitration clause in that case fell to be determined under German law as the governing law.

22 In *Nova*, a partnership agreement between two English and German companies contained an arbitration clause providing for arbitration in Germany under German law, and it read as follows:

> All disputes arising from the partnership relationship or occasioned by (or 'in connection with') the partnership relationship between the partnership and the partners shall be decided by the arbitration tribunal provided for in a separate document.

23 The German company dishonoured a number of bills of exchange which it had accepted and which were drawn in favour of the English company, whereupon the English company commenced an action in England claiming payment of the bills. The German company sought a stay of the action, which was refused by the House of Lords (Lord Salmon dissenting) on two grounds, namely: (a) on the evidence of German law the arbitration agreement did not extend to the claims on the bills of exchange; and (b) there was no dispute between the parties with regard to the matters agreed to be referred within the meaning of s 1(1) of the 1975 Act, and accordingly there was no jurisdiction to stay the court proceedings. On the second point (b), Lord Wilberforce took it to be clear law that unliquidated cross-claims could not be relied upon by way of set-off against a claim on a bill of exchange.

24 In this case, the parties did not address me on Swiss law. Unlike the case in *Nova*, there was no affidavit evidence on Swiss law before the court to aid in the interpretation of the scope of Art 20.1. As I see it, it is for Yafriro to prove what Swiss law is on the matter. Yafriro was content to argue this point on the assumption that Swiss law was the same as Singapore law in so far as the interpretation of Art 20.1 was concerned. In other words, the court was asked to assume that the unproven aspects of Swiss law were identical to Singapore law in coming to its decision on whether Piallo's claim on the dishonoured Cheques fell within Art 20.1.

25 Both parties thus proceeded on the basis that Swiss law was the same as Singapore law on the construction of Art 20.1 in relation to their dispute.

Suing on the stopped Cheques

26 It cannot be seriously disputed that a bill of exchange is itself a contract separate from the underlying contract, and that a claim for unliquidated damages based on the underlying contract cannot operate as a defence or set-off to the claim based on the bill of exchange: see, *eg*, *Nova* ([17] *supra*) at 732; *Wong Fook Heng v Amixco Asia Pte Ltd* [1992] 1 SLR(R) 654 ("*Amixco*").

27 In *Amixco*, the appellant had granted the respondent an option to purchase a property ("the first option"). The respondent drew a cheque in the appellant's favour in purported payment of the option money, but the cheque was dishonoured. The appellant then granted to a third party

another option to purchase over the same property ("the second option"). Subsequently the appellant sued the respondent on the dishonoured cheque, whereupon the respondent defended itself by arguing that the appellant in granting the second option had repudiated the first option. The Court of Appeal stated that the claim on the cheque was distinct from and independent of performance under the first option (at [13]–[15]). Since the appellant had given good consideration for the cheque, it was entitled to judgment for the sum of the cheque.

28 Relying on these broad principles, Piallo argued that each Cheque was a distinct and separate transaction from the underlying Distributorship Agreement, and the claim on the dishonoured Cheques fell outside the scope of Art 20.1. Counsel for Piallo, Mr Peter Doraisamy ("Mr Doraisamy"), relied on *Nova* for the general proposition that a claim on bills of exchange is generally not caught by an arbitration clause unless expressly provided for in the arbitration clause, and that in this case, the arbitration clause in the underlying contract must clearly cover claims involving the underlying contract and the bill of exchange contract for the reason that both are separate transactions.

29 *Nova* was considered in *CA Pacific Forex Ltd v Lei Kuan Ieong* [1999] 2 HKC 571, a decision of the Hong Kong Court of Appeal. The plaintiff there had concluded an agreement to open an account for the defendant for the transaction of forex instruments. Pursuant to the agreement the defendant subsequently drew two cheques in favour of the plaintiff, which cheques were dishonoured on presentation. The plaintiff sued on the cheques and the defendant applied for a stay of proceedings. Stating that a bill of exchange was unarguably a separate contract from the underlying agreement, Seagroatt J held (at 576) that the arbitration clause in question was not precise and sufficiently encompassing to include claims on bills of exchange. Seagroatt J also said (at 575–576):

> To hold that an arbitration clause referring to disputes arising from the underlying agreement, applies to bills of exchange would make 'a very substantial inroad upon the commercial principle on which bills of exchange have always rested.' Accordingly there must be a plain manifestation in the arbitration clause that it is to apply to bills of exchange if the presumption against taking bills of exchange into arbitration is to be rebutted.

30 It was further argued on behalf of Piallo that none of the limited defences such as those based on fraud, invalidity or total failure of consideration applied in this case, and there was hence no dispute to refer to arbitration, assuming for the sake of argument that Art 20.1 was applicable. In fact, Mr Doraisamy contended that Yafriro had admitted its indebtedness by its issuance of the post-dated Cheques amounting to S$680,198.

Wording of Article 20.1

31 By the terms of the arbitration agreement contained in Art 20.1 of the Distributorship Agreement, "[a]ny dispute *arising out of or in connection with the present contract* shall be settled under the rules of Arbitration of the ICC Paris by one arbitrator" [emphasis added]. Hence, as a matter of construction, is Art 20.1 apt to cover the claim on the dishonoured Cheques in these proceedings in that the claim (*ie*, the subject "matter" of these proceedings) is a dispute arising out of or in connection with the Distributorship Agreement?

32 On the question of construction, it seems that in arbitration cases the modern approach in England is to put aside previous authorities on the various forms of words in arbitration clauses where a distinction was drawn between disputes "arising under" and "arising out of" the agreement. The preference instead is to adopt a completely new approach to the construction of an arbitration clause (see *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254 ("*Fiona Trust (HL)*") at [12] where Lord Hoffmann applauded Longmore LJ's call for this new approach in *Fiona Trust & Holding Corporation v Privalov* [2007] 2 Lloyd's Rep 267 ("*Fiona Trust (CA)*") at [17]) that starts from the assumption that businessmen enter into agreements to achieve some rational commercial purpose and, being aware that their agreements may give rise to disputes, want those disputes resolved by "a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law" (*per* Lord Hoffmann in *Fiona Trust (HL)* at [6]). Lord Hoffmann further said (at [13]):

> In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ [in the Court of Appeal] remarked, at [17]: '[i]f any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.'

33 Agreeing with Longmore LJ, Lord Hope of Craighead remarked in *Fiona Trust (HL)* (at [26]):

> The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if the parties wish to have issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly. Otherwise they will be taken to have agreed on a single tribunal for the resolution of all such disputes.

34 In Singapore, our Court of Appeal stated in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 ("*Larsen*") (at [19]) that arbitration clauses should be generously construed such that all manner of claims, whether common law or statutory, should be regarded as falling within their scope unless there was good reason to conclude otherwise. This view resonates with Lord Hoffmann's remarks in *Fiona Trust (HL)* (see [32] above).

35 In a more recent decision, our Court of Appeal in *International Research Corporation PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130 departed from the long-standing English rule that requires an arbitration clause in one contract to be expressly referred to in another contract before that clause is said to be incorporated. Sundaresh Menon CJ, delivering the decision of the court, explained (at [31]) that our legislative scheme is so different that the court is obliged to put the English authorities on one side. Menon CJ said (at [32] and [34]):

> 32 … It is apparent that Art 7(2) of the Model Law 1985 does not place the same restrictive constraints as do the English authorities in respect of the circumstances in which the court may legitimately find that an arbitration clause in one agreement has been incorporated by reference, into another agreement.
>
> …
>
> 34 … The question in general is one of construction: did the parties intend to incorporate the arbitration in question by referring, in their contract, to it or to a document containing it? In our judgment, the analysis of whether a particular case is a 'one contract' or a 'two-contract' case as that notion has developed in English law, while possibly useful in some aspects, is not helpful for our purposes. It is ultimately a matter of contractual interpretation; and in undertaking this exercise, as we held in *Zurich Insurance*, the task is one which must be done having regard to the context and the objective circumstances attending the entry into the contract. As the Judge rightly noted, '[b]e it incorporation or construction, the court is always seeking to ascertain the parties' objective intentions' (see the Judgment at [48]).
>
> [emphasis in original omitted]

36 For present purposes, in the light of the various statements in the passages quoted above and the statements in *Larsen*, in my view, our courts are now likely to adopt a different approach to construction as compared to Seagroatt J's "presumption against taking bills of exchange into arbitration". To the learned judge, the presumption may be rebutted if there are clear words in the arbitration clause to include claims involving the bill of exchange contract like in the case of a dishonoured cheque.

Analysis and conclusions

37 With the above principles in mind, I now turn to the question of whether these proceedings are "in respect of any matter which is the subject of the agreement [to arbitrate]" (*ie*, Art 20.1). This question is answered by examining the true nature of the claim, the defences and the cross-claims raised in the arguments.

38 Generally, Piallo's claim on the dishonoured Cheques and Yafriro's cross-claim for damages for breach of the Distributorship Agreement arose out of the "same incident" in the sense that the circumstances that led to the Cheques being handed over to Piallo *after* the termination of the Distributorship Agreement had to do with the understanding reached between the parties following their negotiations on the same (see [4] above). In this type of situation, it is not difficult to accept that it was the intention of parties that such claims arising out of the same incident be resolved by the same process, that is, by arbitration alone rather than by arbitration and litigation for different disputes. Furthermore, as will be explained in due course, in this case, the resolution of the contractual issue (*ie*, the cross-claims) is necessary for a decision on the bill of exchange issue, so that it can be said that the contractual issue and the bill of exchange issue are so closely connected together on the facts that an agreement to arbitrate on one can properly be construed as covering the other given the sufficiently wide and general words chosen in Art 20.1, which was, in any case, Piallo's own standard clause. As Longmore LJ said in *Fiona Trust (CA)* ([32] *supra* at [17]):

> If businessmen go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause. If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so.

39 Likewise, if a cause of action under a bill of exchange is to be excluded (and it must not be forgotten that claims on cheques must have been contemplated by the parties given Yafriro's obligation to buy and sell deLaCour products for its own account (Art 3), keep a stock of products at its own expenses (Art 13) and to observe the payment terms (Art 6) under the Distributorship Agreement), it would have to be expressly stated, and this was not the case in Art 20.1.

40 Moreover, based on the evidence before me, if the present proceedings were not stayed, Yafriro would at the very least raise the defence of estoppel to the claim on the dishonoured Cheques and a cross-claim for damages for misrepresentation that would exceed the amount of the dishonoured Cheques. More importantly, all these issues (estoppel and

misrepresentation) were intricately tied up with the circumstances surrounding the performance of and negotiations over the Distributorship Agreement (see [38] above).

Estoppel

41 The defence of estoppel was raised by Yafriro in its written submissions and at the hearing proper. Mr Sim on behalf of Yafriro argued that Piallo could not sue on the dishonoured Cheques when Piallo had accepted the countermand and the parties were arranging for the issuance of fresh cheques (see [7] above).

42 As explained in *Bills of Exchange and Bankers' Documentary Credits* (William Hedley & Richard Hedley) (LLP, 4th Ed, 2001) (at para 5.29), a claimant on a bill of exchange may be estopped from asserting his rights on the same which, by his conduct, he has led someone to believe will not be enforced:

> So that if a holder of a bill of exchange either expressly, or by implication, leads the drawer, or any other party to the bill, to believe the bill will not be enforced (and the other party relies on that belief to his detriment) … [t]he holder will be estopped thereafter from making any claim on the bill.

43 Yafriro's case is that the Cheques were issued pursuant to the parties' dealings under the Distributorship Agreement as explained above. In contrast, Mr Doraisamy argued that the Cheques were for 51 purchases that were invoiced to Yafriro from May to December 2012 and they were entirely separate transactions, and had nothing to do with the Distributorship Agreement. I was not persuaded that the purchases could be divorced from the Distributorship Agreement.

44 It was not disputed that the Cheques were given *after* the purported termination of the Distributorship Agreement. Prior to the termination, Yafriro was already unhappy with Piallo for allegedly breaching the terms of the Distributorship Agreement in early 2012 when the latter collaborated with a Singapore entity to launch and distribute a special edition Lamborghini deLaCour timepiece in Singapore. In further breach of the Distributorship Agreement, Piallo permitted the same Singapore entity to open a boutique at the Mandarin Gallery, Singapore, to market and sell deLaCour products. In late 2012, Piallo again purportedly breached the Distributorship Agreement when it established a distributorship platform in Singapore under a third party called Delacour Asia Pacific Pte Ltd which was incorporated on 5 November 2012, and Yafriro was required to deal with this intermediary. Against this backdrop of purported breaches and, above all, the premature termination of the Distributorship Agreement, there would have had to be a compelling commercial/business reason for Yafriro to voluntarily hand over 15 post-dated Cheques to pay off its debts; and to Yafriro, that reason was the understanding the parties had reached

on continuing their business relationship. This understanding was alluded to in the April letter (see [4] above).

45 Mr Doraisamy said that there was no agreement to accept fresh cheques. Piallo's e-mail on 10 January 2013 agreed to the return of the countermanded Cheques dated March and April 2013 if Yafriro would issue fresh cheques for a total amount of CHF244,503.45 in favour of Piallo (see [7] above). As it turned out, Piallo never received any fresh cheques. Mr Sim nonetheless argued that the evidence indicated that Piallo who had earlier sold the Cheques to its bank did re-negotiate with its bank for the return of the Cheques following Yafriro's countermand, and that indicated that Piallo had accepted the countermand, and that the parties were arranging for the issuance of fresh cheques. Mr Sim submitted that arguably, in these circumstances, Piallo was estopped from suing on the dishonoured Cheques.

46 Despite the opposing views of counsel, it is not for this court in a stay application to assess the genuineness or merits of the defence; this is a matter for the arbitrator to decide (see *Tjong* at [69(e)]). For present purposes, Mr Sim's contentions that the facts gave rise to an estoppel would have arisen directly from the Distributorship Agreement as they concerned the re-negotiation of payment terms for goods supplied under that agreement, as well as the continuation of the existing contractual relationship between the parties (see the narrative in the April letter at [4] above). It follows that the defence of estoppel here is related to the subject of the arbitration agreement, since it arose out of or in connection with the Distributorship Agreement.

Misrepresentation

47 In *Safa Ltd v Banque du Caire* [2000] 2 Lloyd's Rep 600, the plaintiff sought to claim summarily amounts due under two letters of credit opened by the defendant bank. Notably, a letter of credit was viewed there (at 605) as being similar to a bill of exchange in so far as both were seen as equivalent to cash. The bank resisted summary judgment by arguing, *inter alia*, that the original beneficiary of the letters of credit had made misrepresentations to the bank when persuading it to open the letters of credit. Waller LJ, with whom the other judges agreed, held in favour of the bank, saying that a real prospect of success of the misrepresentation cross-claim was established (at 608 and 610).

48 In this case, the April letter stated that Yafriro had issued the post-dated Cheques because it had been "*misled to believe* that [Piallo] would continue to honour their obligations for the remaining term of the [Distributorship Agreement] and there was a consensus on the arrangement moving forward" [emphasis added]. This showed that Yafriro was alleging a misrepresentation on Piallo's part. It was even clearer that the circumstances relating to the misrepresentation issue were predicated

entirely on the negotiations on and performance of the Distributorship Agreement "moving forward". In my view, the claim of misrepresentation which Yafriro indicated it might raise (including the defence of estoppel) was inextricably linked with the subject matter of these legal proceedings, that is to say, the surrounding circumstances that led to the issuance of the post-dated Cheques arose out of or in connection with the Distributorship Agreement.

49 For these reasons, I was of the view that the subject matter of this action fell within the scope of Art 20.1.

Was there a dispute in the present case which was referable to arbitration?

50 It is clear from the conclusion reached on the first issue that there was a dispute between the parties that had to be settled by arbitration as prescribed in Art 20.1. As mentioned, Art 20.1 states that "[a]ny *dispute* arising out of or in connection with the present contract shall be settled under the rules of Arbitration of the ICC Paris by one arbitrator" [emphasis added]. Both parties cited *Tjong* (at [69]) for the proposition that the word "dispute" in the context of an arbitration agreement should be interpreted broadly, and that the existence of a dispute would be readily found unless in the case the defendant unequivocally admitted that a claim was due and payable, and his failure to pay was really due to an inability to pay (at [59]). I make two points. First, the Cheques were stopped because of the alleged misrepresentation, and second, Mr Sim reminded that the court is not required to examine whether there is "in fact" a dispute or a genuine dispute: see *Tjong* at [49].

51 Piallo submitted that Yafriro *had* made an unequivocal admission of liability and quantum in the present case as evidenced by the 15 post-dated Cheques in part payment in favour of Piallo. Although Yafriro later countermanded the Cheques, even after this countermand Yafriro expressed a willingness to pay Piallo a sum of CHF50,000 "within the last week of each month, starting from January 2013, as payment against outstanding amounts due" (see Mr Hew's letter dated 8 January 2013 at [6] above). In its submissions Piallo relied heavily on a decision from Hong Kong, *Getwick Engineers Ltd v Pilecon Engineering Ltd* [2002] HKCFI 189 ("*Getwick*").

52 The facts of *Getwick* were not particularly difficult. The defendant had employed the plaintiff as its subcontractor in respect of some construction work to be carried out. Initially the defendant did not pay certain amounts to the plaintiff, but the defendant later issued three post-dated cheques to the plaintiff. The first two were honoured, while the third was dishonoured. The plaintiff sued on the dishonoured cheque. Geoffrey Ma J (as he then was) granted the claim, holding (at [26(4)]) that the dishonoured cheque was:

> … *to be regarded as a clear and unequivocal admission on the defendant's part of its liability and quantum (in that amount) under payment certificates.* This cheque was issued following the 28 April letter … It was one of three cheques sent to the plaintiff by the defendant as an acknowledgement of its liability under payment certificates which had been issued to the plaintiff … In reaching this conclusion, I have borne in mind that cheques are to be regarded as cash and save in exceptional circumstances, no set off or counterclaim will be permitted … Two of the three cheques have been honoured. I see no reason why the third cheque should not be seen in the same light. *I have not been referred to any case in which a cheque or bill of exchange has been regarded as constituting a clear and unequivocal admission of liability and quantum, but in principle, I do not see why it cannot be so regarded.* [emphasis added]

This passage above was cited by the Court of Appeal in *Tjong* (at [57]), where the court agreed with Ma J's "robust approach in assessing the effect of dishonoured cheques *in such limited circumstances*" [emphasis added].

53 While *Getwick* may support the proposition that a cheque may constitute a clear and unequivocal admission of liability and quantum, it does *not* provide a conclusive answer to the question whether there was a "dispute". First, the Court of Appeal in *Tjong* expressly confined its approval of *Getwick* as an "obvious" case where the cheque constituted an admission of liability and quantum seen in the light of the limited circumstances of the case (*Tjong* at [59]). Notably, the Court of Appeal in *Tjong* was not focussing in any way on the question whether claims on bills of exchange should or should not be taken into arbitration. Second, regard must also be had to the holding in *Tjong* (at [62]) that even if a defendant makes an admission *but later purports to deny the claim on the ground that the admission was mistaken, fraudulently obtained or never made*, then there might well be a dispute before the court, both over the substantive claim as well as over whether the defendant could challenge the alleged earlier admission, and the matter should ordinarily be referred to arbitration.

54 Even accepting here that the Cheques were initially a clear and unequivocal admission of Piallo's claim, the circumstances before and after the Cheques were issued showed that Yafriro subsequently *denied* the claim.

55 First, Yafriro's letter dated 8 January 2013 clearly referred to a dispute over Piallo's alleged "unexpected and premature alteration" to the Distributorship Agreement (see [6] above). Yafriro claimed in the letter that this alteration had resulted in significant damage to its sales and credibility, "making the payment schedule highly impossible" (see also the narrative in the April letter at [4] above). Thus any clear and unequivocal admission of a claim as represented by the Cheques had by now been *contradicted* by Yafriro's averment that it had countermanded the Cheques because of Piallo's unilateral alteration to the Distributorship Agreement.

At the very least there was a dispute over whether the Cheques had been rightly countermanded by Yafriro, which, following *Tjong*, is a dispute that should be referred to arbitration.

56 Second, in response to Piallo's letters of demand, Yafriro's lawyers stated on 8 March 2013 that Yafriro was justified in countermanding the Cheques owing to the following conduct on Piallo's part:

(a) Piallo's failure to supply the deLaCour products ordered by Yafriro, a breach under Art 6.1 of the Distributorship Agreement;

(b) Piallo entering into an agreement with a third party allowing the latter to distribute deLaCour products, a breach of Arts 1 and 14 of the Distributorship Agreement giving Yafriro the exclusive right to market, distribute and sell deLaCour products; and

(c) Piallo's decision not to proceed with the opening of a deLaCour boutique in Singapore, which caused Yafriro to breach its obligation under Art 4.2 of the Distributorship Agreement to open a mono-brand boutique.

In addition, the matters outlined in [44] above are relevant to Yafriro's decision to countermand the Cheques.

57 I am not concerned at this juncture with the validity of the allegations in [56] above, although the fact that they were made did show at the very least that Yafriro believed it had grounds for not paying Piallo. There was clearly a dispute surrounding Yafriro's reasons for countermanding payment under the Cheques.

Conclusion

58 For all the foregoing reasons, I dismissed the appeal with costs fixed at S$6,500. Piallo was granted liberty to apply to lift the stay of proceedings after the arbitral tribunal ruled on its own jurisdiction.

Reported by Lau Kwan Ho.