BCY
v
BCZ

[2016] SGHC 249

High Court — Originating Summons No 502 of 2016
Steven Chong J
16, 17 August; 9 November 2016

Arbitration *— Agreement — Governing law — Arbitration agreement part of contract containing choice of New York law as governing law of agreement — Arbitration agreement specifying Singapore as seat of arbitration — Whether governing law of arbitration agreement New York law or Singapore law*

Arbitration *— Arbitral tribunal — Jurisdiction — Parties negotiating sale and purchase agreement containing arbitration clause — Sale and purchase agreement not executed — Whether parties bound by arbitration clause to submit dispute to arbitration — Whether arbitral tribunal had jurisdiction over dispute*

Facts

This dispute arose from the proposed sale of the plaintiff's shares in a company ("the Shares") to the defendant and a co-purchaser ("W"). Seven drafts of the sale and purchase agreement ("SPA"), which incorporated an International Chamber of Commerce ("ICC") arbitration clause, were circulated and negotiated but the SPA was not eventually signed.

The first draft SPA provided for New York law as the governing law of the agreement. This choice remained the same in all seven drafts of the SPA. The second draft SPA sent on 25 June 2013 replaced a choice-of-court clause in the first draft SPA with the ICC arbitration clause. In the fourth draft SPA, two amendments were made to the arbitration clause: any dispute was now to be referred only to one arbitrator (instead of three) and Singapore was specified as the seat of arbitration. The sixth draft SPA was sent on 18 July 2013 by the plaintiff's investment specialist, who indicated in the covering e-mail that the plaintiff was "ready to sign" the SPA that day. W replied on the same day that its legal counsel was still "finalising the draft". A seventh draft SPA with some "significant changes" was circulated by e-mail on 25 July 2013 by W to the plaintiff and defendant. This was stated to be the "final and agreed SPA" which the defendant and W were "available to sign".

The plaintiff decided not to proceed with the sale of the Shares. The defendant commenced arbitration pursuant to the rules of the ICC. The defendant's position in the arbitration was that the arbitration agreement was formed either on 25 June 2013 or on 18 July 2013, before the SPA was concluded.

The Arbitrator found that the proper law of the arbitration agreement was New York law. He held that if the parties did not identify an express choice of law for the arbitration agreement, there was a rebuttable presumption that their implied choice of law was the governing law of the main contract. Since the governing law of the main contract was New York law, the proper law of the arbitration

agreement would be the same. There were no factors displacing that rebuttable presumption. Applying New York law on contract formation, the Arbitrator found, on the basis of the words and conduct of the parties, that the arbitration agreement came into existence between the plaintiff and the defendant by 18 July 2013. That was the date on which the plaintiff had indicated its preparedness to sign the sixth draft SPA.

This originating summons was the plaintiff's application for a declaration, pursuant to s 10(3) of the International Arbitration Act (Cap 143A, 2002 Rev Ed), that the Arbitrator had no jurisdiction to hear and determine any claim advanced by the defendant in the arbitration.

Held, allowing the application:

(1) In the absence of any indication to the contrary, parties were assumed to have intended the whole of their relationship to be governed by the same system of law. This meant that in the absence of an express choice of law for the arbitration agreement, the natural inference was that the proper law of the main contract should also govern the arbitration agreement. This presumption was supported by the weight of authority and was, in any event, preferable as a matter of principle: at [43] and [49].

(2) Where the arbitration agreement was part of the main contract, the governing law of the main contract was a strong indicator of the governing law of the arbitration agreement unless there were indications to the contrary. The choice of a seat different from the law of the governing contract would not in itself be sufficient to displace that starting point. The governing law of the main contract should only be displaced if the consequences of choosing it as the governing law of the arbitration agreement would negate the arbitration agreement even though the parties had themselves evinced a clear intention to be bound to arbitrate their disputes: at [65] and [74].

(3) Where the arbitration agreement was freestanding, in the sense that it was not intended to be a term of any other contract, then in the absence of any express choice of law, the law of the seat would most likely be the governing law of the arbitration agreement: at [66] and [67].

(4) The arbitration agreement was clearly intended to be part of the SPA and was at all times negotiated as part of the SPA. Therefore, as a starting point, the presumption was that New York law, as the express choice of law governing the SPA, was also the governing law of the arbitration agreement. The choice of Singapore as the seat would not be sufficient on its own to displace the presumption. It was also not displaced by the fact that New York law provided for the doctrine of equitable estoppel, which might have been inconsistent with a term of the SPA expressly stating that it was not intended to benefit any third party or be enforceable by any third party: at [71] to [75].

(5) Based on New York law as the governing law of the arbitration agreement, there was no objective manifestation of any mutual intention by the parties to be bound by the arbitration agreement as at 18 July 2013: at [83].

(6) Although the plaintiff proposed to substitute an arbitration clause in place of the choice-of-court clause in the second draft SPA, it did not follow that it intended to be bound by the arbitration clause independently of the SPA: at [84].

(7) Although the parties agreed on the wording of the arbitration clause by the fourth SPA and made no further changes to the arbitration agreement thereafter, this did not mean they intended to be bound by the arbitration agreement as an independent contract. Agreeing to the wording of the arbitration clause did not *per se* equate to an intention to be contractually bound to arbitrate absent the conclusion of the contract under which the arbitration clause was negotiated: at [86] and [90].

(8) The putative arbitration agreement and SPA were "subject to contract" and would only be binding upon execution: at [93].

(9) The inclusion of the "existence of the SPA" in the scope of the arbitration clause did not show that it was intended to be a binding agreement. It was not unusual for an arbitration clause which was part of a contract to refer disputes concerning the existence of that main contract to arbitration: at [96].

(10) There was no binding arbitration agreement formed on 18 July 2013 prior to the unexecuted SPA. As a consequence, the Arbitrator did not have jurisdiction to hear the claims: at [97].

Case(s) referred to

APC Logistics Pty Ltd v CJ Nutracon Pty Ltd [2007] FCA 136 (refd)

Arsanovia Ltd v Cruz City 1 Mauritius Holdings [2013] 2 All ER (Comm) 1 (folld)

Barnmore Demolition and Civil Engineering Ltd v Alandale Logistics Ltd [2010] IEHC 544 (refd)

Bazak International Corp v Tarrant Apparel Group 491 F Supp 2d 403 (SDNY 2007) (folld)

C v D [2008] 1 All ER (Comm) 1001 (refd)

Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd [2016] 1 SLR 79 (refd)

Chem Orchid, The [2015] 2 SLR 1020 (refd)

Fiona Trust & Holding Corp v Privalov [2007] 2 All ER (Comm) 1053 (refd)

FirstLink Investments Corp Ltd v GT Payment Pte Ltd [2014] SGHCR 12 (not folld)

Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Coy Ltd [2013] EWHC 4071 (Comm) (folld)

Hyundai Merchant Marine Co Ltd v Americas Bulk Transport Ltd [2013] EWHC 470 (Comm) (refd)

Jordan Panel Systems Corp v Turner Construction Co 45 AD 3d 165, 841 NYS 2d 561 (1st Dept 2007) (folld)

Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd [2016] 4 SLR 1336 (refd)

Marion Coal Co v Marc Rich & Co International Ltd 539 F Supp 903 (SDNY 1982) (folld)

Norcast SARL v Castle Harlan, Inc No 12 Civ 4973 (PAC) (SDNY 2014) (refd)

Piallo GmbH v Yafriro International Pte Ltd [2014] 1 SLR 1028 (refd)

Sanum Investments Ltd v Government of the Lao People's Democratic Republic [2016] 5 SLR 536 (folld)

Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA [2013] 1 WLR 102 (folld)

Viscous Global Investments Ltd v Palladium Navigation Corp "Quest" [2014] EWHC 2654 (Comm) (refd)

Legislation referred to

International Arbitration Act (Cap 143A, 2002 Rev Ed) ss 6, 10(3)

Thio Shen Yi SC, Colin Liew, Cheryl Ng and Michelle Chew (TSMP Law Corp) for the plaintiff;
Herman Jeremiah and Geraldine Yeong (Dentons Rodyk & Davidson LLP) for the defendant.

9 November 2016 Judgment reserved.

Steven Chong J:

Introduction

1 When the jurisdiction of an arbitral tribunal is challenged on the basis that there is no binding arbitration agreement, the usual ground for such a challenge is that the contract which incorporates the arbitration clause was itself never concluded. In this familiar situation, it has been held that the validity of the arbitration agreement and the existence of a binding contract would "stand or fall together" and the court would usually determine *both* issues collectively (see *Hyundai Merchant Marine Company Ltd v Americas Bulk Transport Ltd* [2013] EWHC 470 (Comm) at [35]–[36], cited in *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd* [2016] 4 SLR 1336 at [48]).

2 The present case is a departure from that conventional approach. It concerned an International Chamber of Commerce ("ICC") arbitration commenced by the defendant against the plaintiff. The dispute arose from a proposed sale of shares ("the Shares") in a company by the plaintiff to the defendant under a sale and purchase agreement ("SPA"). Seven drafts of the SPA, which incorporated an ICC arbitration clause, were circulated and negotiated but the SPA was not eventually signed.

3 When the plaintiff decided not to proceed with the proposed sale of the Shares, the defendant commenced ICC arbitration proceedings, purportedly pursuant to the arbitration clause in the SPA. A sole arbitrator ("the Arbitrator") was appointed. The plaintiff raised a preliminary objection to the Arbitrator's jurisdiction on the basis, *inter alia*, that no ICC arbitration agreement had been concluded between the parties. The parties agreed to bifurcate the arbitration. There were thus to be two stages: (a) the jurisdictional challenge; and (b) the hearing on the merits, which has yet to take place. For the jurisdictional challenge, the Arbitrator sensibly proposed to the parties that in dealing with the jurisdictional issue, he should also

deal with some issues on the merits, in particular, whether a legally binding SPA was concluded between the parties. This would be entirely in line with the conventional approach. However, the defendant was not agreeable to the Arbitrator's suggestion and the parties thereafter agreed that the Arbitrator would only decide the jurisdictional issue without examining the question whether a valid SPA had been concluded between the parties.

4 Interestingly, the defendant's case is that a binding ICC arbitration agreement was concluded *before* the conclusion of the SPA. In advancing this case theory, the defendant argued, relying on the doctrine of separability, that the arbitration clause is separate from and independent of the SPA. Given the defendant's case that the arbitration agreement *pre-dated* the SPA, it is perhaps explicable why the parties agreed that the Arbitrator should decide the jurisdictional challenge without reference to the question whether the SPA was *separately* concluded between them. For reasons as explained below, in a situation where the arbitration clause was negotiated in the context of a contract, such an approach is problematic from the perspective of the parties and consequently, the Arbitrator as well.

5 As a consequence of the defendant's case theory, the identity of the governing law of the arbitration agreement, as distinct from the governing law of the SPA, was a hotly contested issue in the arbitration. The defendant asserted that the substantive law governing the arbitration agreement should be the same law governing the SPA, *ie*, New York law, while the plaintiff's case was that the arbitration agreement should be governed by the law of the seat of the arbitration, *ie*, Singapore law. That dispute continued to occupy some misplaced primacy in this application. The contest between New York law and Singapore law was misplaced simply because both parties acknowledged during the hearing that there was, in real and practical terms, no material difference between the two systems of law in so far as they relate to the only substantive issue before this court – whether an arbitration agreement was formed. This was essentially the finding of the Arbitrator as well. Nonetheless, owing to seemingly conflicting authorities on this issue, this judgment will examine the two competing positions because in some situations, the differences in the laws may well have a direct and material bearing on the outcome.

6 Eventually, the Arbitrator proceeded to determine the jurisdictional issues as framed by the parties, in particular, whether a valid and binding ICC arbitration agreement had come into existence as a matter of law. In his First Partial Award dated 15 April 2016 ("Award"), he found that a valid ICC arbitration agreement was indeed concluded between the parties by 18 July 2013 principally on the basis that mutual assent to the arbitration agreement could be inferred from the exchange of drafts subsequent to the second draft SPA containing an identical arbitration provision coupled with the plaintiff's statement that it was ready to sign the sixth draft, which contained the arbitration clause. This judgment will examine, in the context

of negotiations of a contract which incorporates an arbitration clause, when and under what circumstances parties would intend to create legal relations by entering into a discrete arbitration agreement independently and, more critically, *prior to* the conclusion of the contract itself.

7 The plaintiff has filed this application under s 10(3) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") for a declaration that the Arbitrator has no jurisdiction to hear any claim advanced by the defendant under the SPA in the arbitration. Owing to the circumstances under which this application was filed, it is imperative to bear in mind that the issue before me is *not* whether the dispute as to the existence of the SPA fell within the arbitration clause. Instead, this court has been specifically tasked by the parties to decide, on a balance of probabilities, whether an arbitration agreement, independent of the SPA, was concluded between the parties by 18 July 2013. This inquiry goes to the heart of the Arbitrator's jurisdiction.

Background facts

8 I start by recounting, as far as is relevant to these proceedings, the course of the negotiations leading to the aborted SPA.

The negotiations

9 The plaintiff is a foreign bank and was at all material times the owner of the Shares. The defendant, a foreign company, was a special-purpose vehicle incorporated on 29 April 2013 to be the contracting party to the SPA. The director and sole shareholder of the defendant is one Mr Z, who is also the director and sole shareholder of another foreign related company ("Y"). The defendant and Y were the claimants in the arbitration. During the course of the negotiations relating to the SPA, neither Mr Z nor his lawyers expressly distinguished as to whether they were negotiating on behalf of Y or the defendant.

10 The sale of the Shares was first discussed between the plaintiff's investment specialist and Mr Z on 8 December 2012. The plaintiff and Y entered into a confidentiality undertaking dated 11 December 2012, by which the plaintiff agreed to make available confidential information relating to the Shares that Y was obliged to hold in confidence. They also entered into an exclusivity agreement dated 8 January 2013, by which the plaintiff agreed not to solicit or accept any proposals for the purchase of the Shares from any other person other than Y until 31 April 2013.

11 By an offer letter dated 30 April 2013 ("the Offer Letter"), Y wrote to the plaintiff offering to purchase the Shares through the defendant. The offer was subject to, among other things, the "execution of a mutually acceptable [SPA]", and the offer price was subject to the parties "entering into a definitive SPA". The offer was stated to be valid until 15 May 2013.

This was later extended, by consent of the plaintiff and defendant, to 31 May 2013.

The draft SPAs

12 The first draft SPA was sent by Mr Z to the plaintiff on 17 June 2013. Article 9.13.1 provided for New York law as the governing law of the agreement. This choice remained the same in all seven drafts of the SPA. Article 9.13.2 provided for any disputes arising out of or in connection with the agreement to be referred to the New York courts.

13 Meetings were held in Washington DC between 24 and 27 June 2013 to discuss the SPA. These were attended by representatives of the plaintiff, the defendant, and another foreign bank ("W") which would later become a co-purchaser of the Shares.

14 The second draft SPA was sent by the defendant to the plaintiff and W on 25 June 2013. Notably, Art 9.13.2 was replaced with an arbitration clause:

> **9.13 Governing Law and Dispute Resolution**
>
> 9.13.1 This Agreement and any non-contractual obligations arising out of or in connection with it are governed by and shall be construed in accordance with the Laws of the State of New York of the United States of America.
>
> 9.13.2 All disputes (including a dispute, controversy or claim regarding the existence, validity or termination of this Agreement – a 'Dispute') arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules, such arbitration to take place in Singapore.

15 The third draft SPA was circulated by the defendant to the plaintiff and W on 26 June 2013. It was in this draft SPA that W was added as a co-purchaser. Article 9.13 of the SPA remained unchanged.

16 On 12 July 2013, the fourth draft SPA was circulated by the plaintiff to the defendant and W following the Washington DC meetings. Two amendments were made to Art 9.13.2: any dispute was now to be referred only to one arbitrator and Singapore was specified as the seat of arbitration:

> All disputes (including a dispute, controversy or claim regarding the existence, validity or termination of this Agreement – a 'Dispute') arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one arbitrator appointed in accordance with the said Rules, such arbitration to take place in Singapore. The seat of the arbitration shall be Singapore.

There were no further amendments to Art 9.13 in the subsequent draft SPAs.

17 The fifth draft SPA was sent on 17 July 2013 by the plaintiff to the defendant and W.

18 The sixth draft SPA was sent on 18 July 2013 by the plaintiff's investment specialist to its external legal counsel, but was copied to the defendant and W. The plaintiff's investment specialist indicated in the covering e-mail ("the 18 July e-mail") that it was "ready to sign" the SPA that day:

> [The plaintiff] is ready to sign the SPA today.
>
> There is some minor typos and blank for filling up. Please see attached file.
>
> Kindly print out engrossed copy for signature in counterparts.

19 W replied on the same day that its legal counsel was still "finalising the draft". The plaintiff expressed its disappointment at this "last minute review". Thereafter, further negotiations between the parties ensued.

20 A seventh draft SPA was circulated by e-mail on 25 July 2013 by W to the plaintiff and defendant. This was stated to be the "final and agreed SPA" which the defendant and W were "available to sign". This draft, however, contained "significant changes"; for example, the definitions of key terms such as "sale consideration" and "dividend payment" were materially amended.

21 On 27 August 2013, the plaintiff, through its external legal counsel, informed Mr Z, in his capacity as president of Y that it had decided not to proceed with the sale of the Shares due to "recent changes in the business climate". By a letter dated 29 August 2013 signed off by Mr Z, Y demanded that the plaintiff proceed to sign the SPA before 30 September 2013. The SPA was never executed and consequently, the Shares were never transferred to the defendant.

The arbitration

22 The defendant and Y commenced arbitration on 9 February 2015 pursuant to the rules of the ICC. Y is not a party to these proceedings but for convenience, I will use "the defendant" in the context of the arbitration to refer to both the defendant and Y.

23 In the arbitration, the defendant brought, *inter alia*, the following claims against the plaintiff based on New York law:

(a) damages for breach of the SPA in failing to complete the transfer of the Shares;

(b) a claim for promissory estoppel based on an alleged promise by the plaintiff to sell the Shares to Y; and

(c) a claim for unjust enrichment based on actions taken in reliance on the promise.

24 The plaintiff raised a preliminary objection to the Arbitrator's jurisdiction on the basis that no arbitration agreement had been concluded between the plaintiff and the defendant and/or Y.

25 In the Terms of Reference submitted to the Arbitrator dated 3 August 2015, the issues to be determined in the arbitration were categorised under two headings, "Jurisdiction" and "Merits". Two of those issues are relevant here. Issue 1, under the heading of "Jurisdiction", was whether there was a valid and binding ICC arbitration agreement and, if so, (a) how and when it came into existence as a matter of law; and (b) who the parties to that agreement were. Issue 14, under the heading of "Merits", was whether a binding SPA came into existence as a matter of law and, if so, when and how.

26 Although Issue 1 concerned when the arbitration agreement came into existence, the defendant did not, in the Terms of Reference itself, identify any specific date on which the arbitration agreement was allegedly concluded. It only asserted that the SPA became a binding contract either on 18 July 2013, when the plaintiff communicated its readiness to execute the sixth draft of the SPA, or on 25 July 2013, when the seventh draft SPA was circulated. But as I have noted, the defendant's position has always been that the arbitration agreement was concluded *prior* to the purported conclusion of the SPA itself. This can be gleaned from at least three other documents in the arbitration.

27 First, in its initial submission pursuant to Arbitral Communication No 6, dated 29 May 2015, the defendant submitted, in response to the Arbitrator's question, that the arbitration agreement "came into existence no later than 25 June 2013" when the parties replaced Art 9.13.2 with an arbitration clause providing for arbitration in Singapore according to the ICC Rules. In response to the Arbitrator's query as to whether the arbitration agreement had come into existence at the same time as the SPA, the defendant's answer was:

> *No*. A binding SPA came into existence *after* the binding ICC arbitration agreement. The ICC arbitration agreement became binding on the parties no later than 25 June 2013. The SPA became binding once the parties reached agreement on all material terms, and [the plaintiff] expressed its intention to sign the written contract on 18 July 2013, subject to the correction of 'minor typos' and the filling in of a non-substantive 'blank'. On 25 July 2013, a final draft was circulated incorporating [the plaintiff's] edits and to which the purchasers indicated their intention to sign. Accordingly, a binding SPA was established no later than 25 July 2013. [emphasis added]

28 Second, in its statement of case, dated 12 August 2015, the defendant submitted that the plaintiff's words and conduct indicated that it assented to be bound by the arbitration clause on 25 June 2013 (the date of the second draft SPA), and at the very latest, by 18 July 2013 (the date of the sixth draft SPA).

29 Third, in its opening submission on the jurisdictional issues dated 7 December 2015, the defendant asserted that the binding arbitration agreement was formed on 25 June 2013, when Art 9.13.2 in the second draft SPA was amended to include the arbitration clause. The defendant added that the plaintiff never objected to the arbitration clause and had, on 18 July 2013, agreed to sign the sixth draft SPA. That marked "the latest date" that the arbitration clause became binding.

30 Given the defendant's position that the arbitration agreement was formed either on 25 June 2013 or on 18 July 2013, before the SPA was concluded, it was anticipated that there would be an overlap in evidence on the formation of the arbitration agreement and the formation of the SPA. The Arbitrator suggested that both questions be determined together in the jurisdictional phase of the arbitration. The plaintiff adopted this suggestion. The defendant preferred not to deal with the formation of an arbitration agreement as a preliminary issue of jurisdiction. The parties eventually agreed that the Arbitrator would only deal with the jurisdictional issues without dealing with the formation of the SPA.

The Award

31 Only the Arbitrator's findings on the formation of the arbitration agreement are relevant for present purposes.

32 The Arbitrator found that the proper law of the arbitration agreement was New York law. He held, applying *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 ("*Sulamérica*"), that if the parties did not identify an express choice of law for the arbitration agreement, there was a rebuttable presumption that their implied choice of law was the governing law of the main contract. Since the governing law of the main contract was New York law, the proper law of the arbitration agreement would be the same. There were no factors displacing that rebuttable presumption.

33 Applying New York law on contract formation, the Arbitrator found, on the basis of the words and conduct of the parties, that the arbitration agreement came into existence between the plaintiff and the defendant by 18 July 2013. That was the date on which the plaintiff had indicated its preparedness to sign the sixth draft SPA. The Arbitrator rejected the defendant's submission that the arbitration agreement had come into existence upon the exchange of the second draft SPA on 25 June 2013 – there was no objective manifestation of mutual assent to be bound by the arbitration agreement at that time. Mutual assent could, however, be inferred from the exchange of subsequent drafts of the SPA, which had the same arbitration clause throughout, and the 18 July e-mail.

34 The Arbitrator also found that only the plaintiff, the defendant, and W were parties to the arbitration agreement, and that Y was not a party.

The present application

35 This originating summons is the plaintiff's application for a declaration, pursuant to s 10(3) of the IAA, that the Arbitrator has no jurisdiction to hear and determine any claim advanced by the defendant in the arbitration ("Prayer 1"), or, in the alternative, that the Arbitrator only has jurisdiction to hear the claim for breach of the unexecuted SPA (but not the promissory estoppel or unjust enrichment claims).

36 Pursuant to s 10(3) of the IAA, the court undertakes a *de novo* review of the issue of whether an arbitral tribunal has jurisdiction over any particular dispute. While the tribunal's own views may be persuasive, "the court is not bound to accept or take into account the arbitral tribunal's findings on the matter" (see *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [41]).

37 Although the question whether there was a legally binding SPA is not before the court since it has been reserved for the merits stage of the arbitration, it is common ground that for the purposes of this originating summons, the court must necessarily take into account the factual matrix in which the SPA was negotiated in determining whether the arbitration agreement was formed

Governing law of the arbitration agreement

38 It is also common ground in these proceedings, as it was in the arbitration, that whether an arbitration agreement was formed is to be decided in accordance with the governing law of the arbitration agreement. The plaintiff submitted that the governing law of the arbitration agreement was Singapore law. The defendant submitted that the Arbitrator had correctly found it to be New York law.

39 Determining the governing law of the arbitration agreement would have negligible, if any, influence on the primary question of whether an arbitration agreement was formed. This is because both parties acknowledged that there were no material differences between New York law and Singapore law on the formation of an arbitration agreement.Indeed, both sides argued that applying Singapore or New York law would lead to the same result they sought. The only alleged material difference is that New York law permits claims to be brought for unjust enrichment and promissory estoppel. However, this difference is only relevant to the heads of claim and has no bearing on the substantive issue which pertains to the *formation* of the arbitration agreement. In any event, Mr Herman Jeremiah, counsel for the defendant, confirmed during the hearing that the defendant will not be pursuing any claim for unjust enrichment or promissory estoppel. I observed in an unrelated case that it is unnecessary to introduce and prove foreign law if the application of foreign law would lead to the same result as applying the law of the forum (see

The Chem Orchid [2015] 2 SLR 1020 at [157]). Nonetheless, given the divergence of authorities and academic opinions, I shall express my views on this issue with the benefit of the full and well-developed arguments which have been presented by both parties.

40 It is not disputed that the governing law of an arbitration agreement is to be determined in accordance with a three-step test: (a) the parties' express choice; (b) the implied choice of the parties as gleaned from their intentions at the time of contracting; or (c) the system of law with which the arbitration agreement has the closest and most real connection (see *Sulamérica* ([32] *supra*) at [9] and [25]).

41 Since the arbitration agreement in this case does not contain an express choice of governing law, the dispute here is over the application of the second step of the test. The Arbitrator found (and the defendant submits) that the parties impliedly chose the governing law of the main contract to govern the arbitration agreement as well. The plaintiff disagrees and submits that decisive weight should be accorded to the law of the seat of the arbitration in determining the parties' implied choice of law. In this regard, the plaintiff relies on *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 ("*FirstLink*"), which, it claims, represents the law in Singapore.

Sulamérica

42 I start by examining *Sulamérica*, which was the basis for the Arbitrator's decision. In that case, several Brazilian companies made claims under two insurance policies. The policies were stated to be governed exclusively by Brazilian law and contained a two-tiered arbitration clause: if the parties were unable to first resolve the dispute through meditation, the dispute would be referred to arbitration. London was chosen as the seat of arbitration. The insurers denied liability and gave notice of arbitration without referring the dispute to mediation. The insured companies commenced court proceedings in Brazil. The insurers were thereafter granted an injunction by the English High Court to restrain the insured companies from continuing with court proceedings in Brazil. The insured companies appealed against the injunction, arguing that under the law of Brazil, the arbitration clause could not be invoked against them without their consent. Whether the injunction should continue was thus dependant on whether the arbitration clause could be invoked against the insured companies, which was to be determined by the law governing the arbitration agreement. The English Court of Appeal found that it was governed by English law. Applying English law, it found, first, that the clause requiring parties to submit their dispute to mediation was not a binding obligation (at [36]), and second, either party could refer to arbitration any dispute arising out of or in connection with the policy

(at [41]). Hence, the insurers validly referred the dispute to arbitration and the High Court was right to grant the injunction.

43 The starting point of Moore-Bick LJ's analysis, with which Hallett LJ agreed, was that in the absence of any indication to the contrary, parties are assumed to have intended the whole of their relationship to be governed by the same system of law. This meant that in the absence of an express choice of law for the arbitration agreement, the "natural inference" was that the proper law of the main contract should also govern the arbitration agreement (at [11]).

44 Moore-Bick LJ then drew a distinction between the following two scenarios (at [26]):

> (a) If there was a "free-standing agreement to arbitrate" containing no express choice of law, it is unlikely that there would be sufficient basis for finding an implied choice of law and it would be necessary to identify the law with which the arbitration agreement had the closest and most real connection. The significance of the choice of seat, in such a case, would be "overwhelming" and the law of the seat would most likely be the governing law of the arbitration agreement.
>
> (b) If, however, the arbitration agreement formed part of a substantive contract, the express choice of proper law governing the substantive contract would be a "strong indication of the parties' intentions in relation to the agreement to arbitrate", with the result that the implied choice of law for the arbitration agreement was likely to be the same as the expressly chosen law of the substantive contract. This conclusion might be displaced by the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract.

45 The facts of *Sulamérica* ([32] *supra*) fell within the second scenario. Moore-Bick LJ found that the starting point that Brazilian law was the implied choice of law of the arbitration agreement was displaced for two reasons. The first was that London was chosen as the seat of the arbitration, which tended to suggest that parties intended for English law to govern all aspects of the arbitration agreement (at [29]). The second was that the principle under Brazilian law that an arbitration agreement could only be invoked with the insured companies' consent undermined the clear words of the agreement, which clearly allowed either party to refer any dispute to arbitration. This implied that the parties did not intend the arbitration agreement to be governed by Brazilian law (at [30]). Since it could not be said that the parties impliedly chose Brazilian law to govern the arbitration agreement, Moore-Bick LJ went on to the third step of the choice-of-law analysis and found that the arbitration agreement had the closest and most real connection with the law of the seat of the arbitration, which was English law (at [32]).

46 Moore-Bick LJ's holding that the implied choice of law of the arbitration agreement would likely be the same as the expressly chosen law of the main contract was itself a departure from the view of the Court of Appeal in *C v D* [2008] 1 All ER (Comm) 1001 where Longmore LJ held at [26] that:

> … *it would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration*. The reason is that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place. [emphasis added]

In *Sulamérica*, Lord Neuberger MR, who issued a separate concurring opinion, agreed that the governing law was English law but considered (at [59]) that it was unnecessary to choose between two seemingly inconsistent strands of authority, one favouring the view that it is rare for the law of the arbitration agreement to be other than the governing law of the contract, the other (represented mainly by *C v D*) saying it would be rare for the governing law not to be the law of the seat.

FirstLink

47 This brings me to *FirstLink* ([41] *supra*), which is the principal authority relied on by the plaintiff. In that case, the plaintiff commenced an action against the defendants for breach of contract and the first defendant applied to stay the court proceedings under s 6 of the IAA based on the following arbitration agreement in the contract (at [4]):

> Any claim will be adjudicated by Arbitration Institute of the Stockholm Chamber of Commerce. [The plaintiff] and [the first defendant] agree to submit to the jurisdiction of the Arbitration Institute of the Stockholm Chamber of Commerce. Both parties expressly agree not to bring the disputes to any other court jurisdictions, except as agreed here to the Arbitration Institute of the Stockholm Chamber of Commerce

The choice of law clause stated that the agreement as a whole was "governed by and interpreted under the laws of Arbitration Institute of the Stockholm Chamber of Commerce" (at [9]). The plaintiff sought to resist the stay by arguing that the arbitration agreement was null and void, inoperative, or incapable of being performed – in other words, that it was invalid (at [5]).

48 The assistant registrar ("AR") found that the governing law of the arbitration agreement was Swedish law and that, since the plaintiff had not submitted that the arbitration agreement was invalid under Swedish law, it failed to show that the arbitration agreement was invalid (at [17]). In arriving at this decision, the AR adopted the three-step test in *Sulamérica* but disagreed with the "*rebuttable* presumption that the express substantive law of the contract would be taken as the parties' implied choice of the

proper law governing the arbitration agreement" (at [11]) [emphasis in original]. The AR's view (at [13]) was that:

> … it cannot always be assumed that commercial parties want the same system of law to govern their relationship of performing the substantive obligations under the contract, and the quite separate (and often unhappy) relationship of resolving disputes when problems arise.

The AR then held (at [16]) that in the absence of indications to the contrary, the law should find that parties have impliedly chosen the law of the seat as the proper law to govern the arbitration agreement, in a situation of "direct competition between the chosen substantive law and the law of the chosen seat of arbitration". In short, the AR found, contrary to Moore-Bick LJ's view in *Sulamérica*, that in the absence of an express choice, the default position is that the law of the seat should be the governing law of the arbitration agreement. Applying this approach, the AR found that the parties had selected Sweden as the seat of arbitration, and therefore, that they had impliedly selected the law of Sweden as the governing law of the arbitration agreement (at [17]).

My view

49 I agree with Moore-Bick LJ's approach in *Sulamérica* that the implied choice of law for the arbitration agreement is likely to be the same as the expressly chosen law of the substantive contract. This presumption is supported by the weight of authority and is, in any event, preferable as a matter of principle.

50 As to the weight of authority, I disagree with the plaintiff that *FirstLink* represents the law in Singapore. There are other decisions of the High Court where the governing law of the arbitration agreement was implied from that of the main contract. The defendant referred me to two such cases: *Piallo GmbH v Yafriro International Pte Ltd* [2014] 1 SLR 1028 ("*Piallo*") and *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd* [2016] 1 SLR 79 ("*Rals*").

51 I should first say that in both these cases, the court did not specifically address the competing approaches in *Sulamérica* ([32] *supra*) and *FirstLink* ([41] *supra*). There was no reason to do so since there was no divergence between the law of the main contract and the law of the seat of the arbitration. That does not mean, however, that they are not authorities for the applicability of the presumption; it only means that in those cases, there was no occasion to consider what factors, if any, might displace the law of the main contract as the implied choice of law for the arbitration agreement.

52 In *Piallo*, the governing law of the contract was Swiss law and the seat of the arbitration was Geneva. At issue was the scope of the arbitration agreement, which was to be decided in accordance with the applicable law

of the arbitration agreement. Belinda Ang Saw Ean J found that, since the governing law of the main agreement was Swiss law, the scope of the arbitration agreement "[stood] properly to be decided under Swiss law" (at [20]). I note that *Sulamérica* was not cited in this judgment. I should add that the outcome would have been the same even if the law of the seat was the governing law of the arbitration agreement.

53 *Sulamérica* was, however, cited in *Rals*. A supply agreement was expressly governed by Singapore law. The arbitration clause provided for Singapore as the seat of arbitration. The court had to decide whether a party was bound by the arbitration agreement. This could be a matter for the law of the supply agreement or the law of the arbitration agreement, although Vinodh Coomaraswamy J preferred the latter (at [88]). Since Singapore law governed both the supply agreement and the arbitration agreement, there was no competition between the two possible governing laws. As to the governing law of the arbitration agreement, however, Coomaraswamy J had observed at [76] that it was Singapore law because:

> Singapore law governs the broader agreement … in which the arbitration agreement is found and there is, in this case, no reason to move beyond the starting assumption that the parties intended the same law to govern both agreements (*Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 ('*Sulamérica*') at [11]–[14]).

54 In my view, it was strictly unnecessary, on the facts of *FirstLink*, for the AR to depart from *Sulamérica* in favour of a starting presumption in favour of the law of the seat. This issue would only arise for consideration in a situation where, in the AR's words, there is a "direct competition" between the law of the main contract and the law of the seat. There was no such competition in *FirstLink* because, unlike in *Sulamérica* and the present case, neither the governing law of the main contract nor the seat of the arbitration was *explicitly* chosen to begin with. The choice of law clause did not specify a national system of law. Instead, it provided for the laws of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") to apply. Further, the arbitration clause (reproduced above at [47]) was imprecisely drafted and did not *explicitly* state that the seat of arbitration was Sweden. The AR found this to be the case from the reference to disputes being submitted to the SCC (at [17]). I agree with the Arbitrator that the mere reference to rules of the SCC did not necessarily point to Sweden as the seat of the arbitration. This is because under the SCC rules, it would have been for the board of the SCC to decide the seat in the absence of the parties' express agreement. This is not to say that the outcome in *FirstLink* would have been different; indeed, the application of the third stage of the choice-of-law analysis would probably have pointed to Swedish law as the law with which the arbitration agreement had the closest connection. The plaintiff submitted that even if the AR was incorrect in resolving the case at the second stage of the test, *ie*, finding that the parties

impliedly chose Swedish law as the governing law of the arbitration agreement, it did not mean that the reasoning in *FirstLink* was wrong as a matter of principle. For the reasons to follow (see [59] onwards), I prefer the *Sulamérica* approach as a matter of principle.

55 Further support for *Sulamérica* can be found in two first-instance decisions of the English courts which the defendant brought to my attention. These also establish that although in *Sulamérica* the choice of seat was accepted as one of the factors pointing away from the main contract's choice of law, it would be insufficient on its own to negate the presumption that parties intended the governing law of the main contract to govern the arbitration agreement.

56 In *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 2 All ER (Comm) 1 ("*Arsanovia*"), the governing law of the main contract being Indian law was a strong indicator of the arbitration agreement's governing law. The choice of London as the seat of the arbitration agreement was not a sufficiently contrary intention. Smith J observed at [21]:

> [T]he parties to the SHA are to be taken to have evinced an intention that the arbitration agreement in it be governed by Indian law for the reasons that Moore-Bick LJ explained [in *Sulamérica*]. The governing law clause is, at the least, a strong pointer to their intention about the law governing the arbitration agreement and there is *no contrary indication other than choice of a London seat for arbitrations*. [emphasis added]

57 In *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Coy Ltd* [2013] EWHC 4071 (Comm) ("*Habas*"), Hamblen J considered *Sulamérica* ([32] *supra*) and *Arsanovia* and noted that the choice of a different country for the law of the seat "may not in itself be sufficient to displace the indication of choice implicit in the express choice of law to govern the matrix contract" (see [101]). On the facts of that case, given that there was no express choice of law in the main contract, the applicable law of the arbitration agreement was that of the seat (at [103]).

58 Academic commentaries on this issue post-*Sulamérica* are divided and support can be found for both approaches. I will mention just two such commentaries. Prof Adrian Briggs suggests that it would be "surprising" if the governing law of the main contract would not also govern the arbitration agreement since a choice of law expressed in customarily broad and general terms would ordinarily draw no distinction between the main contract and the arbitration agreement (see Adrian Briggs, *Private International Law in English Courts* (Oxford University Press, 2014) at para 14.39). By contrast, David Joseph QC suggests that if there is no express choice of governing law for the arbitration agreement, the courts "will require the presence of some further particular circumstance to apply a governing law other than the law of the seat" (see David Joseph, *Jurisdiction and Arbitration Agreements* (Sweet & Maxwell, 3rd Ed, 2015)

at para 6.36). *FirstLink* ([41] *supra*) is the only authority cited in support of this proposition.

59 The foregoing review demonstrates that more cases appear to favour the *Sulamérica* approach. Though none of them are binding precedents, in my view, the approach in *Sulamérica* is to be preferred. Where the arbitration agreement is a clause forming part of a main contract, it is reasonable to assume that the contracting parties intend their entire relationship to be governed by the same system of law. If the intention is otherwise, I do not think it is unreasonable to expect the parties to specifically provide for a different system of law to govern the arbitration agreement. In practice, parties rarely specify the law applicable to the arbitration agreement as distinct from the main contract (see Gary B Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814 at para 34). When a choice of law clause (such as the one here) stipulates that the "agreement" is to be governed by one country's system of law, the natural inference should be that parties intend the express choice of law to "govern and determine the construction of *all* the clauses in the agreement which they signed *including the arbitration agreement*" [emphasis added] (see *Arsanovia* at [22]). To say that the word "agreement" contemplates all the clauses in the main contract save for the arbitration clause would in fact be inconsistent with its ordinary meaning.

60 The suggestion that the arbitration agreement is a distinct agreement with a governing law distinct from that of the main contract is often justified by the doctrine of separability. However, the doctrine of separability serves to give effect to the parties' expectation that their arbitration clause – embodying their chosen method of dispute resolution – remains effective even if the main contract is alleged or found to be invalid. It does not mean that the arbitration clause forms a distinct agreement from the time the main contract is formed. Resort need only be had to the doctrine of separability when the validity of the arbitration agreement itself is challenged. This is clear from Art 16 of the UNCITRAL Model Law on International Commercial Arbitration set out in the First Schedule of the IAA ("Model Law"):

> Article 16. Competence of arbitral tribunal to rule on its jurisdiction
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. *For that purpose*, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
>
> [emphasis added]

61 Separability serves the narrow though vital purpose of ensuring that any challenge that the main contract is invalid does not, in itself, affect the

validity of the arbitration agreement. This is necessary because the challenge to the validity of the arbitration agreement often takes the form of a challenge to the validity of the main contract. However, as Moore-Bick LJ noted in *Sulamérica*, separability does not "insulate the arbitration agreement from the substantive contract for all purposes" (at [26]). It is one thing to say that under the doctrine of separability, a party cannot avoid the obligation to submit a dispute to arbitration by merely denying the existence of the underlying contract; it is quite different to say that because of this doctrine, parties intended to enter into an arbitration agreement independent of the underlying contract. This does not reflect commercial reality. As the AR himself noted in *FirstLink*, such arbitration clauses are "midnight clauses": they are typically included (or finalised) at the last minute (see *FirstLink* at [1]). In any event, they are typically negotiated as part of the main contract and hence are unlikely to be negotiated independently from it.

62 The AR's preference for the law of the seat in *FirstLink* ([41] *supra*) was premised on two main reasons. With respect, neither leads inexorably to a presumption in favour of the law of the seat. The first was that when a dispute arises between commercial parties, the natural inference is that primacy is to be accorded to the neutral law selected by parties to govern the proceedings of dispute resolution (at [13]). That neutral law, the AR found, would be the law of the seat. The plaintiff argued that this accorded with commercial sensibility.

63 It is correct that the seat of arbitration is chosen based on a desire for a neutral forum, and that the law of the seat will usually be different from the law governing the main agreement (see *Sulamérica* ([32] *supra*) at [15]). But the law of the seat governs *the procedure of the arbitration*; it does not necessarily follow that the seat's substantive law – *ie*, the law of contract which would govern the formation of an arbitration agreement – would be neutral. Moreover, this argument ignores the fact that the choice of law clause in the main contract could equally be driven by a preference for neutrality. That choice of law may in some cases have no apparent connection with any of the parties or the place of performance of their obligations. The present case provides a convenient illustration: New York is not the place of business of the plaintiff, the defendant, W, or Y; nor is it where the Shares are situated. Therefore, the presumed desire for neutrality is not necessarily a strong enough reason for favouring the law of the seat over the law of the main contract.

64 The AR's second reason was that parties would not intend an arbitration agreement valid under the law of the main contract only for it to be declared invalid under the law of the seat, for that would run a serious risk of creating an unenforceable award (see *FirstLink* at [14]). He reasoned that "rational businessmen *must* commonly intend the awards to be binding and enforceable" and hence "would *primarily* be focused on the law

of the seat" [emphasis in original]. He relied on this reason in support of his view that the law of the seat should ordinarily be the governing law of the arbitration agreement. The AR referred to the fact that an arbitral award may be set aside, or refused to be enforced, if the arbitration agreement is invalid either under the law to which the parties have subjected it *or*, failing any indication thereon, the law of the seat (see Arts 34(2)(*a*)(i) and 36(1)(*a*)(i) of the Model Law). However, validity under the law of the seat only arises for consideration if there is no indication of the law the parties have "subjected" the agreement to. The law that the parties have subjected the agreement to would include their implied choice. As Gary Born observes, Arts 34(2)(*a*)(i) and 36(1)(*a*)(i) aim at "giving effect to any express or implied choice-of-law by the parties and, failing such agreement, prescribing a default rule, selecting the law of the arbitral seat" (Gary B Born, *International Commercial Arbitration* Vol I (Wolters Kluwer, 2nd Ed, 2014) ("Born, *International Commercial Arbitration*") at p 526). Therefore, this argument only brings us back to the question of what the implied choice of law is and whether that should be the law of the main contract or the law of the seat. It does not necessarily support a presumption in favour of the law of the seat.

65 Therefore, where the arbitration agreement is part of the main contract, I would hold, adopting *Sulamérica*, that the governing law of the main contract is a strong indicator of the governing law of the arbitration agreement unless there are indications to the contrary. The choice of a seat different from the law of the governing contract would not in itself be sufficient to displace that starting point.

66 How does this choice-of-law analysis apply to a freestanding arbitration agreement? It is first important to be clear what exactly the term "freestanding arbitration agreement" is intended to mean. Arbitration agreements are typically never concluded in a vacuum and are usually part of a substantive contract. Freestanding arbitration agreements may arise, though comparatively rarely, in limited situations. I can think of two such situations. In the case of "highly complex transactions", for example, parties may execute a separate arbitration agreement providing for the arbitration of disputes relating to several contracts or to an overall project (see Born, *International Commercial Arbitration* at p 491). However, Born adds that this will rarely be done. Another example of a freestanding arbitration agreement is one concluded by parties after a dispute has arisen. In *Viscous Global Investments Ltd v Palladium Navigation Corporation "Quest"* [2014] EWHC 2654 (Comm), there were four bills of lading which each purported to incorporate the arbitration clause of a charterparty without identifying any particular charterparty. The plaintiff's cargo was damaged and the defendant's P & I Club issued a letter of undertaking providing security for the plaintiff's claims. The letter of undertaking contained an arbitration clause, which Males J found to be "perfectly capable of operating as a new

and free standing agreement" (at [22]). In both these cases, the arbitration agreement is freestanding because it is not intended to be a term of any other contract. Therefore, there is no question of any express choice of governing law of a main contract to govern the arbitration agreement.

67 If an arbitration agreement is freestanding in that sense, then I agree that when determining the proper law of this freestanding arbitration agreement, if there is no express choice of law, the law of the seat would most likely be the governing law of the arbitration agreement. This accords with the broader principle that if there is no express choice of law for any contract, the law of seat can be an indicator of the implied choice of its governing law (see *Habas* ([57] *supra*) at [102]).

Application to this case

68 The Arbitrator found that there was a rebuttable presumption that the proper law of the arbitration agreement was New York law and that the choice of a Singapore seat did not, by itself, displace that presumption.

69 The plaintiff's fall back argument, in the event I chose to follow *Sulamérica* ([32] *supra*), was that the arbitration clause should, based on the defendant's case, be treated as a freestanding arbitration agreement. Therefore, the Arbitrator should have found that the choice of Singapore as the seat of arbitration meant that the implied proper law of the arbitration agreement was Singapore law.

70 The defendant submitted that New York law governs the arbitration agreement by a straightforward application of *Sulamérica*. I understood Mr Jeremiah to be submitting that even though the arbitration agreement was, on his case, formed before the SPA, it was still intended to be part of the SPA, and therefore the presumption that the governing law of the SPA would govern the arbitration agreement would still apply. Clearly, the defendant is relying on the SPA to support its submission that the governing law of the arbitration agreement and the SPA is one and the same. This suggests that it is not realistic to draw any fine distinction between the arbitration agreement found in the SPA and the SPA itself. In my view, this submission only serves to highlight the inherent difficulty in mounting an argument that the parties intended to enter into an arbitration agreement independent of and *prior* to the SPA.

71 In my judgment, the arbitration agreement here was clearly intended to be part of the SPA. It was at all times negotiated as part of the SPA. The question which I will address below is whether the parties agreed to be bound by the arbitration clause first, with agreement on the rest of the terms of the SPA to follow later when it was executed.

72 Therefore, as a starting point, the presumption is that New York law governs the arbitration agreement. The plaintiff relied on two factors which, it claimed, pointed away from this. The first factor is the choice of

Singapore as the seat. That would not be sufficient on its own to displace the presumption.

73 The second factor is this: the plaintiff submitted that New York law provides for the doctrine of equitable estoppel, which would allow a non-party to rely on the arbitration agreement. This would contradict Art 9.11 of the Draft SPA which states expressly that the SPA was "not intended to benefit any third party or be enforceable by any third party". This, in the plaintiff's submission, meant that the presumption in favour of New York law was rebutted, with the result that the governing law of the arbitration agreement would be the system of law with which it had the closest connection. That would be Singapore law.

74 I reject this argument for at least two reasons. First and more importantly, I think the governing law of the main contract should only be displaced if the consequences of choosing it as the governing law of the arbitration agreement would *negate* the arbitration agreement even though the parties have themselves evinced a clear intention to be bound to arbitrate their disputes. That was precisely what happened in *Sulamérica* ([32] *supra*): if Brazilian law were the proper law of the arbitration agreement, one party would not be bound to arbitrate unless it wished to. This would have completely undermined the clear intention evinced in the arbitration agreement that both parties would be bound to settle their disputes by arbitration. Only in such a situation would the consequences of using the governing law of the main contract as the proper law of the arbitration agreement be a decisive factor in displacing it in favour of the law of the seat of the arbitration. That is not the case here: the potential inconsistency of New York law under the SPA is not of a character that fundamentally undercuts the entire arbitration agreement altogether. That is not to say that the effect on the arbitration agreement of being governed by the law of the main contract will never be relevant. Anything which suggests the parties may not have intended to have their arbitration agreement governed by the same law as the main contract would still be a factor to consider.

75 Second, although the plaintiff submitted that the availability of equitable estoppel under New York law would be inconsistent with Art 9.11, it could well be that Art 9.11 was included to exclude reliance on equitable estoppel in the first place. That was the effect of the Arbitrator's finding. Equitable estoppel was invoked by Y, a non-party, to commence arbitration proceedings against the plaintiff. Notwithstanding the fact that the Arbitrator held that New York law was applicable and that, in principle, New York law permitted a non-signatory like Y to invoke arbitration proceedings against the plaintiff, he nevertheless found, on the facts, that Y was not a party to the arbitration. He relied on *Norcast SARL v Castle Harlan, Inc*, No 12 Civ 4973 (PAC) (SDNY 2014), the facts of which are very similar to the present case, in holding that Art 9.11 of the SPA would

disentitle Y from relying on the doctrine to advance claims in the arbitration against the plaintiff. In other words, the very article which the plaintiff is relying on to highlight the inconsistency between the laws of New York and Singapore was found, by the Arbitrator, to disentitle Y from pursuing the arbitration against the plaintiff. There is no challenge by any party on this ruling and hence for all practical purposes, the difference between New York law and Singapore law, if any, on this issue, is moot.

76 In the circumstances, I conclude, as did the Arbitrator, that New York law, as the express choice of law governing the SPA, is also the governing law of the arbitration agreement.

Whether there was a valid and binding arbitration agreement

77 This is the decisive issue in this application. The defendant's case is that the arbitration agreement was concluded on 18 July 2013. It no longer pursues its alternative case, which the Arbitrator rejected, that the arbitration agreement was concluded on 25 June 2013 at the time when the second draft SPA was circulated.

78 The facts which the defendant relies on in support of its argument can be distilled under the following four points:

(a) It was the plaintiff who proposed the arbitration clause in the second draft SPA. This demonstrated its intention to submit disputes to arbitration instead of court proceedings.

(b) There were no further changes to the arbitration agreement following the fourth draft SPA on 12 July 2013. By the time the sixth draft SPA was circulated on 18 July 2013, the plaintiff stated that it was ready to sign the SPA. The plaintiff's subsequent refusal to sign the seventh draft SPA had nothing to do with the arbitration agreement.

(c) Although the SPA was "subject to contract", this proviso was only meant to apply to the conclusion of the SPA; it did not extend to the negotiations over the arbitration agreement. The proviso could not prevent the formation of the arbitration agreement while the SPA might have remained subject to contract.

(d) The wording of the arbitration agreement was significant: it encompassed the right of the Arbitrator to decide on the validity or existence of the SPA.

79 Mr Jeremiah also submitted that the doctrine of separability supported his argument that the arbitration agreement could have been concluded *prior* to the SPA. However, as I have explained above, the doctrine of separability is only relevant where an arbitration agreement forms part of a main contract – the doctrine prevents a party from impugning the arbitration agreement simply by alleging that the main

agreement was invalid. In this case, Mr Jeremiah's case is that the arbitration agreement was concluded before the conclusion of the SPA. There is no need to invoke the doctrine of separability. The court's task, in deciding whether the Arbitrator had the jurisdiction to hear the dispute, is to consider the usual requirements for the formation of a contract under the applicable law. This was the way both parties agreed to address the jurisdictional issue.

80 Usually, where the arbitration agreement is intended to be part of an underlying contract, the validity and existence of the arbitration agreement and the underlying contract are resolved together. Here, the defendant made a deliberate decision to keep the two issues separate. It is not entirely clear why it chose to adopt this approach but what is clear is that the defendant must bear the consequences of its deliberate election.

81 As a consequence of adopting this strategy, however, the defendant bears the evidential burden of proving on a balance of probabilities that the parties intended and concluded a binding arbitration agreement on 18 July 2013 *prior* to the conclusion of the SPA. The Arbitrator held that all factual issues in the jurisdiction phase of the arbitration would be resolved on a balance of probabilities standard. Mr Jeremiah accepted that this was the evidential standard the defendant had to meet for the purpose of this application as well.

82 Under New York law, a contract is formed when there is offer, acceptance, consideration, mutual assent and intent to be bound. The court must look to the objective manifestations of the parties' intentions based on the attendant circumstances, the situation of the parties, and the objectives they were trying to attain. As authority for these propositions, both parties cited *Bazak International Corp v Tarrant Apparel Group* 491 F Supp 2d 403, 408 (SDNY 2007). Further, under New York law, the court will give effect to a "subject to contract" reservation unless there is conduct which is inconsistent with that reservation or could be construed as a waiver (see *Jordan Panel Systems Corp v Turner Construction Company* 45 AD 3d 165, 183, 841 NYS 2d 561 (1st Dept 2007).

83 Applying these principles, I find that there was no objective manifestation of any mutual intention by the parties to be bound by the arbitration agreement as at 18 July 2013. In my judgment, none of the four points raised by the defendant assists it.

Whether it was material that the plaintiff proposed the arbitration clause

84 Although the plaintiff proposed to substitute an arbitration clause in place of the choice-of-court clause in the second draft SPA, it does not follow that it intended to be bound by the arbitration clause independently of the SPA. The introduction of the arbitration clause was clearly part of the negotiations over the SPA. It was, after all, only one of the revisions which

the plaintiff proposed to the second draft SPA. This point is not decisive. The key question is whether the parties had intended to conclude an independent arbitration agreement giving rise to binding rights and obligations *absent* a concluded SPA.

Whether agreement to wording of arbitration agreement was agreement to be bound

85 The circulation of the fourth draft SPA on 12 July 2013 was preceded by the meetings in Washington DC. At these meetings, the parties reviewed each provision (including the arbitration agreement) on a screen, provided their input, and incorporated their discussions into an updated SPA draft.

86 Although the parties agreed on the wording of the arbitration clause by the fourth SPA and made no further changes to the arbitration agreement thereafter, this does not mean they intended to be bound by the arbitration agreement as an independent contract. Under New York law, the mere exchange of written draft agreements containing an arbitration clause does not indicate that a binding arbitration agreement was formed prior to the execution of a formal written agreement (see *Marion Coal Co v Marc Rich & Co International Ltd* 539 F Supp 903, 907 (SDNY 1982)). The following passages from Born, *International Commercial Arbitration* at pp 795–796, which both parties referred me to, make the same point:

> *In many instances, it will be difficult to show that the parties did not agree to be bound by an underlying commercial contract, but nonetheless intended to conclude an arbitration agreement associated with that contract.* For example, parties not infrequently exchange drafts of proposed contracts, including comments on both draft arbitration provisions and draft commercial terms; sometimes, parties reach agreement on the terms of an arbitration clause before doing so on commercial terms. If no agreement is ever reached on the commercial terms of the underlying contract, it is sometimes argued that the exchange of identical drafts of an arbitration clause, whose terms both parties accept, evidences an agreement on the arbitration provision (notwithstanding the lack of agreement on the underlying contract).
>
> Although dependent on the facts of individual cases, arguments of this sort are generally difficult to sustain. *The parties' agreement on the terms of an arbitration clause does not typically amount to a mutual intention to be legally bound by that provision, absent conclusion of the underlying contract. Rather, such exchanges typically indicate agreement on the text of an arbitration clause, but an intention to be legally bound by that arbitration provision when, but only when, the underlying contract is also concluded.* That conclusion is often reinforced by inclusion of caveats on negotiating materials indicating that the drafts are 'subject to contract,' 'without prejudice,' or otherwise conditional upon final agreement and formal execution of the contracts in question.
>
> [emphasis added]

87 Mr Jeremiah emphasised that, in this extract, the author accepted that it was at least conceivable that parties could negotiate and agree upon the terms of the arbitration clause without agreeing upon the terms of the underlying contract. He accepted, however, that the learned author did, in a footnote, cite two cases where arguments of this sort were made, but rejected. In both these cases a party who had commenced court proceedings successfully resisted a stay of proceedings in favour of arbitration by showing that it was not bound by any arbitration agreement. In *Barnmore Demolition and Civil Engineering Ltd v Alandale Logistics Ltd* [2010] IEHC 544, the Irish High Court found that an arbitration clause in an "unexecuted draft contract" was not a binding arbitration agreement (at [10]). In *APC Logistics Pty Ltd v CJ Nutracon Pty Ltd* [2007] FCA 136, the Federal Court of Australia (Queensland) found that despite an exchange of correspondence on a draft arbitration agreement, there was nothing "amounting to a confirmation or acceptance by the parties that they were in agreement on all terms and [considered] themselves to be bound to perform it"; it was also apparent from the correspondence that the parties envisaged a signed written agreement, which was not executed (at [26]).

88 Mr Jeremiah also drew my attention to an observation of Lord Hoffman in *Fiona Trust & Holding Corporation v Privalov* [2007] 2 All ER (Comm) 1053. Lord Hoffman explained that, as a consequence of the doctrine of separability, an allegation that the main contract was not concluded does not impinge on the validity of the arbitration agreement that has already been agreed. He said at [18]:

> Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.

89 The challenge to the arbitration clause in that case took the form of a challenge to the validity of the main contract on the ground that it had been procured by bribery. Given that the arbitration clause was not impugned on the basis that the main contract was not concluded, this observation takes us no further than the question of what it means for an arbitration clause to be "agreed" – whether that means agreement to the wording of the clause, or agreement to be bound by it.

90 The underlying principle, as I have found, is that agreeing to the wording of the arbitration clause does not *per se* equate to an intention to be contractually bound to arbitrate absent the conclusion of the contract under which the arbitration clause was negotiated.

91 In any case, there is no objective evidence of the parties' mutual intention to be bound by the arbitration clause. At the Washington DC

meetings, the plaintiff's legal counsel stated that any consensus reached regarding the SPA would still be subject to review and approval by the plaintiff's management. The 18 July e-mail does not support the defendant's case either. Being ready to sign the SPA plainly meant that the plaintiff was willing to be bound upon *all parties* signing the SPA. If the defendant's interpretation were right, the 18 July e-mail would have the effect of making all clauses which were not subsequently amended in the seventh draft SPA binding between the plaintiff and the defendant. That could not have been the parties' intention.

92 This submission also runs into an additional difficulty which the plaintiff highlighted: since the SPA was a tripartite agreement, the plaintiff could not have indicated its willingness to be bound by an arbitration clause with the defendant without W's acceptance or assent. There is no evidence that W gave any such assent as at 18 July 2013. In fact, the objective evidence before me is to the contrary. As noted at [19] above, W's reply to the 18 July e-mail was that it was still "finalising the draft". Even after W indicated that it was reviewing the draft, the plaintiff's investment specialist sent W an e-mail on 21 July 2013 asking for an update on the progress in their review of the SPA. There is no reason to assume that W was precluded from making any further change to the arbitration agreement given the general tenor of the response. We now know with the benefit of hindsight that W did not amend the arbitration clause but that does not mean that W could not have amended it if it wanted to after 18 July 2013.

Whether the arbitration agreement remained subject to contract

93 I agree with the plaintiff that the putative arbitration agreement and SPA were "subject to contract" and would only be binding upon execution. The parties' correspondence shows that all terms, including the arbitration agreement, remained subject to contract. This fortifies my conclusion that no binding arbitration agreement was formed before the conclusion of the SPA.

94 The Arbitrator found that the arbitration agreement was not subject to contract. He found that any reference to "subject to contract" in the 30 April letter was not "expressed to be referable to the proposed dispute resolution mechanism". The defendant makes the same argument in its submissions. In the alternative, it argues that even if the 30 April Letter made the arbitration clause "subject to contract" as well, that was no longer the case once the Offer Letter had lapsed on 31 May 2013. The first draft SPA circulated on 17 June 2013 therefore constituted a fresh offer and the parties' negotiations no longer proceeded on a "subject to contract" basis.

95 With respect to the Arbitrator, the "subject to contract" condition in the 30 April Letter could not be referable to any arbitration clause simply because, at the time of that Letter, there was no draft SPA in existence and certainly no arbitration clause either. The defendant's second argument is,

in my view, the more pertinent one. The defendant is right that the offer in the 30 April Letter was only open until a certain time after which it was deemed to be automatically revoked. So the question is whether there was evidence that the negotiations over the first to seventh draft SPAs were nevertheless conducted on a "subject to contract" basis. The answer is clearly in the affirmative – such evidence comprises the following:

(a) First, the terms of the SPA itself. In all seven draft SPAs, there were terms to the effect that the seller and buyer warranted that the SPA had been "duly executed". It is curious that the defendant tried to highlight the draft SPAs as having been circulated "without any conditions or qualifications" in support of its case. The qualifications were in the express terms of the SPAs themselves.

(b) Second, the testimony of those involved in the negotiations. The testimony of the plaintiff's investment specialist and the investment officer assisting her was not challenged by the defendant. According to them, the understanding among all parties was "that all provisions remained open for negotiation until the parties executed a final agreement" and that the plaintiff "never intended for any articles of the draft [SPA] to be binding until a final and agreed version of the document was signed by all Parties".

(c) Third, the parties' course of conduct. The fact that a seventh SPA was circulated with material amendments even after the plaintiff had indicated its readiness to sign the sixth SPA also shows that it in fact remained open for negotiation until it was actually signed.

Whether the wording of arbitration clause was significant

96 Finally, I do not accept the defendant's argument that the inclusion of the "existence of the SPA" in the scope of the arbitration clause shows that it was intended to be a binding agreement. I agree with the plaintiff that it is not unusual for an arbitration clause which is part of a contract to refer disputes concerning the existence of that main contract to arbitration. That is a consequence of its separability – its existence is not tied up with that of the main contract. It is for this same reason that both the Arbitrator and the plaintiff proposed that the jurisdiction phase should also deal with the issue whether and when the SPA was concluded. This was however rejected by the defendant. Even if the inclusion of the said words had been deliberate, it would not compel the conclusion that the arbitration clause was, in itself, a binding agreement. The inclusion of the words clarifies the scope of the arbitration agreement but does not go any way towards answering the question of whether it was meant to be contractually binding *absent* the conclusion of the SPA.

Conclusion

97 For these reasons, I find that, applying New York law as the governing law of the arbitration agreement, there was no binding arbitration agreement formed on 18 July 2013 *prior* to the unexecuted SPA. As a consequence of this finding based on the issue as framed by the parties, it must follow that the Arbitrator did not have jurisdiction to hear the claims.

98 Accordingly, I allow Prayer 1 and consequently Prayer 3 (to set aside the Arbitrator's costs order) of the originating summons with costs fixed at $40,000 inclusive of disbursements. In addition, the defendant is to pay the plaintiff reasonable costs and expenses incurred in the ICC arbitration, including the Arbitrator's fees and expenses as well the ICC administrative expenses, to be taxed by the Registrar of the Supreme Court if not agreed.

99 The plaintiff and the defendant are to take all necessary steps to secure to the plaintiff the release of the sum of US$100,000 (being the security for costs provided by the defendant) from the escrow account established by the ICC Secretariat.

Reported by Sim Bing Wen.