**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2019] SGHC 141**

Originating Summons No 1224 of 2017

Between

BXH

… *Plaintiff*

And

BXI

… *Defendant*

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# GROUNDS OF DECISION

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[Arbitration] — [Award] — [Recourse against award] — [Setting aside] — [Existence of arbitration agreement] — [Assignment and novation of arbitration agreement]

[Arbitration] — [Award] — [Recourse against award] — [Setting aside] — [Invalidity of arbitration agreement] — [Inconsistency between arbitration agreement and jurisdiction clause]

[Arbitration] — [Award] — [Recourse against award] — [Setting aside] — [Composition of tribunal not in accordance with agreement]

[Contract] — [Breach]

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**[2019] SGHC 141**

High Court — Originating Summons No 1224 of 2017
Vinodh Coomaraswamy J
28–29 June; 2, 23 July 2018

3 September 2019

**Vinodh Coomaraswamy J:**

## Introduction

1 By this application, the plaintiff seeks to set aside an arbitral award issued in favour of the defendant. The plaintiff brings this application under Article 34 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law").

2 I have dismissed the plaintiff's application. The plaintiff has appealed against my decision. I now set out my reasons.

## Brief factual background

3 The plaintiff and the defendant are both Hong Kong companies. The plaintiff's business is distributing and remarketing the defendant's consumer goods in Russia. The defendant's business is designing, developing,

manufacturing and selling consumer goods.[1] The defendant is a wholly-owned subsidiary of a Singapore company which I shall call "the Parent Company".

4 The defendant lodged its notice of arbitration with the SIAC in October 2015. In it, the defendant alleged that the plaintiff owed it a total of US$36.4m being the sums due to the defendant on 106 unpaid invoices for goods sold and delivered and finance charges accruing on those invoices.

5 The plaintiff rejected the tribunal's jurisdiction from the outset of the arbitration. The SIAC constituted the tribunal in April 2016 (in the circumstances which I set out at [249]–[255] below) and left it to the tribunal to determine whether it had jurisdiction. The plaintiff thereupon declined to participate any further in the arbitration. The tribunal held an evidential hearing in May 2017 in the plaintiff's absence and issued its final award in July 2017. The tribunal's award addressed both the plaintiff's objection to jurisdiction as well as the merits of the defendant's substantive claim against the plaintiff. The tribunal found in favour of the defendant on both aspects.

6 The plaintiff's primary argument before me is that the award should be set aside under Art 34(2)(*a*)(i) of the Model Law because the tribunal lacked jurisdiction to determine the dispute between the parties. Jurisdiction is in issue because the contract in which the arbitration agreement is found is not a contract between the plaintiff and the defendant. That original contract is, instead, one between the plaintiff and the Parent Company. The defendant claims both its substantive rights against the plaintiff and its right to resolve that claim by way of arbitration as the result of a series of subsequent assignments and novations.

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1 First affidavit of Ms A filed on 6 December 2017, paragraph 11.

7 The plaintiff's alternative argument is that the award should be set aside under Art 34(2)(*a*)(iv) of the Model Law. The plaintiff argues that, even if the tribunal had jurisdiction, the composition of the tribunal was not in accordance with the agreement of the parties. The crux of the plaintiff's argument on this ground is that the tribunal constituted to determine the parties' dispute comprised a sole arbitrator even though their arbitration agreement stipulates that it should comprise three arbitrators.

8 I shall deal with the plaintiff's two grounds in turn. I begin with the issue of jurisdiction.

**The eight contracts**

9 Determining the plaintiff's challenge to jurisdiction involves an analysis of the parties' complicated legal relationship. For present purposes, that relationship is set out in eight related contracts. Some of these contracts are bipartite, some are tripartite and one is between four parties.

10 In brief, as a result of these contracts, at various times: (a) the defendant assumed the Parent Company's rights and obligations to the plaintiff; (b) a third party (which I shall call "the Factor") became entitled to receive payment for some of the defendant's goods; and (c) a Russian corporation (which I shall refer to as the "Russian Corporation") became obliged to make payment for some of the defendant's goods. Establishing whether the tribunal has jurisdiction therefore involves tracing the parties' substantive rights and obligations as well as the procedural right to commence arbitration against the plaintiff through this matrix of eight contracts.

11 The following table enumerates each of these eight contracts, setting out the name by which I shall refer to it in this judgment, the date of each contract and the parties to each contract:

| | **Agreement** | **Date** | **Parties** |
|---|---|---|---|
| 1 | The Distributor Agreement | 24 December 2010 | The plaintiff<br>The Parent Company |
| 2 | The Transition Agreement | 14 January 2013 | The defendant<br>The Parent Company |
| 3 | The Assignment and Novation Agreement | 25 January 2013 | The plaintiff<br>The defendant<br>The Parent Company |
| 4 | The Participation Agreement | 2 October 2013 | The defendant<br>The Factor |
| 5 | The Gold Plan Agreement | 15 November 2013 | The plaintiff<br>The Factor |
| 6 | The Debt Transfer Agreement | On or around 12 December 2014 | The plaintiff<br>The defendant<br>The Russian Corporation |
| 7 | The Open Debt Agreement | On or around December 2014 | The plaintiff<br>The defendant<br>The Factor<br>The Russian Corporation |
| 8 | The Buy Back Agreement | 23 April 2015 | The defendant<br>The Factor |

I now describe each of these eight contracts in more detail.

### *1. The Distributor Agreement*

12 In December 2010, the plaintiff and the Parent Company entered the Distributor Agreement. The Distributor Agreement authorised the plaintiff to

market and sell the Parent Company's goods and services in Russia.[2] The plaintiff began to purchase goods and services from the Parent Company under the Distributor Agreement in and after December 2010.[3]

13 Clause 25.9 of the Distributor Agreement is an arbitration agreement between the defendant and the Parent Company. Clause 25.9 is of central importance in this application. I therefore now set it out in full:

> **25.9 Disputes.** Disputes arising out of or in connection with this Agreement shall be finally settled by arbitration which shall be held in Singapore in accordance with the Arbitration Rules of Singapore International Arbitration Center [*sic*] ("SIAC Rules") then in effect. The arbitration shall be final and binding on the parties, the award shall be in writing and set forth the findings of fact and the conclusions of law. Any award shall not be subject to appeal. The number of arbitrators shall be three, with each side to the dispute entitled to appoint one arbitrator. The two arbitrators appointed by the parties shall appoint a third arbitrator who shall act as chairman of the proceedings. Vacancies in the post of chairman shall be filled by the president of the SIAC. Other vacancies shall be filled by the respective nominating party. Proceedings shall continue from the stage at the time of vacancy. If one of the parties refuses or otherwise fails to appoint an arbitrator within thirty (30) days of the date the other party appoints its arbitrator, the first appointed arbitrator shall be the sole arbitrator. All proceedings shall be conducted, including all documents presented in such proceedings, in the English language. The English language version of this Agreement prevails over any other language version.

14 It is the defendant's contention that all of the Parent Company's rights and obligations under the Distributor Agreement – both its substantive and its procedural rights – were novated to the defendant under the next contract in the series, which I describe at [17]–[20] below. The tribunal accepted the defendant's contention.

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2 DB-E-620, Distributor Agreement, Attachment A.

3 Defendant's written submissions, paragraph 135.

15 A complication in this case – and another point on which the plaintiff relies to argue that the tribunal has no jurisdiction – is that the Distributor Agreement expressly provides that it is to expire on 26 December 2012. I return to the significance of this point at [72]–[79] below.

### *2. The Transition Agreement*

16 In January 2013, the Parent Company and the defendant entered into the Transition Agreement.[4] The objective of the Transition Agreement was to transfer to the defendant all of the Parent Company's assets and liabilities.[5] Thus, the Transition Agreement expressly obliges the Parent Company to "assign or novate, as applicable, and transfer all its rights and obligations under the Existing Agreements to [the defendant] as per the Effective Date".[6] The Transition Agreement expressly names the Distributor Agreement as being within the meaning of the defined term "Existing Agreements".[7]

### *3. The Assignment and Novation Agreement*

17 A few days after the Transition Agreement, the plaintiff, the defendant and the Parent Company entered into the Assignment and Novation Agreement.[8] The Assignment and Novation Agreement follows up on the Transition Agreement by novating the Parent Company's entire legal relationship with the plaintiff under the Distributor Agreement to the defendant.

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4 DB-E-649 to 670, Transition Agreement.

5 First witness statement of Mr G dated 24 August 2016, paragraphs 2.5 to 2.7.

6 DB-E-653, Transition Agreement, Article 2.1(a).

7 DB-E-663, Transition Agreement, Schedule B: Existing Agreements.

8 DB-E-671 to 672, Assignment and Novation Agreement.

18 Clause 1 of the Assignment and Novation Agreement provides as follows:

> 1. [The Parent Company] *hereby assigns, conveys, transfers and delivers all of its rights and obligations in and under the Agreements to [the defendant]* effective on a date between January 1, 2013 and June 30, 2013, as notified by [the Parent Company] to [the plaintiff] and [the defendant] not less than thirty (30) days prior to such date ("Effective Date").
>
> [emphasis added]

The Assignment and Novation Agreement expressly names the Distributor Agreement as being within the meaning of the defined term "Agreements".

19 Following the Assignment and Novation Agreement, the defendant began invoicing the plaintiff for goods supplied. The earliest invoice from the defendant to the plaintiff is dated 7 February 2013.[9] During a brief transition period, ending with an invoice dated 16 February 2013,[10] the Parent Company continued to invoice the plaintiff for goods as well. All invoices to the plaintiff after that date were issued only by the defendant.

20 The defendant contends that the Assignment and Novation Agreement, and in particular cl 1 of that agreement, novated to the defendant all of the Parent Company's rights and obligations under the Distributor Agreement including the right to submit disputes with the plaintiff "arising out of or in connection with" the Distributor Agreement to arbitration under cl 25.9.[11] The plaintiff

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9 AB-3091, Second affidavit of Mr K filed on 27 March 2018, Exhibit AK2-1, X13.

10 AB-3079 to 3090, Second affidavit of Mr K filed on 27 March 2018, Exhibit AK2-1, X1 to X12.

11 Defendant's written submissions, paragraph 30.

contends for a number of reasons that the Assignment and Novation Agreement failed to have that effect.

### *3. The Participation Agreement*

21 In early October 2013, the defendant and the Factor entered into the Participation Agreement.[12] The Participation Agreement established a factoring arrangement under which the defendant was obliged to offer the Factor an option to buy all of the invoices which the defendant issued to its customers based in Russia, including the plaintiff. I shall refer to invoices in this class as "Russian invoices". A factoring arrangement such as this offered the defendant the usual commercial advantages of reducing its payment collection times and improving its short-term cash flow.[13]

22 Clause 2.9.6 the Participation Agreement provides that, if the Factor exercises its option to purchase a particular invoice from the defendant, the defendant is obliged to transfer to the Factor ownership of the invoice and the invoice's "Associated Rights". The Participation Agreement defines "Associated Rights" to mean, among other things, "all [the defendant]'s rights by law as an unpaid vendor or under the sale contract". I set out cl 2.9.6 in full at [130] below.

23 As a result of the Participation Agreement, after 2 October 2013, the invoices which the defendant issued to the plaintiff and which the Factor had purchased were endorsed with a caution reminding the plaintiff that its debt to

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12 DB-E-676 to 684, Participation Agreement.

13 First witness statement of Mr G dated 24 August 2016, paragraph 3.8.

the defendant represented by the invoice could be discharged only by payment directly to the Factor ("the Caution"):[14]

> CAUTION: This prof. receivable is transferred to [the Factor] … The payment in full (with all costs on payer) must be done in direct to its bank account …. *Only the payment to [the Factor] … will be a valid and discharging payment.* [emphasis added]

24 Pursuant to the Participation Agreement, the Factor purchased from the defendant invoices issued to the plaintiff worth the total sum of US$27.45m.

### *4. The Gold Plan Agreement*

25 In November 2013, shortly after the Factor entered into the Participation Agreement with the *defendant*, the Factor entered the Gold Plan Agreement[15] with the *plaintiff*. The Gold Plan Agreement was a financing agreement under which the Factor extended trade credit to the plaintiff on invoices which the Factor had purchased from the defendant.[16]

26 Echoing cl 2.9.6 of the Participation Agreement and the Caution, cl 2.1.2 of the Gold Plan Agreement also provides that the plaintiff "will pay [the Factor] and not [the defendant] in order to settle Supplier Invoices which [the Factor] from time to time purchase[s]".

27 The plaintiff contends that the effect of the Participation Agreement and the Gold Plan Agreement read together is that the right to receive payment under any invoice purchased by the Factor *and* the right to commence arbitration to

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14 Plaintiff's written submissions, paragraph 12; First affidavit of Mr L filed on 28 October 2017, Exhibit ALCH-1, the plaintiff's Russian solicitors' letter, paragraph 18; First affidavit of Mr K filed on 15 November 2017, paragraph 31.

15 DB-E-685 to 702, Gold Plan Agreement.

16 First affidavit of Mr K filed on 15 November 2017, paragraph 29.

recover those debts have all been assigned by the defendant to the Factor and can no longer be asserted by the defendant against the plaintiff.

### *6. The Debt Transfer Agreement*

28 In December 2014, the plaintiff, the defendant and the Russian corporation entered into the Debt Transfer Agreement. Under the Debt Transfer Agreement, the Russian Corporation undertook the obligation to pay the debt which was due under a number of invoices which the plaintiff had failed to pay. The maturity dates for these invoices fell between 21 September 2014 and 12 December 2014.[17] The parties refer to the debt arising from these invoices as "Open Debt". The Open Debt amounts to a total sum of US$32.3m.

29 The objective of the Debt Transfer Agreement is a matter in contention. Certain clauses suggest that the parties intended to novate to the Russian Corporation the plaintiff's obligation to pay the Open Debt, completely extinguishing the plaintiff's obligation to do so. However, another provision of the Debt Transfer Agreement appears to be inconsistent with that intention, as will be seen later.

### *7. The Open Debt Agreement*

30 Shortly after entering into the Debt Transfer Agreement, the three parties to that agreement – the plaintiff, the defendant, and the Russian Corporation – entered into the Open Debt Agreement with the Factor.

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17 DB-E-705 to 711, Debt Transfer Agreement, Attachments 1 to 5.

31 The Open Debt Agreement is brief. It begins by adverting to the Debt Transfer Agreement and then states in its entirety as follows:

> 1) In connection with the conclusion …[of] the "Debt Transfer Agreement"), [the Russian Corporation] accepted the assignment of [the plaintiff's] relevant payment obligations in the amount of the Open Debt set out in the Debt Transfer Agreement and enclosed Attachments to the Debt Transfer Agreement.
>
> 2) [The Factor] and [the plaintiff] have entered into the Gold Plan Agreement of November 15th, 2013, (as signed by [the Factor], each including all its present or future terms, attachments, exhibits, profiles etc. that are incorporated into it by reference to it or otherwise ("the Gold Plan") for deferred payments **by [the plaintiff] of [the defendant's] accounts receivable [which the Factor] purchased from [the defendant]**.
>
> 3) [The Factor] purchased the receivables under the Open Debt from [the defendant]. Therefore:
>
> 4) hereby [the defendant] and [the Factor] instruct [**the Russian Corporation] to pay total amount of Open Debt to [the Factor]** …
>
> 5) [The defendant] hereby confirms that by the payment to [the Factor] [the Russian Corporation] shall be released from its payment obligation towards [the defendant] under the Debt Transfer Agreement.
>
> 6) [The Factor] hereby confirms that the amount of Open debt resulting from the Gold Plan shall be decreased by [the Russian Corporation's] payment, once such payment is credited to [the Factor's] bank account.
>
> 7) **In case [the Russian Corporation] fails to pay the amount of Open Debt, then [the plaintiff] agrees to pay [the Factor] immediately upon [the Factor's] instruction to [the plaintiff].**
>
> [emphasis added in bold]

32 The Open Debt Agreement is closely connected to the Debt Transfer Agreement. That is clear from cl 1 of the Open Debt Agreement and the timing of its execution. The objective of this agreement appears to be to dovetail the Debt Transfer Agreement with the Participation Agreement and the Gold Plan

Agreement by obliging the Russian Corporation to pay the Open Debt to the Factor rather than to the defendant and by obliging the Factor to apply any payments from the Russian Corporation to reduce the Open Debt.

33 It is not disputed that the Russian Corporation has paid only part of the Open Debt to the Factor. As at May 2015, the outstanding Open Debt stood at US$7.07m.[18]

### *8. The Buy Back Agreement*

34 In 2014 or 2015, the Factor decided to withdraw from business connected to Russia. As a result, the defendant agreed to buy back from the Factor all of the Russian invoices which the Factor had purchased from the defendant under the Participation Agreement but which the defendant's customers had not yet paid. As a result, in April 2015, the defendant and the Factor entered into the Buy Back Agreement.

35 Under the Buy Back Agreement, the defendant repurchased from the Factor all of the invoices which the defendant's Russian customers had failed to pay the Factor as at that date for a total of US$43.9m.[19]

36 The defendant contends that it carried out a second buy back in December 2015 of another batch of invoices owed by the plaintiff with a face value of US$2.2m.[20] According to the defendant, the second buy back covers additional invoices which were also outstanding at the time of the Buy Back

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18 Defendant's written submissions, paragraph 187.

19 DB-E-716, Buy Back Agreement, Recitals A and B(a).

20 Plaintiff's written submissions, paragraph 97d; Final award, paragraph 6.2.

Agreement but which the Factor had inadvertently failed to include in that agreement.[21]

37 The plaintiff rejects the defendant's contention on the Buy Back Agreement. It suffices for now to note that the plaintiff's contention is that the Buy Back Agreement read with the Gold Plan Agreement was not a repurchase of any invoices by the defendant, and does not transmit back to the defendant the debts comprised in those invoices or the right to commence arbitration against the plaintiff to recover those debts.[22] The plaintiff further argues that it was not given notice of any buy back arrangement.[23]

**Primary ground: jurisdiction**

***Classification of the debts***

38 The defendant's claim against the plaintiff is based on 106 invoices which the parties have called invoices C1 to C106. The underlying matrix of contracts suggests that these 106 unpaid invoices can be divided into two main categories in two ways: based on whether or not the invoices were purchased by the Factor (see [21] above) and based on whether or not the invoices are part of the Open Debt (see [28] above). The resulting four-fold categorisation of the invoices can be summarised in the following table:

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21 Defendant's written submissions, paragraphs 193 to 194.

22 Plaintiff's written submissions, paragraphs 50 to 51.

23 Plaintiff's written submissions, paragraphs 52 to 54.

| | Not part of the Open Debt (Debt 1) | Part of the Open Debt (Debt 2) |
|---|---|---|
| Not purchased by the Factor (Debt A) | Debt 1A (C86 – C106) Value: US$8.95m | Debt 2A (N.A.) |
| Purchased by the Factor (Debt B) | Debt 1B (C3 – C6, C13, C18, C28, C30 – C85) Value: US$20.38m | Debt 2B (C7 – C12, C14 – C17, C19 – C27, C29) Value: US$7.07m |

39 As can be seen from the table, what I shall call Debt 1 comprises those invoices that are not part of the Open Debt. Subject to the qualification in [41] below, Debt 1 can be further divided into two subcategories:

(a) Debt 1A: This category comprises invoices which the Factor *never* purchased from the defendant. Accordingly, these invoices were not endorsed with the Caution (see [23] above) and were always payable by the plaintiff only to the defendant. The Debt 1A invoices are invoices C86 to C106. They amount in total to US$8.95m.[24]

(b) Debt 1B: This category comprises invoices which the Factor *did* purchase from the defendant, but which the defendant alleges it bought back from the Factor. These invoices were endorsed with the Caution.

[24] DB-F-732, Table of Debt 1A invoices.

The Debt 1B invoices are invoices C3 to C6, C13, C18, C28, and C30 to C85. They amount in total to US$20.38m.[25]

40 Subject again to the qualification in [41] below, Debt 2 can also be divided into two subcategories:

(a) Debt 2A: This category comprises the Open Debt invoices which the Factor never purchased from the defendant. There are, in fact, no invoices and no debts in this category. There is therefore no need to analyse this category further.

(b) Debt 2B: This category comprises Open Debt invoices which the Factor *did* purchase from the defendant but which the defendant alleges it bought back from the Factor. The Debt 2B invoices therefore contain the Caution. These invoices are C7 to C12, C14 to C17, C19 to C27 and C29. They amount in total to US$7.07m.[26]

41 This categorisation is subject to one qualification. The tribunal dealt with invoices C94 and C95 as part of Debt A. Those two invoices, however, do contain the Caution. The plaintiff's case is therefore that the Factor purchased these two invoices and that they therefore should form part of Debt B.[27] In this judgment, I shall accordingly treat invoices C94 and C95 together with Debt B. All further references to Debt B in this judgment should be taken as including invoices C94 and C95 and all further references to Debt A should be taken as excluding those two invoices.

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25 DB-F-733 to 734, Table of Debt 1B invoices.

26 DB-F-735, Table of Debt 2B invoices.

27 Certified Transcript, 28 June 2018, page 6, lines 8 to 15; the plaintiff's written submissions, Annex A.

42 The bulk of the defendant's claim against the plaintiff in the arbitration is Debt 1B. The parties therefore consider the Debt 1B invoices to be archetypical of their transactions.[28]

***The parties' arguments***

43 The parties' arguments on the jurisdiction of the tribunal address the different categories of debt separately, though there is some degree of overlap. I start by summarising the arguments which apply to all categories of debt, before turning to the arguments that apply only to the invoices purchased by the Factor, *ie* Debt B. I then conclude by summarising the arguments which apply only to the remaining invoices, *ie* Debt A.

*The right was never transferred to the defendant*

44 The plaintiff's starting point is to deny that it is a party to any arbitration agreement with the defendant at all. In particular, the plaintiff argues that it is not bound by the Parent Company's assignment and novation of the Distributor Agreement to the defendant. It rests this argument on several grounds:

(a) First, the Distributor Agreement had expired before the parties entered into the Assignment and Novation Agreement. The result is that the Distributor Agreement had no contractual force on 25 January 2013, which is when the Parent Company purported to novate it to the defendant.[29]

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28 Certified Transcript, 28 June 2018, page 5, lines 6 to 9.

29 AB-28 to 46, First affidavit of Mr L filed on 27 October 2017, Exhibit ALCH-1, the plaintiff's Russian solicitors' letter, paragraph 10.1; the plaintiff's written submissions, paragraphs 90.1 to 90.2 and 94.3 to 94.4.

(b) Second, neither the Parent Company nor the defendant gave notice of the assignment or novation to the plaintiff.[30]

(c) Third, the Distributor Agreement does not govern the defendant's substantive claim in the arbitration. The defendant's transactions with the plaintiff are correctly characterised as 106 individual contracts of sale, with a new contract arising every time the plaintiff ordered products from the defendant and received an invoice for those products from the defendant.[31]

(d) Fourth, even if the Distributor Agreement governs the defendant's substantive claim, it does not contain a valid arbitration agreement. That is because there is an inconsistency between cl 25.9 and cl 25.8 of the Distributor Agreement, which provides for the exclusive jurisdiction of the Singapore courts.[32]

45 The defendant's arguments in response can be summarised as follows.

46 In response to the plaintiff's first argument on the expiry of the Distributor Agreement:

(a) The Distributor Agreement did not expire on 26 December 2012. The Distributor Agreement, properly construed, provides for automatic, annual renewal.[33]

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30 Plaintiff's written submissions, paragraph 95; Certified Transcript, 2 July 2018, page 24.

31 First affidavit of Mr K filed on 15 November 2017, paragraph 16; the plaintiff's written submissions, paragraphs 101 to 106.

32 Plaintiff's written submissions, paragraph 108.

33 Defendant's written submissions, paragraphs 313 to 320.

(b) Even if the Distributor Agreement did expire before the parties entered into the Assignment and Novation Agreement, an implied contract by conduct arose between the parties on terms identical to those set out in writing in the Distributor Agreement.[34]

(c) The plaintiff is estopped from denying that the Distributor Agreement, and by extension the arbitration agreement in cl 25.9, is in force between the parties.[35]

(d) The principle of separability means that the arbitration agreement in cl 25.9 survives the expiry of the Distributor Agreement.[36]

47 The defendant also argues that it gave the requisite notice to the plaintiff that the Distributor Agreement had been assigned and novated to it.[37] It relies on an email sent by the defendant to the plaintiff and to the defendant's other business partners on 14 December 2012, which stated that "starting from 14 January 2013, [the defendant's group] will move its operations from Singapore to Hong Kong".[38]

48 The defendant contends that each individual sale of goods to the plaintiff was governed by the entire contractual framework set out in the Distributor Agreement and the subsequent agreements.[39] Accordingly, the arbitration

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34 Defendant's written submissions, paragraphs 321 to 328.

35 Defendant's written submissions, paragraphs 329 to 331.

36 Defendant's written submissions, paragraphs 332 to 338.

37 Defendant's written submissions, paragraphs 123 to 125.

38 Second affidavit of Ms B filed on 25 April 2018, paragraph 12 and Exhibit TB-6.

39 Defendant's written submissions, paragraphs 137 to 141.

agreement in the Distributor Agreement did apply to the defendant's claims under the invoices it issued to the plaintiff.

49 Finally, the defendant argues that there is no contradiction between cll 25.9 and 25.8 of the Distributor Agreement.[40] The clauses can be read together such that the arbitration agreement in cl 25.9 governs the resolution of all disputes arising under the Distributor Agreement while the jurisdiction clause is merely the parties' submission to the Singapore courts' supervisory jurisdiction over any such arbitration.

*The defendant lost the right and never regained it*

50 The plaintiff's argument in relation to Debt B specifically is that the defendant assigned the right to commence arbitration to recover Debt B to the Factor and that that right remained thereafter vested in the Factor and not in the defendant.[41]

51 The plaintiff accepts that an arbitration agreement can be assigned and that the assignee thereby obtains the right to commence arbitration to enforce the substantive rights supported by the arbitration agreement.[42] It relies in particular on cl 2.9.6 of the Participation Agreement to argue that because arbitral clauses are universal rights, they fall within the scope of "Associated Rights" and were thus transferred from the defendant to the Factor.[43]

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40 Certified Transcript, 29 June 2018, page 47, lines 4 to 8.

41 Plaintiff's written submissions, paragraphs 41 to 44.

42 Certified Transcript, 28 June 2018, page 12, lines 11 to 15.

43 Certified Transcript, 28 June 2018, page 14, lines 14 to 22.

52 Therefore, according to the plaintiff, the defendant effected a legal assignment[44] of the arbitration agreement to the Factor, which resulted in the defendant divesting entirely the right to commence arbitration in favour of the Factor.[45] This, it says, is the combined effect of the Participation Agreement, the Gold Plan Agreement and the Caution endorsed on the invoices.[46]

53 The defendant's main argument in response is that even if it assigned its rights under the arbitration agreement to the Factor, those rights returned to the defendant when the Factor assigned Debt B back to the defendant under the Buy Back Agreement.

54 The plaintiff denies that the Factor assigned Debt B back to the defendant. It argues, first, that the Buy Back Agreement was not intended to assign Debt B back to the defendant.[47] As a result, the Factor remained entitled to receive payment of Debt B pursuant to the Participation Agreement. The plaintiff relies in particular on cl 3 of the Buy Back Agreement which states that the Factor "will continue to collect payments (if any) from or on behalf of … [the plaintiff]".

55 Even if the Factor did assign Debt B back to the defendant under the Buy Back Agreement, the plaintiff argues that this assignment did not take effect as a legal assignment under s 4(8) of the Civil Law Act (Cap 43, 1999

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44 Certified Transcript, 28 June 2018, page 15, lines 25 to 27; the plaintiff's written submissions, paragraph 44.

45 Certified Transcript, 28 June 2018, page 10, lines 6 to 9; the plaintiff's written submissions, paragraph 48.

46 Certified Transcript, 28 June 2018, page 18, lines 24 to 27; the plaintiff's written submissions, paragraph 48.

47 Plaintiff's written submissions, paragraphs 49 to 51.

Rev Ed) ("CLA") because the plaintiff as the obligor received no notice of any such assignment.[48] The assignment, if it took place at all, was therefore at best merely an equitable assignment. The plaintiff then argues, first, that an equitable assignment is effective to assign substantive rights but not the right to arbitrate.[49] In the alternative, the plaintiff argues that an equitable assignee has no right to commence arbitration against the plaintiff in its sole name, but is instead obliged to join the equitable assignor – in this case, the Factor – as a co-claimant.[50]

56 Finally, for the invoices which the defendant claims to have repurchased in the second buy back, the plaintiff argues that the defendant bought these back only *after* the arbitration had commenced.[51] Accordingly, the defendant did not hold the rights represented by these invoices when it commenced this arbitration in October 2015.[52]

*The plaintiff is not the correct respondent*

57 In relation to Debt 2B specifically, the plaintiff argues in addition that it novated Debt 2B to the Russian Corporation. It submits that this is the effect of the Debt Transfer Agreement, which is consistent with the Open Debt Agreement.[53] Accordingly, the proper respondent to any claim for Debt 2B is the Russian Corporation and not the plaintiff.[54]

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48 Plaintiff's written submissions, paragraphs 52 to 59.

49 Certified Transcript, 28 June 2018, pages 30 to 33.

50 Plaintiff's written submissions, paragraph 64; Certified Transcript, 28 June 2018, page 35, line 9 to page 36, line 13.

51 Plaintiff's written submissions, paragraph 58.

52 Certified Transcript, 28 June 2018, page 49, lines 3 to 14.

53 Certified Transcript, 28 June 2018, page 40, lines 31 to 37; page 41, lines 8 to 37.

54 Plaintiff's written submissions, paragraph 71.

58 The defendant rejects the plaintiff's interpretation of the Debt Transfer Agreement. The defendant contends, based on the background to this agreement, that it was not intended to transfer the obligation to pay Debt 2B from the plaintiff to the Russian Corporation.[55] The defendant also contends that, based on the express terms of this agreement, the plaintiff is released from its obligations to the defendant only when the Russian Corporation makes full payment to the defendant.[56] This, it submits, is inconsistent with a novation of debts.

*The plaintiff cannot claim sums due on debit notes issued unilaterally*

59 I now consider Debt 1A. This comprises invoices which are not part of the Open Debt and which the Factor did not purchase. The plaintiff's chief complaint is that these invoices are not contractual in nature but are in fact debit notes issued unilaterally by the defendant to the plaintiff and which therefore do not give rise to any contractual obligation to pay.[57]

60 The plaintiff also raises specific arguments in relation to specific invoices:[58]

(a) in relation to invoices C86 to C93 and invoice C106 (totalling US$0.99m), the plaintiff argues that these debts were extinguished by December 2014; and

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55 Defendant's written submissions, paragraph 174.

56 Defendant's written submissions, paragraph 42.

57 Certified Transcript, 28 June 2018, page 45, lines 7 to 30; the plaintiff's written submissions, paragraphs 83 to 84.

58 Plaintiff's written submissions, paragraphs 85 to 86.

(b) in relation to invoices C100 to C105 (totalling US$4.87m), that these are debts owed by another entity entirely.

61 For these reasons, the plaintiff submits that the tribunal has no jurisdiction over the defendant's claim for Debt 1A as well.

62 The defendant argues that the Debt 1A invoices – being in form debit notes replacing original invoices – are valid demands for payment based on its internal accounting practices.[59] It therefore submits that a dispute over Debt 1A is within the tribunal's jurisdiction.

***The tribunal's findings***

63 The tribunal's findings can be summarised as follows:[60]

(a) The Distributor Agreement did not expire on 26 December 2012.[61]

(b) The defendant was the correct claimant in the arbitration because the Assignment and Novation Agreement validly novated the Parent Company's rights and obligations under the Distributor Agreement to the defendant.[62]

(c) The dispute set out in the defendant's Notice of Arbitration did not arise under the Gold Plan Agreement but instead arose under the Distributor Agreement. The result was that the resolution of the

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59 Second witness statement of Ms B dated 3 February 2017, paragraph 3.11.

60 Final award, paragraphs 7.2 and 10.1.

61 Final award, paragraphs 8.10 to 8.13.

62 Final award, paragraph 8.25.

defendant's claim was therefore governed by the arbitration agreement in the Distributor Agreement and not by the exclusive jurisdiction clause in the Gold Plan Agreement.[63]

(d) The defendant effected a legal assignment of Debt B to the Factor.[64] It was therefore unnecessary to consider whether the defendant effected an equitable assignment of Debt B to the Factor.

(e) The Open Debt Agreement effected a legal assignment of the Open Debt to the Factor.[65]

(f) There was nothing to prevent the Factor from assigning the Open Debt back to the defendant.[66]

(g) The Factor did in fact assign the Open Debt back to the defendant, and the defendant had not lost the right to recover the Open Debt from the plaintiff. The defendant was therefore the proper claimant in the arbitration.[67]

(h) Despite the Debt Transfer Agreement with the Russian Corporation, the plaintiff was the proper respondent in the arbitration.[68]

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63 Final award, paragraph 8.48.

64 Final award, paragraph 8.47.

65 Final award, paragraph 8.47.

66 Final award, paragraph 8.48.

67 Final award, paragraph 8.40.

68 Final award, paragraph 8.56.

***Issues on jurisdiction***

64 The paramount question as to jurisdiction is whether the plaintiff and defendant were parties to an arbitration agreement within the meaning of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") when the defendant issued its notice of arbitration. This paramount question can be divided into the following subsidiary questions:

(a) Did the Assignment and Novation Agreement novate to the defendant the arbitration agreement between the plaintiff and the Parent Company in cl 25.9 of the Distributor Agreement?

(b) Did the Participation Agreement assign to the Factor the arbitration agreement in relation to invoices purchased by the Factor, *ie* Debt B? If so, did the Buy Back Agreement and the second buy back assign that benefit back to the defendant?

(c) In relation to Debt 2B, were the plaintiff's obligations transferred from the plaintiff to the Russian Corporation such that the plaintiff ceased to be obliged to pay Debt 2B entirely?

(d) Does the defendant have a valid claim on invoices C3 to C6 which form part of Debt 1B?

(e) Does the defendant have a valid claim on the debit notes which constitute Debt 1A?

As is apparent from these questions, only the first question concerns the tribunal's jurisdiction over *all* of the debts which the defendant claimed in the arbitration. The remaining questions concerns the tribunal's jurisdiction over only certain categories of debt. The plaintiff accepts that, if it fails on the first

question, it must succeed in establishing the tribunal's lack of jurisdiction under each of the remaining questions in order to secure its objective in this application of setting aside the award in full.[69]

65 Apart from these five questions arising from the matrix of contracts, a further two issues arise as to the tribunal's jurisdiction. They are:

(a) Was cl 25.9 of the Distributor Agreement incorporated into the contracts of sale between the parties?

(b) Is cl 25.9 of the Distributor Agreement unworkable for being inconsistent with the jurisdiction clause in cl 25.8 of the same agreement?

66 I deal with these two issues after dealing with the five questions which I have identified.

***Assignment and novation of the Distributor Agreement***

67 As mentioned, the basis of the tribunal's jurisdiction in the arbitration is cl 25.9 of the Distributor Agreement. This is a fairly lengthy clause which I have already set out in full (see [13] above). I reproduce only the relevant parts now:

> **25.9 Disputes.** Disputes arising out of or in connection with this Agreement shall be finally settled by arbitration which shall be held in Singapore in accordance with the Arbitration Rules of Singapore International Arbitration Center [*sic*] ("SIAC Rules") then in effect. The arbitration shall be final and binding on the parties, the award shall be in writing and set forth the findings of fact and the conclusions of law. Any award shall not be subject to appeal. …

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69 Certified Transcript, 2 July 2018, page 18, lines 4 to 17.

68 To recap, the plaintiff argues that the defendant was not and never became a party to the Distributor Agreement. To this end, it submits that the Distributor Agreement expired on 26 December 2012, before the parties entered into the Assignment and Novation Agreement. This means that the Parent Company could not have transferred the arbitration agreement to the defendant under the Assignment and Novation Agreement because the entire Distributor Agreement had ceased to have contractual force before then.

69 The defendant rejects this and relies on the parties' conduct to argue that the Distributor Agreement continued to have contractual force after 26 December 2012. The defendant also relies on the doctrine of separability to argue that, at the very least, the arbitration agreement continued to have contractual force after that date.

70 Whether the defendant became a party to the arbitration agreement in cl 25.9 in the first place raises the following subsidiary issues:

(a) Did the Distributor Agreement expire on 26 December 2012?

(b) Even if the Distributor Agreement did expire on that date:

(i) Did the arbitration agreement in cl 25.9 of the Distributor Agreement survive the expiry of the Distributor Agreement?

(ii) Alternatively, did the parties' conduct after that date give rise to an implied contract on the same terms as the Distributor Agreement?

(iii) Further and in the alternative, is the plaintiff estopped from denying the continued existence of the Distributor Agreement?

71 I will consider each argument in turn.

*Expiry of the Distributor Agreement*

72 The plaintiff's first argument is that the Distributor Agreement expired on 26 December 2012, before it could be novated to the defendant.[70] The plaintiff relies on Attachment A to the Distributor Agreement, which defines both the "Term Start" and the "End Date" of the agreement. Notably, the "End Date" is stated to be 26 December 2011.[71] The plaintiff also points to the clause beneath the defined start and end date of the agreement, which states:

> Unless either party notifies the other not less than one (1) month prior to the End Date, this Agreement shall continue after the End Date for a period of one (1) years [*sic*].

73 Reading the clauses together, the plaintiff submits that the Distributor Agreement continued for a year after 26 December 2011 and then expired on 26 December 2012. Neither the plaintiff nor the Parent Company gave notice to the other to extend or terminate the Distributor Agreement. On that basis, the plaintiff argues that the Distributor Agreement expired on 26 December 2012.

74 The defendant adopts a different interpretation of these provisions. The defendant submits that, in the absence of notice, the Distributor Agreement was extended automatically for *successive one-year periods*, and not just for a single year ending 26 December 2012.[72] The defendant's case is therefore that the Distributor Agreement remained in force all the way until it gave notice to terminate the agreement on 8 September 2015.

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70 Plaintiff's written submissions, paragraphs 90.2 to 90.3.

71 DB-E-620, Distributor Agreement, Attachment A.

72 Defendant's written submissions, paragraph 313.

75 On this point, I accept the plaintiff's submission and reject the defendant's. The defendant's argument that the Distributor Agreement contemplated successive renewals for additional one-year terms indefinitely is quite inconsistent with the parties' express contractual provisions on the term of the agreement. The clause in Attachment A provides expressly that unless notice is given by either party, the agreement "shall continue after the *End Date* for a period of one (1) years [*sic*]" [emphasis added]. The parties chose to define "End Date" in the Distributor Agreement expressly as "26 December 2011". It is significant to me that the Distributor Agreement defines "End Date" as a specific date and not recursively by reference to the end of the current one-year extension effected by notice. That this clause comes just one line after the defined duration of the agreement also serves as an indicator that the reference to "End Date" in the following clause must refer to the fixed date stipulated in the Distributor Agreement. In my view, the Distributor Agreement provided that it would continue to have contractual effect after 26 December 2011 up to 26 December 2012, at which point it would expire unless the parties entered into a separate extension agreement.

76 The defendant's alternative argument is that the Distributor Agreement provided that it would continue to apply so long as the plaintiff continued ordering goods from the counterparty to that agreement and the counterparty continued supplying goods in response. For this argument, it relies on cl 24.4 of the agreement. Clause 24.4 provides:

> [The Parent Company] may, in its sole discretion, authorize Distributor to perform certain activities under the Agreement after its termination or expiration. *Any such activities shall be conducted in accordance with the terms of this Agreement.* [emphasis added]

77 I reject this argument also. Clause 24.4, on a plain reading, means only that, if the plaintiff's counterparty authorises the plaintiff to perform certain

specific activities under the Distributor Agreement after it ceases to have contractual force, those specific activities will be governed by the terms of the Distributor Agreement *which are relevant* to those activities and the plaintiff is therefore obliged to carry out the authorised activities in the *manner* stipulated in the agreement. Clause 24.4 does not, on its face, provide that all the terms of the Distributor Agreement – comprising both rights and obligations vested in both the plaintiff and the counterparty – continue to have contractual force simply because the plaintiff has been authorised to perform those specific activities.

78 Reading cl 24.4 in the context in which it appears in the Distributor Agreement supports my interpretation of it. Clause 24 of the Distributor Agreement carries the title "Term and Termination". It sets out the circumstances in which the parties agreed that the Distributor Agreement will cease to have contractual force. Clause 24.1 deals with the duration of the agreement. Clause 24.2 provides that either party may terminate the agreement with three months' prior notice. Clause 24.3 provides when a party may terminate the agreement upon the other party's breach. Clause 24.4 then appears. By its very phrasing, cl 24.4 is clearly premised on the Distributor Agreement having ceased to have contractual force. In that context, its intent is to permit the Parent Company to authorise the plaintiff to perform any residual activities necessary or desirable in order to bring the parties' business relationship to an orderly end. Purchase of goods under the Distributor Agreement is not a residual activity but the core purpose of the agreement. The intent of cl 24.4 is not that the Distributor Agreement in its entirety should continue to have full contractual force indefinitely into the future. That would be wholly inconsistent with the premise on which cl 24.4 is based.

79 Accordingly, cl 24.4 does not form a basis for the defendant to argue that the Distributor Agreement as a whole continued to have contractual force after 26 December 2012.

*Survival of cl 25.9*

80 The defendant's alternative argument is that, in any event, the arbitration agreement in cl 25.9 survived the expiry of the Distributor Agreement on 26 December 2012. There are two facets to this argument. The defendant bases this argument on both the principle of separability of arbitration agreements[73] and on cl 25.3 of the Distributor Agreement:

> **25.3 Survival.** Any terms of this Agreement which by their nature survive the expiration or termination of this Agreement, including Limitation of Liability and Indemnification, shall survive any such expiration or termination.

81 The defendant submits that an arbitration agreement is a "paradigm example" of a term which by its nature survives the expiration of the contract into which it is integrated.[74] Therefore, as a consequence of both the principle of separability and the parties' own contract, cl 25.9 continued to have contractual force after 26 December 2012.

82 The principle of separability means that the invalidity of a contract does not necessarily entail the invalidity of an arbitration agreement which is integrated into that contract. Lord Hoffmann, delivering the judgment of the House of Lords in *Fiona Trust & Holding Corp v Privalov* [2007] 4 All ER 951 said (at [17]):

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73 Defendant's written submissions, paragraphs 277 to 280, and 332 to 334.

74 Defendant's written submissions, paragraph 334.

> The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable *only on the grounds which relate directly to the arbitration clause*. [emphasis added]

83 The principle of separability does not, however, mean that an integrated arbitration agreement can never cease to have contractual effect together with the contract into which it is integrated. As Steven Chong J (as he then was) noted in *BCY v BCZ* [2017] 3 SLR 357 at [61], separability does not insulate the arbitration agreement from the substantive contract for all purposes. The question is whether, in this case, it was the intention of the parties that the expiry of the Distributor Agreement should also bring the arbitration agreement between the parties to an end. The intention of the parties, as always, is to be ascertained objectively from the words interpreted by applying the contextual approach.

84 It is generally presumed that the parties intend a dispute resolution clause to survive the substantive contract ceasing to have contractual force. That is because the fundamental purpose of a dispute resolution clause is to govern the resolution of disputes between the parties arising out of the contract. This was recently affirmed in *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama and another* [2018] SGHC 126 at [36], where Audrey Lim JC (as she then was) quoted with approval this statement of principle from Gary Born, *International Commercial Arbitration, Vol I* (Wolters Kluwer, 2nd Ed, 2014) at pp 888–889:

> … the parties' intention will presumptively be that they do not intend to terminate their arbitration agreement, or to permit unilateral termination of that agreement, but rather to leave the arbitration agreement in place to resolve whatever disputes that may subsequently come to light concerning the past performance of their contract or the termination of that contract.
>
> … As a practical matter, commercial parties virtually never intend to terminate an arbitration agreement that they have

> concluded; they instead intend to terminate their underlying contract while leaving their agreed dispute resolution mechanism in place for any disputes that may in the future emerge from their contract while it was in effect.

This is not, of course, a legal presumption in the technical sense of the word. It simply reflects the fact that contractual disputes frequently manifest themselves only after the substantive contract has ceased to have contractual force between the parties. Indeed, it is very often that the parties' dispute is precisely about whether the contract has in fact ceased to have contractual force.

85 There are, in this case, no circumstances from which it can be suggested that the plaintiff and the Parent Company, as the parties to the Distributor Agreement, intended their arbitration agreement to cease to have contractual effect on 26 December 2012, when the Distributor Agreement expired. Indeed, that would be a wholly uncommercial interpretation to put upon cl 25.9 of the Distributor Agreement for the reasons I have already given.

86 Further, cl 25.3 of the Distributor Agreement is in fact express indication that the plaintiff and the Parent Company intended their arbitration agreement in cl 25.9 to survive the expiry of the contract. By including cl 25.3, the parties expressly agreed that certain clauses of the Distributor Agreement would continue to bind the parties even after the Distributor Agreement as a whole had ceased to have contractual effect. I agree with the defendant's submission that the reference in cl 25.3 to terms "which by their nature" survive the termination of the contract captures an arbitration agreement such as cl 25.9.

87 Accordingly, I find that the arbitration agreement continued to have contractual force as between the plaintiff and the Parent Company when the Distributor Agreement expired on 26 December 2012. But I also find, for the reasons which follow, that the Distributor Agreement, or a substantive contract

on terms identical to it, continued to have contractual force after the Distributor Agreement expired on 26 December 2012.

*Implied contract*

88 The defendant submits that an implied contract on the same terms as the Distributor Agreement arose after 26 December 2012.[75] The defendant relies on the conduct of the parties as evidence of an implied contract.[76] This is certainly a recognised manner by which an implied contract can come into existence. As *Chitty on Contracts* (HG Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2019) ("*Chitty on Contracts*") explains at para 1–111:

> … There may also be an implied contract when the parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired. In such a case *the court may infer that the parties have agreed to renew the express contract for another term or the court may infer an implied contract drawing on some of the terms of the earlier contract, but omitting others*. … [emphasis added]

89 The overarching question is whether an intention to renew their written contract after its expiry can be inferred from the parties' conduct, even though that intention is never expressed in words. The exact terms of any implied contract that may arise will of course depend on the facts of each case. I refer to three cases cited by the defendant in which the court found that an implied contract arose.

90 *SJD Group v KJM (Scotland)* [2010] CSOH 13 ("*SJD Group*"),[77] a decision of the Outer House of the Scottish Court of Session, concerned a

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75 Defendant's written submissions, paragraphs 321 to 328.

76 Defendant's written submissions, paragraph 328.

77 Defendant's bundle of authorities ("DBOA"), Tab 23.

franchise agreement which commenced on 1 August 2003 and expired after a five-year term on 1 August 2008. The parties nevertheless continued as though the agreement had not expired, with the plaintiff providing its services to the defendant and invoicing the defendant for payment as before. Lord Glennie held that a reasonable detached observer, looking at the conduct of the parties after the agreement expired, would infer that the parties were continuing to do business, as far as possible, on the same terms as before. Insofar as the original contract provided for a fixed expiry date, however, Lord Glennie held that the observer would not conclude that the implied contract was to be for a further fixed period of five years but that it would continue only until one party terminated it upon reasonable notice to the other (at [21]).

91 *SJD Group* was considered and approved by Males J, albeit in *obiter*, in the English High Court in the case of *PSG Franchising v Lydia Darby Ltd* [2012] EWHC 3707 (QB).[78] The facts of the case are similar to those in *SJD Group*. Males J agreed (at [54]) with Lord Glennie's reasoning that the likely inference from parties continuing to deal with each other after an agreement expires as though the agreement were still in force is that they intended their contractual relationship to continue on the same terms as in the expired agreement. Males J did not, however, have to consider the term of the implied contract and whether, as in *SJD Group*, the implied contract would continue only until terminated by either party on reasonable notice.

92 In *Brambles v Wail* [2002] VSCA 150,[79] the plaintiff entered into an agreement with the defendant's employer, Andar Transport, for the latter to

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78 DBOA, Tab 18.

79 DBOA, Tab 7.

provide delivery services. The agreement was for a term of three years from 4 April 1990. It expired on 4 April 1993 without the plaintiff renewing the agreement. Nonetheless, the defendant on behalf of Andar continued to carry out weekly deliveries for the plaintiff and invoiced it accordingly. The Victorian Court of Appeal found the inference that the parties had proceeded as though they were bound by a single agreement on the same terms as the expired agreement to be a more compelling inference than the inference that they had entered into a series of individual implied agreements covering each subsequent delivery (at [61]):

> The question whether an implied or tacit agreement to continue dealing on the same terms save that the agreement should be terminable on reasonable notice is to be inferred is, … an evidentiary or factual question. On the facts we have set out earlier we consider such an inference should be drawn here. The evidence … warrants the finding that *after 3 April 1993 the parties proceeded as though still governed by the terms of the original agreement (save that, since it had already expired, either could terminate the substitute arrangement on reasonable notice)*, rather than a finding that they impliedly agreed merely that Andar should collect and deliver the laundry and that Brambles should pay it a reasonable sum for that or a finding that the parties made a series of individual implied agreements … [emphasis added]

93 The plaintiff attempts to distinguish these three cases on the grounds that in all those cases, it was the *original parties* to the agreement who continued to act as if the agreement remained in force after its expiry. It may be appropriate to imply a new contract on identical terms to an expired contract as between the original parties to the expired contract based on the original parties' prior course of dealing.[80] In this case, however, the defendant is a third party to the original Distributor Agreement between the plaintiff and the Parent Company.

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80 Certified Transcript, 28 June 2018, page 50, lines 27 to 39.

94 The plaintiff relies on *Grossner Jens v Raffles Holdings Ltd* [2004] 1 SLR(R) 202 ("*Grossner Jens*"). In *Grossner Jens*, the plaintiff claimed payment for its brokering services, alleging that it had provided those services pursuant to an implied contract between itself and the defendant. Tan Lee Meng J dismissed the plaintiff's claim, noting that material terms of the alleged contract had not been agreed. The plaintiff's scope of duties and remuneration also could not be implied from any previous course of dealing between the parties because there were insufficient dealings between them (at [14] and [18]). The plaintiff appears to be arguing, based on this case, that because there were no prior dealings between itself and the defendant, there is no basis to find that an implied contract arose on the terms of the Distributor Agreement – a contract to which the defendant was not even a party before it expired.[81]

95 The plaintiff is correct, as a matter of pure principle, that the court cannot conjure an implied contract out of nothing. But that is not the situation on the facts before me. The defendant here, although initially a third party to the Distributor Agreement, stepped into the shoes of the plaintiff's original counterparty (*ie* the Parent Company) pursuant to a tripartite novation. Accordingly, the question in our case is whether the plaintiff dealt with the Parent Company (prior to the novation), and later with the defendant (after the novation), consistently with the notion that the Distributor Agreement was still in force.

96 On the evidence before me, it is clear that the plaintiff and the Parent Company continued their course of dealing under the Distributor Agreement even after it expired on 26 December 2012. As mentioned above (at [12] and

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[81] Certified Transcript, 28 June 2018, page 51, lines 10 to 13.

[19]), the Parent Company began invoicing the plaintiff in December 2010[82] and continued to do so until 16 February 2013. In the meantime, the defendant began issuing invoices to the plaintiff on 7 February 2013 and continued supplying goods to the plaintiff until the last quarter of 2014.[83] A reasonable detached observer, on these facts, would draw the inference that an implied contract, terminable on reasonable notice, subsisted between the plaintiff and the Parent Company on the same terms as the Distributor Agreement on and after 26 December 2012. That is what the Parent Company and the plaintiff then novated to the defendant on 25 January 2013.

97 This inference is supported by the evidence. In or around mid-2013, the defendant required all its customers to provide letters of guarantee.[84] The plaintiff accordingly procured a related company to provide a guarantee to the defendant. The guarantee is dated 9 August 2013 and was to be effective for a period of one year, until 9 August 2014.[85] The guarantee confirms that the defendant is "a party of a [Distributor Agreement] with [the plaintiff]" and states that the guarantor's obligations include:[86]

> … (1) the payment of amounts due to [the defendant] from [the plaintiff] under the [Distributor Agreement], deriving from products purchased under the authority of the [Distributor Agreement] as well as any other amount due in connection with the [Distributor Agreement] and (2) any commitment, promise or covenant entered into by [the plaintiff] pursuant to the [Distributor Agreement]. …

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82 Defendant's written submissions, paragraph 135.

83 First witness statement of Ms B dated 24 August 2016, paragraphs 5.2 to 5.5.

84 First witness statement of Mr A dated 24 August 2016, paragraphs 5.2 to 5.4.

85 DB-E-673, Guarantee Letter, paragraph 7.

86 DB-E-673, Guarantee Letter, paragraph 1.

It is evident, by the act of procuring the guarantee and by the terms of that guarantee that the plaintiff, the defendant and its guarantor considered the Distributor Agreement as continuing to set out the contractual terms which bound the parties as of 9 August 2013.

98 Lastly, the parties also entered into other agreements after 2012 that expressly referred to the Distributor Agreement. The first of those agreements is the Assignment and Novation Agreement on 25 January 2013. The preamble of the Assignment and Novation Agreement states:

> Whereas, [the Parent Company] and [the plaintiff] are parties to the agreement(s) listed in the table below … which are *in full force and effect as of the date hereof*; … [emphasis added]

The only "agreement(s) listed in the table below" is the Distributor Agreement.

99 Similarly, the Debt Transfer Agreement of 12 December 2014 between the plaintiff, the defendant and the Russian Corporation states unequivocally that "[the plaintiff] and [the defendant] are parties to the [Distributor Agreement] … *which is in full force and effect as of the date hereof*" [emphasis added].

100 In my view, the conduct of the plaintiff and the Parent Company puts it beyond doubt that they considered themselves to be bound by a contract on the terms set out in the Distributor Agreement after its expiry on 26 December 2012. Similarly, the conduct of the plaintiff and the defendant after entering into the Assignment and Novation Agreement puts it beyond doubt that they considered themselves to be bound by a contract on the terms set out in the Distributor Agreement on and after 25 January 2013. The inference is even more compelling than that in *Bramble v Wail* because there was more than conduct in this case to evidence the parties' intention. They not only carried on with the

sale and purchase of goods and invoicing as normal, they expressly affirmed in words that they considered the Distributor Agreement to continue to bind them at various points in 2013 and 2014. I therefore find that there was an implied contract on identical terms as the Distributor Agreement that arose between the plaintiff and the Parent Company parties after 26 December 2012, which was then novated to the defendant on 25 January 2013 and which continued thereafter until the defendant terminate it by notice in September 2015.

101 A final point to consider is whether an arbitration agreement contained in an implied contract satisfies the requirement of being "in writing" under s 2A(3) of the IAA. Section 2A(4) of the IAA, however, states that an arbitration agreement is "in writing *if its content is recorded in any form*, whether or not the arbitration agreement or contract has been concluded orally, *by conduct* or by other means" [emphasis added]. In *AQZ v ARA* [2015] 2 SLR 972 at [119]–[120], Judith Prakash J (as she then was) held that the arbitration agreement in an oral contract satisfied the statutory requirement of writing because it was on terms identical to an arbitration agreement contained in an earlier written contract between the parties. The arbitration agreement between the plaintiff and defendant is, in all but the most formal or technical of senses, cl 25.9 of the Distributor Agreement.

102 The defendant is therefore entitled to rely on the arbitration agreement in cl 25.9 of the Distributor Agreement to found the tribunal's jurisdiction.

*Estoppel*

103 Finally, the defendant relies on the same facts set out at [96]–[99] above to argue that the plaintiff represented to the defendant by conduct that the Distributor Agreement continued to have contractual force after 26 December 2012. The plaintiff is therefore estopped from asserting that the Distributor

Agreement expired on 26 December 2012, and in particular, is estopped from denying the existence of the arbitration agreement.[87]

104 The defendant argues that two types of estoppel are engaged on these facts.[88] The first type is contractual estoppel. Where the parties to a contract have, *in their contract*, agreed that a specified state of affairs forms the basis on which they have contracted, they are estopped from alleging that the actual facts are inconsistent with the state of affairs specified in the contract (see *Chitty on Contracts* at para 4–116).

105 The second type of estoppel is estoppel by convention. Where both parties to a contract act on an assumption as to the state of the facts or the law, they are estopped from denying the truth of that assumption if it would be unjust or unconscionable to allow that (*Chitty on Contracts* at para 4–108).

106 The difference between the two types of estoppel is explained in *Chitty on Contracts* at para 4–116 in this way:

> [Contractual estoppel] would differ from estoppels by convention in that **"contractual estoppel" gives effect to a term of a contract which, on its true construction, prevents a party from denying facts specified in that term** and in the circumstances (if any) specified in it; while **estoppels by convention invoke factors extrinsic to the contract** as grounds for precluding the estopped party from denying facts such as the existence of a promise *not* included in the contract on its true construction and of holding him bound by that promise … [emphasis in original; emphasis added in bold]

107 The terms that the defendant relies on as giving rise to a contractual estoppel are those found in the *preamble* to the Assignment and Novation

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87 Defendant's written submissions, paragraph 331.

88 Defendant's written submissions, paragraphs 329 to 330.

Agreement and the Debt Transfer Agreement (see [98]–[99] above). In *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 201, Andrew Ang J noted that there are indications that a contractual estoppel may be founded on a recital in an instrument not by deed. Ang J went on to opine, at [71]:

> I find that it is more conceptually consistent for a recital in an agreement not by deed to be similarly capable of giving rise to an estoppel by convention, where the proposition in the recital was contemplated by the parties and intended to be an agreement between them. …

108 With respect, the reasoning at [71] of *OMG Holdings* is not entirely clear. If the basis of estoppel by convention is that parties have acted on an assumed state of affairs that is *not* a legally binding term within their contract, then there would be no need for the requirement that the proposition in the recital was "intended to be an agreement" between the parties.

109 Nevertheless, nothing turns on the precise difference between contractual estoppel and estoppel by convention in this case. It makes no difference in the present case whether the statements confirming the continuation of the Distributor Agreement in the preamble to the Assignment and Novation Agreement and in the Debt Transfer Agreement are interpreted as being legally binding terms which both parties are precluded as a matter of contract from denying or as an *extrinsic* state of affairs which the defendant acted upon. Either characterisation leads to the conclusion that the plaintiff is estopped from denying that the Distributor Agreement's terms continued to bind it after 26 December 2012. The defendant supplied goods to the plaintiff in 2013 and 2014 on the basis that the parties continued to be bound by the terms set out in the Distributor Agreement. The plaintiff accepted those goods. It would be unconscionable for the plaintiff to assert now, in a claim by the defendant on unpaid invoices for those goods, that such reliance was mistaken.

110 Accordingly, I accept the defendant's alternative argument that the plaintiff is estopped from denying the existence of the Distributor Agreement, and from denying that it is bound by the arbitration agreement contained in cl 25.9 of the Distributor Agreement.

*Notice*

111 Finally, the plaintiff argues that cl 1 of the Assignment and Novation Agreement itself mandates that notice must be given by the Parent Company to the plaintiff and defendant before the novation will be effective. Such notice, the plaintiff contends, was not given.[89]

112 Clause 1 of the Assignment and Novation Agreement provides:

> 1. [The Parent Company] hereby assigns, conveys, transfers and delivers all of its rights and obligations in and under the Agreements to [the defendant] effective on a date between January 1, 2013 and June 30, 2013, *as notified by [the Parent Company] to [the plaintiff] and [the defendant] not less than thirty (30) days prior to such date* ("Effective Date"). [emphasis added]

113 The first point I make is that the Assignment and Novation Agreement, despite the use of the word "assigns" in cl 1, effected a novation of the Distributor Agreement from the Parent Company to the defendant, not an assignment. I say that because it expressly transferred both the Parent Company's rights as well as its obligations to the defendant. That is no doubt the reason why it was drawn up and executed as a tripartite agreement. There is no general requirement for notice to be given to an obligor before an obligee whose rights arise by reason of a novation may take action to enforce those

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89 Plaintiff's written submissions, paragraphs 95 to 99.

rights alone and in its own name. The issue of notice arises here only because of the express terms of cl 1 of the Assignment and Novation Agreement.

114 The defendant's case is that the Parent Company did give the notice required by cl 1 of the Assignment and Novation Agreement.[90] It relies on an email dated 14 December 2012 from the Parent Company to a number of its business partners, including the plaintiff, informing them of the impending transition of the Parent Company's operations to the defendant "starting from 14 January 2013". The defendant argues that the 14 December 2012 email constitutes notice under cl 1, and that the novation took effect on 14 January 2013.

115 The documents, on their face, seem to support the defendant's submission. The relevant email is short and states simply:[91]

> Please be advised that, starting from 14 January 2013, [the defendant group] will move its operations from Singapore to Hong Kong.

116 The email is titled "*Assignment and Novation to [the defendant] – transition will occur on 14 January 2013*" [emphasis added]. This makes it clear that the transition will take place as an event on the specified date and not as a process commencing on the specified date. Further, the email comes with one attachment, an Information Letter which elaborates:[92]

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90 Defendant's written submissions, paragraphs 122 to 125; Certified Transcript, 29 June 2018, p 14, lines 1 to 32; p 16, lines 6 to 15.

91 DB-G-2261, Email from the Parent Company to the plaintiff and other recipients dated 14 December 2012 at 9.24pm.

92 DB-G-2263, Letter dated 14 December 2012.

> We are writing further to our communication dated November 1, 2012, which announced the transition of certain operations from [the Parent Company] to [the defendant].
>
> In accordance with the Assignment and Novation Agreement included in that communication, we are now able to confirm that the transition will occur on 14 January 2013.

The attachment itself is titled: "on 14 Jan 2013 [the defendant] starts operations.pdf".

117 The chief difficulty with the defendant's submission is that the 14 December 2012 email, and the alleged effective date of novation of 14 January 2013, came before the three parties executed the Assignment and Novation Agreement on 25 January 2013. This raises the question whether, as a matter of construction of the Assignment and Novation Agreement, the 14 December 2012 email is capable of being the contractual notice required by cl 1 of that agreement.

118 Clause 1 does not require notice to be issued only after cl 1 acquires contractual effect. The language of cl 1 is neutral on this point: "*as notified* by [the Parent Company] to [the plaintiff] and [the defendant] not less than thirty (30) days prior to such date". I accept the defendant's submission that the words "as notified" do not unequivocally suggest that notice is an event for the future (*eg* "as *will be* notified"). Nothing much can be discerned from it, and it does not preclude the possibility of a notice in the past (*eg* "as *already* notified").

119 Indeed, it is significant to me that the only legal significance of the notice is to fix the Effective Date. Clause 1 of the Assignment and Novation Agreement does not impose an obligation on the Parent Company to give notice. In other words, if the Parent Company never gave notice, it would not be in breach of the agreement. All that would happen in that case is that the novation

which the defendant had agreed to would simply not become effective. That suggests to me that what is important is that the plaintiff should know the Effective Date, regardless of how and more importantly when that happens.

120 The factual circumstances make it clear that the notice being issued before the Assignment and Novation Agreement is of little contractual significance. These circumstances reveal how the parties would have seen the 14 December 2012 email and its attachment.

121 The earliest indication to the Parent Company's partners, including the plaintiff, of the impending novation came with an email on 19 November 2012 from the Parent Company. The email attached a blank draft of the Assignment and Novation Agreement, on identical terms as the one executed on 25 January 2013 with the plaintiff. The email states:[93]

> As you know, effective from 2013, [the defendant group] will move its operations from Singapore to Hong Kong. Please refer to the Information Letter attached.
>
> To simplify the transfer of Distribution Agreements Off-Shore between your companies, and [the Parent Company], to [the defendant], please insert your company names, print out and sign the attached Assignment as well as the Novation Agreement in 2 original copies. *Please send me those originals to [the defendant group]'s office … by 30 November 2012*. …
>
> [emphasis added]

122 From the email, it is apparent that the Parent Company and the defendant intended to execute assignment and novation agreements with each of its customers, including the plaintiff, latest by 30 November 2012. From the evidence, there were some customers of the Parent Company who executed their

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93 DB-G-2259, Email from the Parent Company to the plaintiff and other recipients dated 19 November 2012 at 9.12am.

assignment and novation agreements before 30 November 2012.[94] It was not explained why the plaintiff's Assignment and Novation Agreement was executed only on 25 January 2013. I am prepared to infer that the intention of the Parent Company and the defendant was similarly to execute this agreement by 30 November 2012. The plaintiff would have been aware of the Parent Company's and the defendant's intention, as two of its officers were copied on the email. In light of this, all parties must be taken to have understood the 14 December 2012 email as the notice required under cl 1, even if there were reasons that prevented particular counterparties from executing the novation agreement with the Parent Company and the defendant before 30 November 2012.

123 Accordingly, I find that the Parent Company did give notice of the Effective Date to the plaintiff by the email of 14 December 2012.

124 I now deal with the issue of jurisdiction in relation to the three specific categories of debts. The plaintiff disputes the defendant's right to commence arbitration against it in relation to all three categories of debt claimed by the defendant.[95]

125 I begin with an analysis of jurisdiction in respect of Debt B, *ie* Debt 1B and Debt 2B. These are the invoices which the defendant assigned to the Factor under the Participation Agreement and which were issued to the plaintiff with the Caution endorsed upon them.

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94 DB-G-2259, Email from Ms S to the defendant dated 23 November 2012 at 11.31pm.

95 Plaintiff's written submissions, paragraph 39.

***General points on Debt B***

126 The plaintiff argues that: (a) the assignment of Debt B to the Factor under the Participation Agreement carried with it to the Factor the right to arbitrate disputes in relation to Debt B, depriving the defendant entirely of that right; and (b) that that right was never assigned back to the defendant.

127 The defendant argues that the assignment of Debt B to the Factor did not deprive the defendant entirely of the right to arbitrate disputes in relation to Debt B. That right remained vested in the defendant, even if it was concurrently also vested in the Factor.[96] In the alternative, the defendant argues that the defendant later regained the right to arbitrate disputes in relation to Debt B when the Factor assigned Debt B back to the defendant under the Buy Back Agreement.[97]

128 Two sub-issues therefore arise for consideration.

(a) First, did the defendant's assignment of Debt B to the Factor deprive the defendant entirely of the right to arbitrate disputes in relation to Debt B?

(b) Second, if it did, did the Factor later assign that right back to the defendant under the Buy Back Agreement?

129 There is, in addition, a logically anterior sub-issue as to which law applies to determine these two sub-issues. In the arbitration, the parties agreed that the law applicable to any assignment would be Singapore, English or Hong Kong law, and that regardless of which of the three laws applied the

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96 Certified Transcript, 29 June 2018, page 29, lines 2 to 16; page 36, lines 28 to 32.

97 Certified Transcript, 29 June 2018, page 38, line 28 to page 39, line 3.

requirements for a legal assignment were the same.[98] The parties were also content to proceed on the basis that the law applicable to the assignment of an *arbitration agreement* is the same as the law applicable to the assignment of the main contract. As the parties did not address me on this issue in the present application, I proceed on the basis that the applicable law to determine the sub-issues in [128] is not substantively different from Singapore law.

*Did the defendant assign the right to arbitrate to the Factor?*

130 The Participation Agreement obliged the defendant to offer to sell to the Factor all invoices representing receivables due to the defendant from the date of its commencement, 2 October 2013. If the Factor accepted the defendant's offer in respect of a particular invoice, cl 2.9.6 of the Participation Agreement obliged the defendant to transfer to the Factor that invoice and its "Associated Rights":

> **2.9.6. <u>Transfer of Ownership of [the defendant's] Invoices</u>**
> [The defendant] hereby:
>
> (i) transfers to [the Factor] the ownership of all [the defendant's] Invoices and Associated Rights purchased by [the Factor] and such ownership shall be complete and unencumbered by any lien or charge or other interest and it shall vest in [the Factor] from the date of [the defendant's] Invoice …
>
> [emphasis in original]

131 "Associated Rights" means:[99]

> … in relation to any [of the defendant's] Invoice or Financed Products any of the following (i) *all [the defendant]'s rights by law as an unpaid vendor or under the sale contract*; … [emphasis added]

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98 Plaintiff's written submissions, paragraph 45; Final award, paragraph 8.35.

99 DB-E-679, Participation Agreement, cl 1.

132 The plaintiff contends that an assignment of a particular invoice under the Participation Agreement coupled with the Caution endorsed on the invoice issued to the plaintiff effects a legal assignment of the debt represented by that invoice to the Factor, effective under s 4(8) of the CLA.[100] The defendant, at least by the time of the hearing of this application, does not dispute this.[101]

133 The more difficult issue is where the right to arbitrate a dispute in relation to a particular debt resides after the defendant assigns that debt to the Factor. The plaintiff relies primarily on two English cases to advance its proposition that an assignment of a contractual right divests the assignor completely of any right to arbitrate a dispute in relation to that right.

134 In *NBP Developments Ltd and anor v Buildko & Sons Ltd* (1993) 66 BLR 120 ("*NBP Developments*"), the main contractor of a building development commenced an arbitration against its employer. Midway through the arbitration, the main contractor effected an absolute assignment of its rights against the employer to a third party. The third party informed the employer that it intended to pursue the arbitration, but took no further steps to join itself as a party to the arbitration. After the arbitration had been inactive for three years, the employer applied for a final injunction restraining the main contractor (who was still the sole claimant named in the arbitration) from continuing with the arbitration. The question which arose was whether the main contractor was entitled to pursue the arbitration even after the absolute assignment. The court held that the effect of the absolute assignment was that the main contractor no

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100 Plaintiff's written submissions, paragraphs 44 to 48.

101 Certified Transcript, 29 June 2018, page 30, lines 25 to 34.

longer retained any right to arbitrate. The assignee had succeeded to the rights of the main contractor in the arbitration from the date of the assignment (at 131).

135 The next case on which the plaintiff relies is *Montedipe SpA v JTP-RO Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep 11 ("*The Jordan Nicolov*"). In that case, a charterer referred a claim against a ship owner to arbitration. The ship owner put the charterer's continued title to pursue the claim in issue by adducing evidence that the charterer had, after commencing the arbitration, assigned the claim to its insurer. The charterer failed to adduce any evidence to prove that it continued to have title to the claim. The tribunal upheld that the charterer's claim on the merits of the dispute, but declined to make an award to that effect because the charterer had failed to discharge its burden of proving title to the claim. The charterer applied to the English High Court for an order remitting the award so that the tribunal could enter an award, based on its favourable findings of fact on the merits, in favour of *both* the charterer and the insurer. Hobhouse J declined to remit the award to allow the insurer to intervene. The tribunal's award had to be in in favour of *either* the charterer (the assignor) *or* the insurer (the assignee) but could not be in favour of *both*. But the charterer had, by its failure to adduce evidence of title, left the tribunal in a position where it could not conclude which it should be. Hobhouse J stated (at 20):

> … An award, or judgment, must correspond to a proved cause of action. It cannot be right to give an award or judgment to a person who has no cause of action against the respondent/defendant. … A joint award cannot be right since on any view there is no joint right in the plaintiffs – *only one or the other can be entitled to an award.* … [emphasis added]

136 The defendant disagrees that the cases cited stand for the proposition advanced by the plaintiff. The defendant submits that *The Jordan Nicolov* did

not discuss the effect of an assignment on the *assignor's* right to arbitrate.[102] On the defendant's case, while the effect of an assignment is to deprive an assignor of a substantive right (such as the right to a debt) and to convey it exclusively to the assignee, it does not follow that the assignment also deprives the assignor of the right to arbitrate a dispute over that right and passes it exclusively to the assignee.[103] The defendant also bases this argument on its interpretation of the separability presumption: that because the arbitration agreement exists as a contract separate from the underlying contract into which it is integrated, an original party to an arbitration agreement is deprived of the right to arbitrate only if there is a clear expression of intent to achieve that result.[104]

137 I reject the defendant's submission. The right to arbitrate a dispute over a contractual right which has been assigned cannot be vested *simultaneously* in both the assignor and the assignee. The defendant cites no authority for this submission. The nature of an assignment is that it "extinguishes the legal cause of action of the assignor against the party liable so that the assignor cannot thereafter himself ask for an award against the party liable" (*The Jordan Nicolov* at 15). Hobhouse J was very clear that as between the assignor and assignee, "*only one or the other* can be entitled to an award" [emphasis added]. Although *NBP Developments* was concerned, strictly speaking, only with the right of an assignor to *continue* an arbitration that was commenced before the assignment, Fox-Andrews J also noted that the assignor "had no right to sue in their own name".

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102 Certified Transcripts, 29 June 2018, page 35, lines 13 to 18.

103 Certified Transcripts, 29 June 2018, page 36, lines 1 to 32.

104 Certified Transcripts, 2 July 2018, page 13, line 21 to page 14, line 16.

138 The more subtle aspect of this argument is that an assignor of an arbitration agreement remains a *party* to the arbitration agreement and therefore the ground under Art 34(2)(*a*)(i) is not satisfied. Although in *Rals (HC)* (at [52]–[53]), I held that an assignee of rights under a contract does not become a party to the contract (or to an arbitration agreement integrated into that contract) in the contractual sense, the question under Art 34(2)(*a*)(i) of the Model Law is not only whether the parties have an arbitration agreement between them but must include the question of whether the defendant has standing to invoke the arbitration agreement in respect of a particular substantive right. By assigning to the Factor the right to receive payment under Debt B, the defendant also gave up the annexed right to arbitrate a dispute in relation to Debt B.

139 As a final point, the defendant distinguishes the cases cited by the plaintiff on the basis that the defendant assigned only *one* of its rights under the Distributor Agreement to the Factor, *ie* the right to receive payment under the purchased invoices. The defendant retained all of the other substantive rights which it had under the Distributor Agreement, to which the right to arbitrate under the integrated arbitration agreement still attached. As such, the defendant argues, there is still *an* arbitration agreement in existence between the parties.[105] The defendant acknowledges that it would not have the right to commence an arbitration in relation to Debt B, but contends that this is an issue regarding the scope of the arbitration agreement to which both the plaintiff and the defendant are parties rather than its existence. It is therefore not a basis for setting aside the award under Art 34(2)(*a*)(i) of the Model Law.

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105 Certified Transcripts, 29 June 2018, page 38, lines 21 to 27; 2 July 2018, page 14, line 23 to page 15, line 2.

140 There is some merit to this argument. The Distributor Agreement governs the overarching business relationship between the plaintiff and the defendant. As a result, it confers rights on the defendant which are wholly unrelated to its right to payment under an invoice which it issues to the plaintiff within that overarching business relationship. These unrelated rights include, among others, a right to review the plaintiff's records for compliance with the Distributor Agreement (cl 4); a right to require protection of its confidential information (cl 8); and a right to adjust prices or terminate the Distributor Agreement for non-payment by the plaintiff (cl 13). It cannot have been the parties' intention that these rights should be assigned to the Factor together with the invoices. Those rights are relevant only to the defendant as against the plaintiff, in their capacity as supplier and distributor respectively, within the framework of the Distributor Agreement.

141 The parties obviously continued to be parties to the arbitration agreement in cl 25.9 of the Distributor Agreement in relation to these unrelated substantive rights. The argument then that their arbitration agreement does not include the right to arbitrate disputes in relation to Debt B is indeed a question of scope. Unintuitive as this result may be, Singapore's law of arbitration has clearly taken the position that the ground for setting aside under Art 34(2)(*a*)(i) of the Model Law deals with the *existence* of an arbitration agreement while questions of *scope* are dealt with under Art 34(2)(*a*)(iii) (see *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 ("*Astro*") at [152]–[158]; *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd and ors* [2019] 3 SLR 12 at [81]).

142 The plaintiff does not base the present application on the tribunal's *excess* of jurisdiction under Art 34(2)(*a*)(iii).[106] For this reason alone, the defendant's assignment of Debt B to the Factor should not affect the existence of an arbitration agreement between the defendant and the plaintiff within the meaning of Art 34(2)(*a*)(i). That is sufficient, in itself, to defeat the plaintiff's application to set aside the award in relation to claims over Debt B on this ground. Nonetheless, I also go on to consider whether the right to arbitrate a dispute over Debt B was re-assigned to the defendant.

*Was the right to arbitrate re-assigned to the defendant?*

143 I have held that the defendant's assignment of Debt B to the Factor deprived the defendant of the right to arbitrate disputes in relation to Debt B and vested that right exclusively in the Factor. That is not enough, however, for the plaintiff to succeed on this limb of its case. It must also establish that the defendant's repurchase of Debt B from the Factor under the Buy Back Agreement *failed* to transfer the right to arbitrate disputes in relation to Debt B back to the defendant.

144 Under the Buy Back Agreement, the defendant paid to the Factor the total sum of US$43.88m in April 2015 to repurchase unpaid debts due to the Factor from a number of the defendant's distributors. This total sum included a sum of US$28.48m which the plaintiff had failed to pay to the Factor. These amounts are expressly referred to in the recitals to the Buy Back Agreement:[107]

**Whereas:**

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106 DB-B-391 to 393, Originating Summons filed on 28 October 2017, paragraphs 1.1 and 1.2.

107 DB-E-716 to 717, Buy Back Agreement, Recital (A) to (C) and cl 1.

> A) [The Factor] and [the defendant] entered into the Participation Agreement to establish the terms under which [the Factor] would purchase [invoices] from [the defendant], …
>
> B) As of April 13rd, 2015, the outstanding amounts owned by the Russian … Remarketers were as follows:
>
> a. *[The plaintiff]: USD 28,477,365.85*, all of which constitutes amounts due in respect of the With Recourse Invoices;
>
> …
>
> C) Together, the above-referenced amounts collectively due … is USD 43,877,255.79 (such sum, the "With Recourse Obligations");
>
> …
>
> [The Factor] and [the defendant] agree on the following:
>
> 1) Notwithstanding that the relevant Financing Agreements have not been formally terminated and a Date of Determination established pursuant to Section 2.10 of the Participation Agreement, [the defendant] acknowledges and agrees that the total amount of the With Recourse obligations is as set forth above, and agrees to pay to [the Factor] the amount of USD 43,877,255.79 in immediately available funds on or before April 17, 2015.
>
> [emphasis added]

145 The plaintiff does not dispute that the defendant paid the sum of US$28.48m to the Factor. But the plaintiff argues that the effect of the Buy Back Agreement was not to assign the unpaid debt back to the defendant.[108] In the alternative, even if the unpaid debt was assigned back to the defendant, the plaintiff argues that this was at best an equitable assignment and not a legal assignment.[109] An equitable assignee may not commence proceedings against an obligor without joining the assignor, in this case the Factor. The defendant

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108 Plaintiff's written submissions, paragraph 51.

109 Plaintiff's written submissions, paragraphs 52 to 59.

therefore had no right to commence the arbitration and to obtain an award in its sole name in relation to this debt.[110]

(1) Effect of the Buy Back Agreement

146 The plaintiff's first argument turns on the construction of the Buy Back Agreement. It argues that, even after the defendant paid US$28.48m to the Factor in April 2015 for the plaintiff's unpaid debt, the plaintiff's obligation to pay that debt was still owed to the Factor and not to the defendant.[111]

147 The plaintiff points out that cl 1 of the Buy Back Agreement expressly acknowledges that the "financing agreements" between the Factor and the defendant's distributors, such as the plaintiff, had not been formally terminated. These financing agreements include the Gold Plan Agreement. That agreement expressly obliged the plaintiff to settle those debts *only* by payment to the Factor (see [26] above). That obligation therefore continued to bind the plaintiff despite the Buy Back Agreement.

148 The plaintiff also relies on cl 3 of the Buy Back Agreement:

> 3) The parties agree that *[the Factor] will continue to collect payments* (if any) from or on behalf of … [the plaintiff] … and that [the Factor] will remit to [the defendant] any such monies received within 3 business days. [emphasis added]

149 The plaintiff submits that, because the Buy Back Agreement expressly preserved the plaintiff's obligation to pay the unpaid debt to the Factor under the Gold Plan Agreement, it could not have been intended to assign that debt back to the defendant. The plaintiff's case is that the defendant and the Factor,

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110 Plaintiff's written submissions, paragraph 64.

111 Plaintiff's written submissions, paragraphs 51.4.1 and 51.6.

by entering into the Buy Back Agreement, merely set up an arrangement under which the defendant paid the plaintiff's unpaid debt to the Factor in advance, thereby relieving the Factor of the credit risk. In consideration of that, the Factor undertook to continue to collect payments referable to that debt directly from the plaintiff and to remit them to the defendant, as and when collected.[112]

150 It is true that, unlike earlier agreements concluded by the parties, the Buy Back Agreement does not use the language of assignment or of a transfer of rights. The defendant contends that there was no need for the Buy Back Agreement to do so, because it must be read in light of cl 4.3.1 of the Participation Agreement. That clause expressly obliged the defendant to repurchase unpaid invoices from the Factor.[113]

151 The preamble to the Buy Back Agreement supports the defendant's contention about the relationship between the two agreements:

> This agreement ("Agreement") is executed between [the Factor] and [the defendant] and *amends for the purpose of this Agreement the existing [Participation Agreement]* … between [the Factor] and [the defendant] …. Capitalized terms used and not defined herein shall have the meanings set forth in the Participation Agreement. [emphasis added]

152 Clause 4.3 of the Participation Agreement sets out the defendant's repurchase obligation. Crucially, it states that upon repurchase, the Factor will transfer all rights to the unpaid debt and "all Associated Rights" back to the defendant. The exact terms of cl 4.3 are important to the defendant's case, and I set them out here:

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112 Certified Transcript, 28 June 2018, page 21, lines 5 to 15; page 25, line 13 to page 26, line 8.

113 Defendant's written submissions, paragraphs 151 and 191.

> **4.3.1 Repurchase Obligation** [The defendant] agrees to purchase and [the Factor] agrees to sell at the Repurchase Price all or any part of [an Invoice of the defendant's] not paid by the relevant Remarketer (a) immediately upon demand by [the Factor] when the cause of non payment is due to a breach of any of the [defendant's] representations and warranties, (b) immediately upon notice by [the Factor] if payment has not been received in full by [the Factor] within 180 calendar days of the date of [the defendant's] Invoice for [an Invoice] which is under Dispute between [the defendant] and the Remarketer.
>
> …
>
> **4.3.3 Return of [the defendant's] Rights** Upon payment by [the defendant] to [the Factor] of the Repurchase Price of all [the defendant's] Invoices in respect of which demand has been made under Section 4.3.1 then [the Factor] shall transfer to [the defendant] all its rights to such … Invoices and all Associated Rights which relate solely to such … Invoices. Payment of the Repurchase Price by [the defendant] shall not affect any other right or remedy of [the Factor].

153 The defendant argues that, when it paid the total sum of US$48.88m to the Factor in April 2015, it repurchased from the Factor all of the unpaid debt together with all of the Associated Rights attached to that debt. By operation of cl 4.3.3 of the Participation Agreement, those rights, including the right to arbitrate a dispute in relation to that debt, re-vested in the defendant.[114]

154 As for cl 3 of the Buy Back Agreement, the defendant submits that this clause was included simply to set out an administrative process to deal with distributors who might continue the previous practice of paying debts directly to the Factor. If that occurred, cl 3 obliged the Factor to remit the payment to the defendant within three business days.[115]

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114 Defendant's written submissions, paragraphs 191 and 192.

115 DB-A-202, Claimant's Second Memorial dated 3 February 2017, paragraph 4.58.3; Certified Transcript, 29 June 2018, page 25, lines 5 to 18.

155 At the outset, there is a complication with the defendant's argument. Clause 4.3.1 is not a general obligation for the defendant to repurchase unpaid debt from the Factor. Instead, cl 4.3.1 on its face provides that the defendant's repurchase obligation arises only in the two specific situations set out in the clause: (a) if the cause of non-payment is a breach of the defendant's representations and warranties; and (b) if the distributor disputes the debt and fails to pay it within 180 days. There is no suggestion by the defendant that it repurchased the debt under the Buy Back Agreement because either situation (a) or (b) had arisen. To that extent, the repurchase in this case was voluntary rather than obligatory.

156 I nevertheless accept the defendant's submission and reject the plaintiff's on the effect of the Buy Back Agreement. The legal effect of the Buy Back Agreement on the repurchased debt is a question of construing it as a contract. It is well-accepted that our courts apply the contextual approach to contractual construction (*Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [72]). In applying the contextual approach, extrinsic evidence of the circumstances leading to the execution of the Buy Back Agreement is admissible if the evidence is relevant, obvious and reasonably available to both parties (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128]–[129]).

157 The evidence shows that by the end of 2014, the Factor was trying to withdraw entirely from operations in Russia.[116] The defendant therefore had to

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116 DB-A-90, Witness statement of Mr G dated 24 August 2016, paragraph 5.1.

terminate its factoring arrangement with the Factor.[117] A few days before entering into the Buy Back Agreement in April 2015, the Factor emailed the defendant a draft of the Buy Back Agreement together with a list of the invoices that made up the plaintiff's unpaid debt of US$28.48m referred to in Recital (B) of the Buy Back Agreement.[118] In this context and from the perspective of the defendant and the Factor, the contractual purpose of the Buy Back Agreement was to give effect to the Factor's complete withdrawal from operations in Russia. Although the Buy Back Agreement was entered into voluntarily rather than pursuant to an obligation under cl 4.3.1 of the Participation Agreement, the Factor's decision to terminate its Russian business indicates to me an intention to sever entirely any legal link between the Factor and the defendant's distributors. That could be achieved only by a repurchase of the debt in the true sense of the word, *ie* a legal assignment of the debt under which the Factor drops out completely.

158 I therefore do not accept the plaintiff's submission that the defendant's payment to the Factor under the Buy Back Agreement was simply to transfer the credit risk associated with the unpaid debt from the Factor to the defendant, while leaving the Factor the owner of the debt. This would not have made any commercial sense when the Factor's intention was to withdraw from Russian operations entirely.

159 That cl 3 of the Buy Back Agreement states that the Factor "will continue to collect payments (if any) from or on behalf of" the plaintiff is not, in my view, inconsistent with a legal assignment of the debt back to the

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117 DB-A-127, First witness statement of Ms B dated 24 August 2016, paragraph 6.3; DB-A-90, Witness statement of Mr G dated 24 August 2016, paragraph 5.1.

118 DB-A-236, Second Witness Statement of Ms B, paragraph 2.3.

defendant. The key word in cl 3 is "*collect*". By its plain meaning, that word refers simply to the physical act of collecting money. That is reinforced by the words "if any" which follow. If the parties' intention was that the Factor was to collect payments to which it had a continuing legal entitlement, the words "if any" would not appear there. Those words make clear that the purpose of cl 3 is to cater for a contingency: the contingency that the defendant's distributors would continue to make payment to the Factor. Clause 3 is not inconsistent with the intention which I have found to convey ownership of the unpaid debt back to the defendant. That conveyance must, of necessity, have carried with it the associated right to commence arbitration in relation to that debt.

160 Accordingly, on a contextual construction of the Buy Back Agreement and taking into account the circumstances surrounding its execution, I find that it did have the effect of assigning the unpaid debt and the associated right to commence arbitration in respect of that debt back to the defendant.

(2) Form of assignment

161 The plaintiff argues that it was not given notice of the assignment, as required for the assignment to be effective as a legal assignment by s 4(8) of the CLA. The plaintiff's case is that, in the absence of notice, the defendant was merely an equitable assignee of the debts at best. And as an equitable assignee, the defendant had no right to commence arbitration in relation to the debt in its sole name, *ie* without the involvement of the Factor as its assignor.[119]

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119 Certified Transcript, 28 June 2018, page 22, line 11 to page 23, line 19.

162 I deal first with the contention that the assignment back to the defendant was not a legal assignment because of the failure to give notice of assignment. Section 4(8) of the CLA provides:

> Any absolute assignment by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action *of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action*, shall be and be deemed to have been effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed before 23rd July 1909, to pass and transfer the legal right to such debt or chose in action, from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor. [emphasis added]

163 The tribunal found that the defendant did give notice of assignment, at two points. It reasoned, at para 8.37 of the award:

> It also seems plain that [the plaintiff] had notice of the repurchase, from … communication between [the plaintiff] and [the defendant] in June 2015 …, and subsequently as a result of the submissions made during this arbitration. If there was any doubt on the part of [the plaintiff] about the assignment, it has had the opportunity during the arbitration to contact [the Factor], to make inquiries; but it has not done so.

164 The defendant relies on the same reasoning as the tribunal: notice of assignment was given to the plaintiff first in communications in June 2015 and second in the submissions in the arbitration. The defendant also relies on a letter from the Factor to the plaintiff dated 5 May 2017.[120]

165 I turn first to the communications in June 2015. The communications which the tribunal relied on are emails from the defendant to the plaintiff on 18

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120 Defendant's written submissions, paragraphs 195 and 197.

June 2015, urgently seeking the plaintiff's signature on an Acknowledgement of Debt Letter, needed for the defendant to obtain insurance.[121] The first email of 18 June is the more relevant, and I set out relevant paragraphs of the email below:

> As you know we are working closely with [an insurer] now on the insurance claim for [the plaintiff]. According to the procedure we need to send a package of documents to [the insurer] by end of this week which includes Acknowledgement of Debt Letter which should be signed by [the plaintiff].
>
> Please review and check the attached Acknowledgement of Debt Letter (1st file), *all invoices listed in the letter were taken from current AR balances of [the plaintiff]* (3 excel files attached). Please print this Acknowledgment Letter, sign it by responsible person & stamp. …
>
> [emphasis added]

166 There is a second email dated 18 June 2015 from the defendant to the plaintiff, but it is less important for present purposes. It suffices to state that the defendant was chasing the plaintiff to sign and return the Acknowledgment of Debt Letter by the end of the day.

167 The attachments to the first email, on the other hand, are significant. The first attachment, the Acknowledgement of Debt Letter,[122] states that "[b]y signing this Letter, [the plaintiff] ("the Debtor") formally confirms to [the defendant] ("the Creditor") that the Debtor owes the Creditor the amount of 34,232,548.72 at the date of 15th Jun, 2015". Directly below these words, the letter sets out a table of all invoices, and their amounts, that were outstanding from the plaintiff to the defendant as of 15 June 2015. The invoices date from 6

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121 DB-A-128, First witness statement of Ms B dated 24 August 2016, paragraphs 8.1 to 8.3.

122 AB-2319 to 2321, Acknowledgement of Debt Letter.

September 2014 until 23 April 2015. Critically, the invoices that the defendant claims to have repurchased from the Factor are included in the table, and in fact form the vast majority of the invoices listed in the table.

168 The plaintiff argues, however, that this is not sufficient to constitute notice of assignment. It submits that the 18 June 2015 emails are flawed in that they do not explain that the insurance claim arose because of an assignment of the unpaid debt back to the defendant. The plaintiff relies on the English Court of Appeal decision in *Van Lynn Developments v Pelias Construction Co Ltd (formerly Jason Construction Co Ltd)* [1968] 1 QB 607 ("*Van Lynn Developments*"). That decision interprets the statutory requirement for a valid notice of assignment. On the strength of the case, the plaintiff submits that the notice must "make it plain that there has in fact been an assignment".[123]

169 What s 4(8) of the CLA requires for a valid notice of assignment is not in dispute. In the context of a debt, the language used to notify the debtor of the assignment is immaterial if the meaning is plain, and the debtor is given to understand that the debt has been made over by the creditor to a third party: *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2010] 3 SLR 48 ("*Cooperatieve*")[124] (at [94]).

170 In *Van Lynn Developments*,[125] the court considered a letter which omitted to give the date of the assignment and which wrongly stated that notice of assignment had already been given. The court held that the letter was

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123 Plaintiff's written submissions, paragraph 53.1.

124 Plaintiff's bundle of authorities ("PBOA"), Tab 16.

125 PBOA, Tab 40.

nevertheless a valid notice of assignment within the meaning of the English equivalent of s 4(8) of the CLA. The passage in that judgment on which the plaintiff relies must be seen in context (at 613):

> … It is quite plain … that no formal requirements are required for a notice of assignment. It is sufficient if it brings
>
> > "to the notice of the debtor with reasonable certainty the fact that the deed does assign the debt due from the debtor so as to bind the debt in his hands and prevent him from paying the debt to the original creditor."
>
> It seems to me to be unnecessary that it should give the date of the assignment *so long as it makes it plain that there has in fact been an assignment so that the debtor knows to whom he has to pay the debt in future.*
>
> [emphasis added]

171 Far from providing support for the plaintiff's position that a valid notice of assignment must state explicitly that there has in fact been an assignment, *Van Lynn Developments* is consistent with *Cooperatieve* in that it reiterates that there are no strict requirements for the form of a notice of assignment. What is important is not the point of legal form – that there has been an assignment – but the point of commercial substance: that the debtor must know to whom he must pay the debt in the future in order to get a good discharge for the debt.

172 Finally, in *Lanxess Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 2 SLR(R) 769 ("*Lanxess*") at [41],[126] Andrew Ang J held that statements of account sent by an assignee to a debtor setting out the assigned debts was valid notice of assignment under s 4(8) of the CLA:

> The defendant submitted that the statements of account issued between 15 January 2004 and 24 June 2004 did not constitute written notice since they made no mention of the purported assignment but merely reflected a progressive decrease in the

126 PBOA, Tab 27.

> quantum of the debt against payments received … This submission cannot stand in the face of the language of each [*sic*] the statement of account, which clearly asserted a right by the issuer to repayment of the debt from the defendant or the actual buyer. *Each statement of account was an implicit record of the fact of assignment and plainly indicated to the defendant that by virtue of the assignment the plaintiff was entitled to receive the money.* … [emphasis added]

173 The statement of principle in *Lanxess* is directly applicable in the present case. It is immaterial that the email of 18 June 2015 and the Acknowledgement of Debt Letter contain no reference to the fact that the invoices listed in the letter have been assigned by the Factor back to the defendant. The email and the letter are an implicit record of the fact of assignment. It is sufficient for the letter to inform the plaintiff that the debts, identified by invoice numbers, were now owed to the defendant and ought to be paid to the defendant. There is no need for the notice to use the word "assignment". There is no magic in the word.

174 The plaintiff's last point of objection is that its representatives did not sign the Acknowledgement of Debt Letter. In an email to the defendant on 19 June 2015, the plaintiff replied that it needed to "compare all invoices and amounts" and asked for further details "[b]efore signing a balance".[127]

175 This argument is misconceived. Notice of assignment is a unilateral act. It does not require the debtor's consent or acknowledgement to be valid. It matters not that the notice is framed as a letter from the debtor to the assignee. It need merely convey to the debtor the identity of the debtor's new creditor in respect of the debt in question. The defendant gave this notice to the plaintiff on 18 June 2015. "If the debtor ignores such notice, he does so at his peril": *Cooperatieve* at [94].

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127 AB-2327, Email from Mr N dated 19 June 2015 at 10.00pm.

176 In any event, the further details sought by the plaintiff on 19 June 2015 email pertained to compensation for previous year's losses and other rebates. The plaintiff raised no question about the ownership of the debt. I find that the plaintiff had notice, at the latest by 18 June 2015 and by reason of the email of that date and its attachment, that it was to make payment of this debt to the defendant and not to the Factor. The plaintiff's refusal to sign the Acknowledgment of Debt Letter does not detract from this finding.

177 In light of my finding above, it is not necessary to consider whether the submissions in the arbitration, or the Factor's letter of 5 May 2017, constitute valid notice of assignment. It is also not necessary to decide whether the rule that an equitable assignee must join the assignor in a claim is one that goes to the equitable assignee's *right* to arbitrate, or is merely a matter of procedure.

***Points specific to Debt 1B***

178 The plaintiff singles out invoices C3 to C6, which are part of Debt 1B, for special treatment. The plaintiff advances two additional reasons for arguing that the defendant had no cause of action in respect of these four debts when it commenced arbitration on 1 October 2015. First, the plaintiff contends that these debts had already been extinguished before October 2015.[128] Second, the plaintiff contends that the defendant bought these debts back from the Factor only in December 2015, after it had commenced the arbitration.[129]

179 The defendant argues at the outset that the question of whether these debts had been extinguished goes to the merits and is irrelevant on the question

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128 Plaintiff's written submissions, paragraph 67.

129 Plaintiff's written submissions, paragraphs 68 and 69.

whether there was an arbitration agreement between the parties. The tribunal had made a finding that these debts were still due. The plaintiff cannot now challenge this finding.[130]

180 I disagree. A tribunal's determination that it has jurisdiction in a particular arbitration has no legal or evidential value before a court which has to determine the same question: *Astro* at [163]. The court may have regard to the reasoning and findings of the tribunal, if the court considers that they are of assistance, but the court is neither bound nor restricted by them: *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at 813.

181 Insofar as the defendant's right to commence arbitration in relation to a particular debt is a subsidiary procedural right annexed to that debt, the question of whether the debt has been extinguished is a question which goes both to the merits and also to the fundamental question of whether the defendant has the right to commence arbitration in relation to the debt. It is apparent that the sole arbitrator appreciated this point as well. He therefore addressed the question of whether these debts had already been paid in his analysis of the plaintiff's jurisdictional objections.[131]

182 The plaintiff's argument on these four debts is that they have been extinguished by certain credit notes issued by the defendant to the Factor. Having considered the evidence, I reject that argument as being misconceived.

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130 See the Summary Table of Arguments tendered by the defendant on 29 June 2018, Item 4.

131 Final award, paragraphs 8.62 to 8.63.

183 The facts relevant to this limb of the plaintiff's case are set out in a witness statement filed in the arbitration by the credit manager of the defendant's group of companies.[132] In December 2014 and January 2015, the defendant issued 12 credit notes to the Factor, totalling US$2.18m.[133] The defendant issued these credit notes only "to clear invoices that [the Factor] was not able to load into the system".[134] The 12 invoices to be cleared were invoices which the defendant offered to the Factor under the Participation Agreement but which the Factor declined to purchase. These 12 invoices therefore continued to be due from the plaintiff to the defendant directly. The credit notes were the defendant's way of cancelling or withdrawing the offer of these invoices to the Factor.[135] As the defendant explains, the credit notes "were not financed"[136] and were issued only for good accounting practice in the defendant's transactions with the Factor. However, the Factor mistakenly applied the credit notes to reduce the debts which the plaintiff then owed to the Factor under invoices C3 to C6.[137]

184 The Factor's mistake was rectified on 14 January 2015. On that day, the defendant's Senior Financial Operations Specialist informed the Factor that it had applied the credit notes incorrectly and asked the Factor to use the credit

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132 DB-A-239, Second witness statement of Ms B dated 3 February 2017, paragraphs 3.6 to 3.11.

133 AB-5915, Exhibit C218, Email from the Factor to the plaintiff dated 23 December 2014 at 12.30pm; AB-5916, Exhibit C218, Email from the plaintiff to the Factor dated 12 January 2015 at 4.07pm.

134 DB-A-240, Second witness statement of Ms B dated 3 February 2017, paragraph 3.8.

135 DB-A-240, Second witness statement of Ms B dated 3 February 2017, paragraphs 3.8 and 3.11.

136 DB-A-240, Second witness statement of Ms B dated 3 February 2017, paragraph 3.8.

137 DB-A-240, Second witness statement of Ms B dated 3 February 2017, paragraph 3.6; AB-5914 to 5917.

notes to cancel invoices C194 to C205.[138] I pause here to note that the 12 cancelled invoices returned to the defendant as part of Debt A. Their position will be discussed under Debt 1A. These are debit notes C86 to C93, and C96 to C99.

185 On 18 May 2015, the defendant emailed the plaintiff to inform it of the Factor's mistake:[139]

> After reconciliation of account we found out that credit notes issued for the rebilled invoices were used twice:
>
> 1. Used against original invoices (clear the original invoices) ([the defendant's] allocation)
>
> 2. Used against aged invoices with [the Factor]
>
> *At the moment, [the defendant] is missing payment for the original invoices*. Please could you review below and can we discuss the next steps? Thank you
>
> [emphasis added]

186 At this point, *ie* in May 2015, the defendant had not yet bought back invoices C3 to C6 from the Factor. This explains why the defendant said at the time that only the original invoices under Item 1 of the email were due to the defendant.

187 I therefore find that invoices C3 to C6 were not extinguished by the credit notes. The correspondence between the defendant and the Factor shows that the Factor applied the credit notes to write off invoices C3 to C6 in error. The plaintiff was informed of the error in May 2015. Ultimately, the credit notes

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138 AB-5922 to 5924, Email from the defendant to the Factor dated 14 January 2015 at 5.01pm.

139 AB-5928 to 5929, Email from the defendant to the plaintiff dated 18 May 2015 at 3.35pm.

are a matter between the defendant and the Factor. The defendant's evidence is that the credit notes were not financed, and were meant only for good accounting practice to effect a withdrawal of those invoices from the offer to the Factor. These are all matters within the defendant's knowledge alone. In the absence of any evidence to the contrary from the plaintiff, the defendant has discharged its burden of proof on this factual issue on the balance of probabilities.

188 The plaintiff's second contention is that the defendant repurchased invoices C3 to C6 no earlier than December 2015. The cause of action on those invoices therefore vested in the defendant only *after* the defendant commenced the arbitration. The plaintiff argues that, like a writ which is issued before a cause of action has accrued, the defendant's notice of arbitration (at least in respect of these four invoices) is a nullity.[140] To support this proposition, the plaintiff relies on the case of *Internaut Shipping GmbH and anor v Fercometal SARL (The "Elikon")* [2003] 2 Lloyd's Rep 430 ("*Internaut*").[141]

189 *Internaut* is an unusual case and arose out of a dispute over a charter-party. The disponent owner (Internaut) should have been named as the claimant in the arbitration. By mistake, the registered owner (Sphinx) was named as the claimant instead. The court accepted that, on the facts, a valid arbitration had been commenced by the disponent owner, *ie* Internaut. But it noted that in principle, the identity of the actual parties to an arbitration is a matter going to jurisdiction, and that "the further conduct of the arbitration in the name of a claimant who was never in truth a party to the charter-party or to the arbitration agreement [is] a nullity" (at 448).

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140 Plaintiff's written submissions, paragraphs 55 and 56.

141 Plaintiff's supplemental bundle of authorities ("PSBOA"), Tab 8.

190 The plaintiff argues that the Factor is in a position analogous to that of Internaut (the correct party to the arbitration) and the defendant is in a position analogous to that of Sphinx (the wrong party).[142] The plaintiff's argument is misconceived. That case stands for the proposition only that *if* the defendant is found not to have been the true owner of the debts as at the time arbitration was commenced in October 2015, the arbitration must be considered a nullity. But that submission puts the cart before the horse. I must first determine *whether* the defendant had a valid cause of action on invoices C3 to C6 in October 2015.

191 I accept the defendant's submission that it was entitled to commence arbitration in October 2015 even in respect of debts repurchased only later. In *The Jarguh Sawit* [1997] 3 SLR(R) 829, the Court of Appeal drew a distinction between the assignment of an *accrued* chose in action and the assignment of other rights attached to property, such as the right to sue for *future* infringement. The Court made clear that an assignee may amend its pleadings to assert a cause of action that was already in existence when it filed the writ, but which was assigned to the plaintiff only after it filed the writ. As the Court noted, the vesting of such rights in the assignee has *retrospective* effect (at [63]).

192 The Factor's assignment back to the defendant of invoices C3 to C6 in December 2015 was for debts which the plaintiff already owed, first to the defendant and then to the Factor, before October 2015. The cause of action for a failure to pay these debts had already accrued as at the date the arbitration was commenced, *ie* October 2015. Applying *The Jarguh Sarwit*, the plaintiff's complaint about the lack of a valid cause of action is unfounded.

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142 Certified Transcript, 2 July 2018, page 17, lines 6 to 15.

193 Accordingly, I dismiss the plaintiff's jurisdictional objections in respect of invoices C3 to C6.

***Points specific to Debt 2B***

194 The plaintiff's next major challenge to the tribunal's jurisdiction is over Debt 2B, *ie* invoices which the Factor purchased from the defendant but which were also part of the Open Debt arrangement with the Russian Corporation. The plaintiff's argument is simply that its obligation to pay these debts was novated to the Russian Corporation pursuant to the Debt Transfer Agreement, and that this was further reflected in the Open Debt Agreement. Accordingly, the *only* party who can be pursued for non-payment of these invoices is the Russian Corporation and not the plaintiff.[143]

195 The tribunal held that the Debt Transfer Agreement did not effect a true novation of the debts which it covered. Although this agreement transferred the obligation to pay the Open Debt to the Russian Corporation, the tribunal held that under cl 3 of the agreement, the plaintiff retained an obligation to pay the Open Debt if the Russian Corporation failed to do so.[144] As US$7.07m of the Open Debt remained unpaid when the defendant commenced this arbitration, the tribunal accepted that it had a basis on which to assert jurisdiction over the plaintiff in respect of this debt. The plaintiff disputes the tribunal's finding on the issue.

196 The question is whether the Debt Transfer Agreement, on its proper construction, effected a transfer to the Russian Corporation of the plaintiff's

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143 Plaintiff's written submissions, paragraph 71.

144 Final award, paragraph 8.56.

obligation to pay the Open Debt so as to relieve the plaintiff entirely of that obligation. What complicates the question is that the Debt Transfer Agreement is, on its face, internally inconsistent.

197 It is worth setting out the main provisions of the Debt Transfer Agreement:[145]

> 1. [The plaintiff] hereby assigns, conveys, transfers and delivers all of its obligations in and under the Agreement related to payment to [the defendant] of the Open Debt to [the Russian Corporation] effective on a date December 10, 2014 ("Effective Date").
>
> 2. [The Russian Corporation] hereby accepts such assignment and agrees to transfer to [the defendant's] bank account the total amount of Open Debt within 90 banking days starting from the Effective Date.
>
> 3. [The defendant] hereby consents to the assignment and transfer of all such obligations of [the plaintiff] in and under the Agreement to [the Russian Corporation] and *agrees that [the plaintiff] shall be released and discharged from all duties and obligations* in and under the Agreement related to payment to [the defendant] of the Open Debt *on the date when [the defendant] gets full amount of the Open Debt to [the defendant's] bank account as stipulated in section 2 above*.
>
> 4. [The plaintiff], [the Russian Corporation] and [the defendant] hereby agree that *this Debt Transfer Agreement shall constitute a novation of the rights, duties and obligations of [the plaintiff]* in and under the Agreement and accordingly, *all such rights, duties and obligations of [the plaintiff] shall be extinguished and of no force or effect on and after the Effective Date*. [The defendant] acknowledges and agrees that on and after the Effective Date [the Russian Corporation] shall be [the plaintiff's] successor in duties and obligations related to payment to [the defendant] of the Open Debt in and under the Agreement.
>
> [emphasis added]

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145 DB-E-703 to 704, Debt Transfer Agreement.

The "Agreement" referred to in these clauses is defined in the preamble as the Distributor Agreement.

198 Clauses 3 and 4 are the provisions which give rise to the internal inconsistency. Clause 4 expressly constitutes the Debt Transfer Agreement as a novation. It goes on to state in absolute terms that all the rights, duties *and obligations* of the plaintiff under the Distributor Agreement are extinguished from 10 December 2014 with the Russian Corporation succeeding to those rights, duties and obligations immediately. Clause 3, on the other hand, is entirely inconsistent with the extinction of the plaintiff's rights, duties and obligations effected on its face by cl 4. It provides that the plaintiff is released from its obligation to pay the Open Debt only if the Russian Corporation pays the Open Debt in accordance with cl 2, *ie* within 90 banking days of 10 December 2014. While the tribunal gave effect to cl 3, it did not go further to express a view on how cll 3 and 4 may be reconciled.

199 The plaintiff argues that cl 3 is inconsistent not only with cl 4, but also with cl 1. Clause 1 envisages the plaintiff transferring to the Russian Corporation (and thereby being released from) its obligation to pay the Open Debt with immediate effect on 10 December 2014. Clause 3 is inconsistent with that intention insofar as it provides that the plaintiff is to be released from that obligation only when the Russian Corporation pays the Open Debt, which could be up to 90 days *after* 10 December 2014.

200 The plaintiff submits that cl 3 may be rejected because it comes after cl 1 and is wholly inconsistent with its effect, which is to effect an immediate

release of the plaintiff on 10 December 2014.[146] For this submission, the plaintiff relies on a principle of construction which Woo Bih Li JC (as he then was) applied in *AL Stainless Industries Pte Ltd v Wei Sin Construction Pte Ltd* [2001] SGHC 243 ("*AL Stainless Industries*").[147] Woo JC cites Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 2nd Ed, 1997) ("*Lewison (2nd ed)*") at pp 245–246 (at [24]) as authority for the following principle:

> If a clause in a contract is followed by a later clause which destroys the effect of the first clause, the later clause is to be rejected as repugnant and the earlier clause prevails. *If, however, the later clause can be read as qualifying rather than destroying the effect of the earlier clause, then the two are to be read together, and effect given to both.* … Provisions are inconsistent if they cannot sensibly be read together. [emphasis added]

201 The defendant submits, on the other hand, that it is cl 3 which captures the essence of the parties' intent in entering into the Open Debt Agreement. It will be noted that cl 3 transfers to the Russian Corporation the plaintiff's obligation under the Distributor Agreement *to pay the Open Debt*. That is the effect of the words "such obligations" in cl 3, which refers back to cl 1 and the connection established there between the transferred obligations and the Open Debt. The extinction of the plaintiff's obligations under the Distributor Agreement effected by cl 4, on the other hand, is unqualified. Clause 4 provides on its face that *all* of the plaintiff's obligations under the Distributor Agreement will be extinguished, not just its obligation to pay the Open Debt.

202 The defendant submits that this unqualified reading of cl 4 cannot have been the parties' intention. Even assuming that the obligation to pay the Open

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146 Certified Transcript, 28 June 2018, page 41, lines 3 to 6.

147 PBOA, Tab 10.

Debt was transferred to the Russian Corporation immediately, thereby releasing the plaintiff immediately from its obligation to pay the Open Debt, the plaintiff owed other debts under the Distributor Agreement directly to the defendant, *ie* Debt 1A. Clause 4 on its face would have the effect of releasing the plaintiff from liability to pay those debts too. But it could not have been the intent of the parties to use the Debt Transfer agreement to release the plaintiff from even its obligation to pay Debt 1A.

203 The defendant submits, further, that it would be uncommercial for the defendant to agree to release the plaintiff immediately from its obligation to pay the Open Debt upon a third party's mere promise to pay, as cll 1 and 4 appear to do, without retaining for itself some right of recourse against the plaintiff if that payment did not take place. That intent, the defendant submits, is captured in cl 3.

204 I begin by pointing out that the narrow principle of construction cited in *Lewison (2nd ed)* (at [200] above) is expressly stated, in later editions of the author's work, to be *secondary* to the broader principle that a contract must be construed as a coherent whole and every part of it given effect to where possible (see Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 6th ed, 2016) ("*Lewison (6th ed)*") at p 522). The court's duty, when faced with apparently inconsistent contractual terms, is to "do its best to reconcile them if that can conscientiously and fairly be done" (*Société Générale, London Branch v Geys* [2013] 1 All ER 1061 at [24]).

205 In other words, this principle of construction does not assist the plaintiff unless the later clauses of the Debt Transfer Agreement "destroy the effect" of the earlier clauses. In my view, applying the contextual approach to the

construction of contracts, cll 1 to 4 of the agreement can be read together in a way consistent with the intentions of the parties.

206 The circumstances in which the parties entered into the Debt Transfer Agreement are relevant. The defendant's evidence in the arbitration is that from September 2014, the plaintiff began facing severe cash flow issues. From late September to October 2014, the plaintiff, the defendant, and the Factor were in constant correspondence about the plaintiff's unpaid debts.[148] According to the defendant, following this correspondence, the defendant was able to locate a bank in Russia that was able to receive payment from the plaintiff in rubles and pay it out in US dollars.[149] But the bank could receive the rubles only from a Russian company, not from a Hong Kong company like the plaintiff. The plaintiff procured the Russian Corporation's involvement for that purpose. The bank also asked for contractual documentation recording the arrangement involving the Russian Corporation. It was in this context that the parties executed the Debt Transfer Agreement.[150] The plaintiff disputes this factual context, but has offered no competing narrative of the circumstances in late 2014 leading up to the agreement.[151] I accept the defendant's account.

207 Seen in this context, cl 1 is relatively uncontroversial. It provides that the plaintiff transfers its obligation to pay the Open Debt to the Russian Corporation effective 10 December 2014. Both parties accept that cl 1 means what it says. The plaintiff accepts this because its case is that the parties intended

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148 DB-A-116 to 126, First witness statement of Ms B dated 24 August 2016, paragraphs 5.3 to 5.21.

149 DB-H-2403 to 2404, Certified Transcript of the arbitration, pages 30 to 32.

150 DB-H-2403 to 2404, Certified Transcript of the arbitration, page 31.

151 Plaintiff's written submissions, paragraph 74.

to transfer the obligation to pay the Open Debt entirely to the Russian Corporation. The defendant accepts this because this confirmation was necessary for the bank to accept rubles from the Russian Corporation and convert them into US dollars.

208 Clause 2 is also uncontroversial. It simply provides that the Russian Corporation, as the party now obliged to pay the Open Debt, must do so within 90 banking days of 10 December 2014.

209 The contentious cl 3 is next. The plaintiff's submission is that the provision in cl 3 that its obligation to pay the Open Debt is discharged only when the defendant receives full payment from the Russian Corporation is inconsistent with an intention to release the plaintiff from that obligation with immediate effect. I do not agree.

210 The parties entered into the Open Debt Agreement very shortly after the Debt Transfer Agreement. In the Open Debt Agreement, the parties agreed, among other things:[152]

> 7) *In case [the Russian Corporation] fails to pay the amount of Open Debt, then [the plaintiff] agrees to pay [the Factor] immediately upon [the Factor's] instruction to [the plaintiff].* [emphasis added]

Clause 7 of the Open Debt Agreement preserves – even more clearly than cl 3 of the Debt Transfer Agreement – the plaintiff's obligation to pay the Open Debt if the Russian Corporation fails to do so. The only difference between cl 7 of the Open Debt Agreement and cl 3 of the Debt Transfer Agreement is that in the former, the parties make clear that the Russian Corporation is to pay *the*

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152 DB-H-712 to 713, Open Debt Agreement, cl 7.

*Factor*, as a result of the Factor's purchase of the Open Debt from the defendant. The obligation of either the Russian Corporation or the plaintiff to pay the Open Debt is otherwise the same. From this, it appears that the parties did intend for cl 3 of the Debt Transfer Agreement to be an important part of their commercial arrangement, which explains why it is mirrored in cl 7 of the later agreement.

211 How can cl 4 of the Debt Transfer Agreement be reconciled with cl 3? In my view, it is possible to do so if cl 4 is read to mean that the plaintiff's obligation to pay the Open Debt is extinguished with immediate effect and transferred to the Russian Corporation *until the time stipulated for the Russian Corporation to pay the Open Debt under cl 2 of the Debt Transfer Agreement expires*. The plaintiff's obligation to pay the Open Debt would then revive if the Russian Corporation fails to fulfil its obligation under cl 2. I accept the defendant's submission that cl 3 represents the essence of the parties' intention. In my view, the only sensible way to read cll 3 and 4 together is to read cl 3 as qualifying or modifying the effect of cl 4 in this way, though not destroying it entirely.

212 The construction which I have put upon cl 4 is admittedly not one which it bears on its face. Clause 4 provides, without qualification, that "*all* such rights, duties and obligations" shall be extinguished "*on and after*" the Effective Date of 10 December 2014. This provides on its face that the obligation to pay the Open Debt ceases to exist on and after 10 December 2014, with no possibility of revival 90 days thereafter. Although the incongruity in wording is unfortunate, I do not consider this to be fatal to the interpretation of cl 4 that I have adopted (at [211]). It is not unprecedented for the court, upon a true construction of the contract in context, to read down words that are unqualified on their face in order to uphold the parties' commercial intent (see *Lewison (6th ed)* at pp 531–532).

213 The Debt Transfer Agreement on its proper construction was not intended to extinguish permanently and for all purposes the plaintiff's obligation to pay the Open Debt. If the Russian Corporation failed to pay the Open Debt, as it did in part, the plaintiff agreed that its obligation to pay the Open Debt which remained outstanding at that time would revive.

214 The plaintiff is therefore the correct respondent in respect of Debt 2B. The tribunal had jurisdiction over this portion of the defendant's claim.

***Debt 1A***

215 I come now to the final category of debt: Debt 1A. This is the portion of the defendant's claim in the arbitration which the plaintiff was always obliged to pay to the defendant directly. Debt 1A encompasses debit notes C86 to C93 and C96 to C106. None of these debit notes are endorsed with the Caution.

216 The plaintiff raises a number of jurisdictional objections with respect to Debt 1A.

217 First, in relation to all the debit notes comprised in Debt 1A, the plaintiff argues these are not proper commercial invoices and were simply debit notes "unilaterally raised" by the defendant to the plaintiff.[153]

218 This argument is without merit. As explained above (at [184]), the defendant issued credit notes to cancel invoices C194 to C205, which were rejected for purchase by the Factor. In their place, the defendant raised debit notes C86 to C93, and C96 to C106. This was made known to the plaintiff in

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153 Plaintiff's written submissions, paragraphs 83 to 84.

the email sent by the defendant on 18 May 2015. The body of the email contained a table listing the invoice reference numbers of all of the cancelled invoices. The invoice reference numbers were tracked to the debit reference numbers of all debit notes raised in their place.[154] Each of the debit notes also contains a "Reference Invoice No." setting out the reference number of the original invoice in respect of which the debit note was issued.[155]

219 The plaintiff's claim that the defendant is trying to impose a debt unilaterally on the plaintiff by the use of these debit notes is therefore wholly misconceived.

220 The plaintiff's second contention is that any debt arising from debit notes C86 to C93 and C106 was extinguished as of December 2014, as reflected in the monthly statements issued by the Factor.[156] This claim is unsubstantiated by the evidence and I reject it. The monthly statement for the month ending 31 December 2014 does not include any of the original invoices corresponding to the above debit notes.[157] The monthly statement for the month ending 31 November 2014, on the other hand, does include the original invoices C194, C196, and C197, corresponding to debit notes C86, C88, and C89.[158] Although these are listed by the Factor as no longer owing, with the reason given as

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154 AB-5928 to 5929, Email from the defendant to the plaintiff dated 18 May 2015 at 3.35pm.

155 AB-4820 to 4834, and 4886 to 4911, Exhibits C86 to C93, and C96 to C106.

156 Plaintiff's written submissions, paragraph 85.

157 AB-1833 to 1889, the Factor Monthly Statement of Account for Month Ending 31 December 2014.

158 See DB-A-242 to 243, Second witness statement of Ms B dated 3 February 2017, paragraph 4.4.1; AB-1821 to 1822, the Factor Monthly Statement of Account for Month Ending 30 November 2014, pages 44 to 45.

"Volume Removal", the defendant has explained – and I accept – that the Factor did so only to remove the invoices from its accounts because the Factor declined to purchase these invoices.[159] I reject the plaintiff's submission that the Factor's monthly statements shows the debt as having been paid.

221 Third, the plaintiff claims that debit notes C100 to C105 are debts owed by another company and not the plaintiff. Debit notes C100 to C105 make reference to certain credit notes marked C225 to C230, which are stated to be sold to the other company. The defendant explains that these products were originally ordered by the other company. But for various reasons, the goods were not ultimately sold to that company.[160] The defendant delivered these products to the plaintiff instead.

222 Importantly, in an email chain from 18 to 19 March 2015, the defendant confirmed to the plaintiff that the plaintiff's orders placed on 18 March 2015 had been processed and attached invoices relating to the orders. Among the invoices were debit notes C100 to C105.[161] The plaintiff then asked for an explanation of these invoices. The defendant replied:

> This is a shipment from the end of December that we haven't physically shipped yet.
>
> *So now we're re-invoicing, and soon they will ship to your address.*
>
> [emphasis added]

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159 DB-A-242 to 243, Second witness statement of Ms B dated 3 February 2017, paragraph 4.4.1.

160 DB-A-244 to 246, Second witness statement of Ms B dated 3 February 2017, paragraphs 4.12 to 4.15.

161 AB-6096 to 6097, Email from the defendant to the plaintiff dated 18 March 2015 at 10.06pm.

223 It is clear from the email that the debit notes were for orders placed by the plaintiff. I therefore accept the defendant's explanation and reject the plaintiff's submission that it is not liable in respect of debit notes C100 to C105.

***Two final points on jurisdiction***

224 The plaintiff raises two final points as to the existence and validity of an arbitration agreement with the defendant. As these points do not arise from the assignments or novations which I have already dealt with, I deal with both points briefly here.

*Separate and distinct contracts of sale*

225 The first point which the plaintiff takes is that separate and distinct contracts for sale arose every time the plaintiff ordered products from the defendant and the defendant invoiced the plaintiff for those products. On that basis, the plaintiff argues that the defendant's claims on these invoices are not governed by the terms of the Distributor Agreement even if the Distributor Agreement continued to have contractual force after 24 December 2012.[162] At its heart, the plaintiff's objection is that these individual contracts of sale do not incorporate the arbitration agreement in cl 25.9 of the Distributor Agreement.

226 As the plaintiff acknowledges, every invoice or debit note issued by the defendant to the plaintiff upon an order being made contains a line which states that the invoice or debit note is:[163]

> issued as a result of [the defendant's] CUSTOMER AGREEMENT or the equivalent agreement between us …

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162 Plaintiff's written submissions, paragraphs 100 to 103.

163 Plaintiff's written submissions, paragraph 102; DB-A-229, Second witness statement of Mr A dated 3 February 2017, paragraph 3.2.

227 The plaintiff submits that the phrase "Customer Agreement" in the invoices does not refer to the Distributor Agreement. The plaintiff exhibits instead a standard form agreement bearing the title "Customer Agreement" which it contends the defendant used in 2013.[164] This Customer Agreement contains, at cl 5.7, a dispute resolution clause which provides for the Hong Kong courts to have exclusive jurisdiction. In the alternative, the plaintiff submits that the defendant's online "Terms of Use" govern the individual contracts of sale, even if the Customer Agreement does not.[165]

228 The defendant's submission is that the Distributor Agreement *is* the "Customer Agreement" or the "equivalent agreement" referred to in each invoice.[166]

229 I accept the defendant's submission and reject the plaintiff's submission. The plaintiff's submission implicitly accepts that each individual sale, as reflected by the accompanying invoice, is not self-contained but must draw from another source more granular terms relating to payment, risk and other details. Its contention is simply that that source is not the Distributor Agreement. I disagree.

230 Comparing the terms of the defendant's standard form Customer Agreement exhibited by the plaintiff with the terms of the Distributor Agreement, it is apparent that they govern the same matters between the parties in respect of payment, warranties, indemnification, assignment and the like. It

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164 AB-2521 to 2533, Customer Agreement – Offshore Hong Kong.

165 Plaintiff's written submissions, paragraph 105.

166 DB-A-229, Second witness statement of Mr A dated 3 February 2017, paragraphs 3.1 and 3.2.

would be absurd if, having gone to the trouble of novating the Distributor Agreement to the defendant, the parties then intended for another standard form contract – containing matters already covered in the Distributor Agreement – to govern the individual contracts of sale. Indeed, that the many contracts in this case which effect the assignment or novation of specific debts refer repeatedly to the *Distributor Agreement* as the source of those debts shows that there was no doubt in the parties' minds as to which was the source of the more granular terms governing the invoices being transferred.

231 I accordingly reject the plaintiff's argument that the individual contracts of sale represented by the invoices do not incorporate the Distributor Agreement.

*Arbitration agreement conflicts with jurisdiction clause*

232 Finally, the plaintiff contends that the arbitration agreement in cl 25.9 is unworkable because it conflicts with cl 25.8 of the Distributor Agreement.[167] The two clauses, so far as relevant, read as follows:

> **25.8 Governing Law, Jurisdiction and Venue**. This Agreement shall be governed by and interpreted in accordance with the laws of Singapore, except for its rules regarding conflict of laws. *The jurisdiction and venue for any legal action between the parties hereto arising out of or connected with this Agreement, or the Services and Products furnished hereunder, shall be in a court located in Singapore.* …
>
> **25.9 Disputes.** Disputes arising out of or in connection with this Agreement shall be finally settled by arbitration which shall be held in Singapore in accordance with the Arbitration Rules of Singapore International Arbitration Center ("SIAC Rules") then in effect. …

167 Plaintiff's written submissions, paragraph 108.

233 The plaintiff submits that cll 25.8 and 25.9, read together, give rise to an irreconcilable inconsistency. I disagree.

234 The starting point is that where the parties have evinced a clear intention to submit their disputes to arbitration, the court should seek to give effect to this intention as far as possible (see *Insigma Technology v Alstom Technology* [2009] 3 SLR(R) 936 at [31]). Thus, even in cases involving pathological or bare arbitration clauses, so long as the intent to arbitrate is not in doubt, the court strives to give effect to that intention, preferring an interpretation that renders the clause workable over one that does not.

235 The intention of the parties to arbitrate may, arguably, be less clear where the contract contains *both* an arbitration clause and a jurisdiction clause. Even so, a line of first-instance decisions demonstrates that the courts in common law jurisdictions have sought to construe the clauses in such a way as to give effect to both, rather than to disregard entirely one or the other.

236 In *Paul Smith Ltd v H&S International Holding Inc* [1991] 2 Lloyd's Rep 127 ("*Paul Smith*"),[168] the contract provided that: (a) disputes would be determined by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC"); and (b) that the contract would be interpreted according to English law, and "[t]he Courts of England shall have exclusive jurisdiction over it to which jurisdiction the parties hereby submit".

237 The plaintiff contended that the arbitration agreement was invalid by reason of the inconsistency. Rejecting the argument, Steyn J (as he then was) said that it is a "drastic and very unattractive result" to find "the total failure of

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168 Defendant's supplementary bundle of authorities ("DSBOA"), Tab 30.

the agreed method of dispute resolution in an international commercial contract" (at 129). Instead, Steyn J held that the governing law and jurisdiction clause referred, not to disputes over the parties' substantive rights and obligations, but to the arbitration itself, such that the English courts had supervisory jurisdiction over the arbitration (at 130). While acknowledging that this interpretation resulted in some infelicity of language with the jurisdiction clause, Steyn J was of the view that the incongruity is preferable to treating the arbitration clause as *pro non scripto*, *ie* as if it had never been written.

238 The *Paul Smith* approach to the construction of jurisdiction and arbitration clauses which appear in the same contract has been applied in later cases. Distilling the approach more explicitly in *Axa Re v Ace Global Markets Ltd* [2006] Lloyd's Rep IR 683, Gloster J held that:

> … the reference to English jurisdiction operates *in parallel with the arbitration provisions* by fixing the supervisory court of the arbitration, that is to say the curial law or the law governing the arbitration in relation to matters arising in the course of the arbitration, and further fixes the appropriate court for proceedings after arbitration. [emphasis added]

239 In *PT Tri-MG Intra Asia Airlines v Norse Air Charter Limited* [2009] SGHCR 13,[169] which appears to be the only local case so far on this issue, the arbitration agreement provided for disputes to be resolved by ICC arbitration. Another clause in the same contract provided that the governing law of the contract would be Singapore law, and that the parties agreed "for the exclusive benefit of the others" that the Singapore courts would have jurisdiction over any disputes arising from the contract. The assistant registrar, undertaking an

169 DSBOA, Tab 31.

extensive review of the authorities in the field including those I have cited above, applied the *Paul Smith* approach and gave effect to both clauses (at [46]):

> Upon a careful consideration on the suitability and applicability of the case law reviewed thus far, I am inclined to apply the technique of construction in *Paul Smith* … locally and find that the cll 15 [the arbitration agreement] and 22.2 [the jurisdiction agreement] can be reconciled by reading cl 22.2 as a submission to the Singapore court's supervisory jurisdiction over the arbitration.

240 To summarise the approach taken, Robert Merkin QC, in his treatise *Arbitration Law* (Informa, Service Issue No 82, 2019) (at para 5.13) notes:

> … the courts will, where possible, give effect to both clauses so far as possible rather than to say that one overrides the other. Applied to the present context, the approach adopted by the courts is to say that giving effect to the arbitration clause does not deprive the jurisdiction clause of all meaning, in that it remains applicable to enforcement of any award, whereas giving effect to the jurisdiction clause would negative the arbitration clause. The outcome, therefore, is that the courts will generally give priority to the obligation to arbitrate.

241 I adopt the reasoning and the approach in these cases. If the parties have included both an arbitration agreement in cl 25.9 and a jurisdiction clause in cl 25.8, and in the absence of any allegation that either clause is vitiated in some way, I must proceed on the basis that the parties intended for both clauses to have *some* contractual effect.

242 As the authorities acknowledge, the *Paul Smith* approach to construing arbitration and jurisdiction clauses together is not perfect. In particular, in this case, the parties agreed in cl 25.8 that "[t]he jurisdiction and venue for any legal action … *arising out of or connected with this Agreement, or the Services and Products furnished hereunder*" shall be the Singapore courts. On the face of it, this clause envisages that substantive disputes surrounding the Distributor

Agreement, and not only matters of curial review of an arbitration under cl 25.9, will be determined by the Singapore courts.

243 Nonetheless, a dispute over the parties' substantive rights and obligations arising out of or connected with the Distributor Agreement cannot obviously be the subject of *both* litigation and arbitration. The only practical – thought not entirely satisfactory – solution is to adopt the *Paul Smith* approach and hold that the parties intended to resolve substantive disputes in arbitration under cl 25.9 and to resolve disputes arising out of any such arbitration in the Singapore courts in the exercise of their supervisory jurisdiction under cl 25.8.

244 This approach is consistent with the underlying trend in Singapore arbitration jurisprudence that a clear intent to arbitrate disputes manifested in an international commercial contract should, as far as possible, be upheld.

245 Accordingly, I dismiss these final two points which the plaintiff has raised on jurisdiction.

**Alternative ground: composition of the tribunal**

246 The plaintiff also seeks to set aside the award under Art 34(2)(*a*)(iv) of the Model Law, on the basis that the composition of the tribunal was not in accordance with the parties' agreement.

247 The crux of the plaintiff's argument is that the appointment of a sole arbitrator is inconsistent with the parties' agreement in cl 25.9 of the Distributor Agreement to have disputes determined by a three-member tribunal.[170] The

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170 Plaintiff's written submissions, paragraphs 122 and 123.

plaintiff submits that having the parties' dispute determined by a sole arbitrator nominated by only one of the parties conflicts with the implicit understanding between the parties that there must be procedural equality and impartiality in the composition of the tribunal.

248 As the circumstances in which the SIAC constituted the tribunal are relevant to the plaintiff's attempt to set aside the award on this ground, I now summarise those circumstances.

***Circumstances in which the tribunal was constituted***

249 As I have mentioned, the defendant lodged its notice of arbitration with the SIAC in 1 October 2015.[171] On 12 October 2015, the SIAC invited each party to exercise its right to nominate an arbitrator in accordance with cl 25.9 of the Distributor Agreement.[172] In the same letter, the SIAC reminded both parties that their arbitration agreement provided expressly that the consequence of a party's failure to nominate an arbitrator would be that the arbitrator nominated by the other party would be the sole arbitrator:[173]

> We note from the above arbitration clause that *"[i]f one of the parties refuses or otherwise fails to appoint an arbitrator within thirty (30) days of the date the other party appoints its arbitrator, the first appointed arbitrator shall be the sole arbitrator"*. [emphasis in original]

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171 DB-A-1 to 32, Notice of Arbitration filed on 1 October 2015.

172 AB-3477 to 3490, Letter from the SIAC to the plaintiff and defendant dated 12 October 2015, paragraph 10.

173 AB-3477 to 3490, Letter from the SIAC to the plaintiff and defendant dated 12 October 2015, paragraph 11.

250 On 15 October 2015, the plaintiff raised its first plea objecting to jurisdiction under Rules 25.1 and 25.3 of the SIAC Rules (5th Ed, 2013).[174] On the next day, the plaintiff lodged a response to the notice of arbitration asking the SIAC to reject the defendant's claim on the basis of "improper jurisdiction".[175]

251 On 21 October 2015, by a letter to the SIAC copied to the plaintiff's lawyers, the defendant nominated its arbitrator.[176] That letter triggered the thirty-day period stipulated in cl 25.9 for the plaintiff to nominate its arbitrator. The period expired on 20 November 2015 without the plaintiff nominating its arbitrator. Indeed, the plaintiff did nothing until almost three weeks after the period expired, on 9 December 2015. On that day, the plaintiff sent an email to the SIAC repeating its objection to the SIAC's jurisdiction and rejecting the SIAC's request that the plaintiff nominate an arbitrator.[177]

252 On 12 January 2016, the SIAC wrote to the parties informing them that the Registrar of the Court of Arbitration of the SIAC had decided, pursuant to Rule 25.1 of the SIAC Rules, that the SIAC Court would not determine the plaintiff's jurisdictional objection raised both in its objection to jurisdiction and in its response to the notice of arbitration. The SIAC said that it would instead

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174 AB-3493 to 3494, Plea dated 15 October 2015.

175 AB-3523 to 3562, Response to the Notice of Arbitration dated 16 October 2015, p 2.

176 AB-3565 to 3566, Letter from the defendant to the SIAC dated 21 October 2015, paragraph 3.

177 DB-G-2079 to 2080, Email from the plaintiff to the SIAC dated 9 December 2015 at 11.21pm, paragraph 4.

constitute the tribunal and leave it to the tribunal to determine the jurisdictional objection.[178]

253 On 29 January 2016, the SIAC informed both parties that it would now ascertain whether the defendant's nominee would accept appointment as a sole arbitrator.[179] On 22 March 2016, the SIAC informed both the plaintiff and defendant that the defendant's nominee was able and willing to act as the sole arbitrator in the matter.[180] But the SIAC also informed the parties that the nominee, a senior litigation solicitor practising in an international law firm, had made general disclosure of a connection between his firm and the Factor:

> 4. [The nominee] has also made the following disclosure pursuant to paragraph 2 of the Code of Ethics:
>
> *[My firm] currently works for several … entities [related to the Factor] (not for the [Factor] itself, but I believe that is affiliated to the … entities that [my firm] works for). I am not involved in that work myself.*
>
> ("General Disclosure")
>
> 5. In light of the above, we would be grateful to receive the Parties' comments on [the arbitrator's] … General Disclosure as soon as possible and latest by 28 March 2016.

254 In response, the plaintiff emailed the SIAC Court on 28 March 2016 and 30 March 2016 raising an informal challenge to the defendant's nominee on the basis that his "indirect affiliation to the interests of the Claimant" created a

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178 Final award, paragraph 5.4; DB-G-2081 to 2084, Email from the SIAC to the parties dated 12 January 2016 at 3.36pm, paragraphs 3 and 4.

179 DB-G-2085 to 2086, Email from the SIAC to the parties dated 29 January 2016 at 7.37pm, paragraph 5.

180 DB-G-2094 to 2095, Letter from the SIAC to the parties dated 22 March 2016, paragraph 2.

possibility of a lack of independence.[181] The SIAC did not respond directly to this informal challenge.

255 On 22 April 2016, the SIAC constituted the tribunal. The SIAC wrote to both parties on that day informing them that the tribunal had been constituted with the defendant's nominee as the sole arbitrator.[182] The letter does not address the plaintiff's challenge to the defendant's nominee's appointment on grounds of a possible lack of independence.

256 On 27 April 2016, the plaintiff made a formal "global objection" to the SIAC's jurisdiction.[183] On 28 April 2016, the tribunal wrote to the parties on various procedural matters, including arrangements for a preliminary meeting.[184] The plaintiff replied on the same day, stating that it was "not ready to participate in any legal proceedings".[185] On 29 April 2016, the tribunal invited the plaintiff to reconsider attending the preliminary meeting.[186] The plaintiff reiterated its refusal to attend.

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181 DB-G-2098 to 2099, Email from the plaintiff to the SIAC dated 28 March 2016 at 9.58pm; DB-G-2102, Email from the plaintiff to the SIAC dated 30 March 2016 at 3.45pm.

182 DB-G-2105, Letter from the SIAC to the parties dated 22 April 2016.

183 DB-G-2112 to 2113, Email from the plaintiff to the SIAC and the defendant dated 27 April 2016 at 6.07pm.

184 DB-G-2121 to 2126, Letter from the sole arbitrator to the parties dated 28 April 2016.

185 DB-G-2130, Email from the plaintiff to the sole arbitrator dated 28 April 2016 at 11.14pm.

186 DB-G-2127, Email from the sole arbitrator to the plaintiff dated 29 April 2016 at 9.05pm.

257 On 24 August 2016, the defendant served its first claimant's memorial. In it, the defendant rejected the plaintiff's objection to jurisdiction.[187]

258 By 22 September 2016, the SIAC had not responded to the plaintiff's informal challenge of March 2016 on grounds of lack of independence or its formal challenge of April 2016 on grounds of lack of jurisdiction.[188] On 22 September 2016, the plaintiff reiterated both its earlier challenges and took the position that "the intent of the agreed nomination procedure is not being followed in this arbitration." The plaintiff asked that the SIAC to "put a stop to the current arbitration and *... let the plaintiff nominate and appoint a co-arbitrator*" [emphasis added].

259 In the same letter, the plaintiff sets out four legal bases for its request. First, Article 11(5) of the Model Law obliges the SIAC to "have due regard to … such considerations as are likely to secure an independent and impartial arbitrator". Second, Article 18 of the Model Law requires that "parties shall be treated with equality". Third, the plaintiff pointed out to the SIAC that it should allow the plaintiff to nominate its arbitrator out of time because the 30-day period for one party to exercise its right to appoint an arbitrator under cl 25.9 is not of the essence. For this proposition, the plaintiff relied on five cases decided by the US federal courts. Finally, the plaintiff made the point that the appointment of a sole arbitrator was inconsistent with the parties' intention manifested in their arbitration agreement to have their disputes heard by a three-member tribunal. The plaintiff's position was that the SIAC should have the

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187 DB-A-33 to 79, Claimant's First Memorial dated 24 August 2016, paragraph 35.

188 Plaintiff's written submissions, paragraph 117.1; DB-G-2186 to 2191, Letter from the plaintiff to the President of the SIAC dated 22 September 2016.

plaintiff's challenges determined by a three-member tribunal and that it would participate in the arbitration to vindicate its challenges as a preliminary point.[189]

260 In its written submissions, the plaintiff claims that it nominated its arbitrator – one Mr C, an advocate and solicitor of the Singapore bar – on 23 September 2016.[190] However, there appears to be no evidence of this save for a general statement in the plaintiff's letter of 22 September 2016 asking for its "arbitrator candidate to be nominated", without specifying a name. The plaintiff has not provided any further evidence of such nomination, nor was Mr C's name mentioned in any correspondence from the plaintiff to either the defendant or the SIAC which is in evidence in this application.

261 On 27 September 2016, the plaintiff wrote to the SIAC copying both the defendant and its lawyers stating that:

> 2. We wish to clarify that we made the challenge to the arbitrator in our email of 28.3.2016, as followed up on 27.4.2016. We also mentioned this at paragraphs 14 and 16 of our letter of 22.9.2016. We take it that Articles 11.1 and 12.1 of the SIAC 2013 Rules as well as Articles 11 and 18 of the UNCITRAL Model Law are all applicable to our challenge.
>
> 3. Once again, we repeat respectfully that SIAC has not yet ruled on either the Respondent's objection made long ago on 28.3.2016 and 27.4.2016 or on the other points made in our letter of 22.9.2016. However, the Arbitrator has said (on 26.9.2016) that he intends to continue with the arbitration. If the Respondent's objections are valid and correct, we are concerned that proceeding with the arbitration may only make any mistake or error worse and increase the prejudice to us.

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189 DB-G-2186 to 2191, Letter from the plaintiff to the President of the SIAC dated 22 September 2016, paragraphs 11 and 16.

190 Plaintiff's written submissions, paragraph 117.1.

262 On 27 September 2016, the SIAC responded to the plaintiff's letter, noting that the plaintiff was "making a Notice of Challenge pursuant to Rule 12.1 of the SIAC Rules, 2013".[191]

263 On 14 November 2016, the plaintiff filed its first respondent's memorial in the arbitration.[192]

264 On 19 December 2016, the SIAC wrote to the parties acknowledging that the plaintiff had lodged a notice of challenge to the arbitrator under Rule 12.1 of the SIAC Rules. The letter goes on to state that the SIAC had decided not to suspend the arbitration. Instead, the SIAC called on the parties and the tribunal to provide their comments on the jurisdictional challenge so that the Court of the SIAC could proceed to determine it.[193]

265 On 3 February 2017, the defendant filed its second respondent's memorial in the arbitration. The plaintiff filed its rejoinder to this memorial on 27 February 2017.

266 On 4 May 2017, the SIAC dismissed the plaintiff's challenge to the tribunal.[194] The decision states that the Registrar of the SIAC had considered, among other things, the issues raised by the parties in the chain of correspondence from 28 March 2016 to 10 January 2017.

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191 AB-2474, Email from the SIAC to the parties dated 27 September 2016 at 5.38pm.

192 DB-A-130 to 172, Respondent's First Memorial dated 14 November 2016.

193 DB-G-2227 to 2229, Letter from the SIAC to the parties dated 19 December 2016, paragraphs 3 and 6.

194 AB-3647 to 3649, Decision on Challenge to Sole Arbitrator, paragraph 4.

267 The plaintiff wrote to the SIAC on 5 May 2017, objecting to the SIAC's decision to dismiss its challenge. It also claimed that its right to a fair hearing had been prejudiced by various procedural decisions made by the tribunal. It then stated that it would not participate any further in the arbitration.[195] The plaintiff did not participate in the arbitration in any way thereafter.

268 The evidential hearing before the tribunal took place in Singapore on 16 May 2017 and 17 May 2017, in the plaintiff's absence. The tribunal issued its award on 28 July 2017.

***The parties' arguments***

269 The plaintiff accepts that it did not nominate an arbitrator in accordance with cl 25.9 of the Distributor Agreement.[196] But it argues that it ought to have been allowed to nominate an arbitrator out of time because the right to appoint an arbitrator is a fundamental right which, in this arbitration, only the defendant has enjoyed. As a result, the defendant has had its dispute with the plaintiff determined by a tribunal comprised only of its own nominee.

270 The defendant submits in response that the tribunal was constituted entirely in compliance with the parties' arbitration agreement. In cl 25.9, the parties agreed expressly on the procedure to be followed to constitute a tribunal if one party refused or failed to nominate an arbitrator. That procedure was followed precisely. The award cannot be set aside on an alleged defect in the tribunal's constitution when the tribunal was constituted precisely in accordance with the parties' agreed default procedure and when recourse to that default

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195 DB-G-2231 to 2242, Letter from the plaintiff to the SIAC dated 5 May 2017, paragraph 52.

196 Plaintiff's written submissions, paragraph 114.

procedure was necessitated by the plaintiff's own refusal or failure to nominate an arbitrator.[197] In the alternative, even if it is found that the tribunal was indeed not constituted in accordance with the parties' agreement, the court should not set aside the award because the applicant has not suffered any prejudice.[198]

***Tribunal was constituted in accordance with cl 25.9***

271 I begin by considering again the words of cl 25.9. That reveals instantly an express procedure for constituting the tribunal and, in particular, for constituting the tribunal if one party refuses or fails to nominate an arbitrator:

> … *The number of arbitrators shall be three, with each side to the dispute entitled to appoint one arbitrator.* The two arbitrators appointed by the parties shall appoint a third arbitrator who shall act as chairman of the proceedings. Vacancies in the post of chairman shall be filled by the president of the SIAC. Other vacancies shall be filled by the respective nominating party. Proceedings shall continue from the stage at the time of vacancy. *If one of the parties refuses or otherwise fails to appoint an arbitrator within thirty (30) days of the date the other party appoints its arbitrator, the first appointed arbitrator shall be the sole arbitrator.* … [emphasis added]

272 The plaintiff's argument fails on the very face of the parties' arbitration agreement. The parties agreed expressly that if one party fails to nominate an arbitrator within the stipulated thirty-day time limit, the first-appointed arbitrator shall be the sole arbitrator. This is exactly how the tribunal in this arbitration was constituted. The defendant nominated its arbitrator on 21 October 2015. The plaintiff did not nominate an arbitrator within the stipulated thirty-day period, *ie* by 20 November 2015. The SIAC constituted the tribunal comprised solely of the defendant's nominated arbitrator on 22 April 2016.

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197 Defendant's written submissions, paragraphs 356 to 357.

198 Defendant's written submissions, paragraph 360.

273 The plaintiff has cited decisions of the US federal courts which have upheld the right of a party to have its nominee on an arbitral tribunal despite that party's failure to nominate an arbitrator within the period stipulated in the parties' arbitration agreement.[199] I do not need to deal with those cases in detail.

274 In *Re Utility Oil Corporation* 10 F Supp 678 (SDNY, 1934),[200] the parties' arbitration agreement provided for the tribunal to comprise three arbitrators. But it also provided that "[s]hould one of the parties neglect or refuse to appoint an Arbitrator within twenty-one days after receipt of request from the other party, the single Arbitrator appointed shall have the right to decide alone". The respondent did not nominate an arbitrator within the stipulated three-week period. The claimant applied to the federal court under s 4 of the Arbitration Act 9 USC (US) (1925) ("USAA") to compel the respondent to submit to arbitration by a tribunal constituted only by the claimant's nominee. The court held that in the absence of *unreasonable* refusal by the respondent to appoint an arbitrator, the parties' agreement for a three-member tribunal should continue to bind the parties.

275 The plaintiff relies on *Utility Oil Corporation* to argue that the parties' express provision in their arbitration agreement for a three-member tribunal should be upheld in this case because the plaintiff did not refuse unreasonably to appoint an arbitrator but was delayed by the SIAC's own failure to acknowledge the plaintiff's informal challenge to the defendant's nominee's appointment on grounds of a potential conflict of interest.

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199 Plaintiff's written submissions, paragraph 114.

200 PBOA, Tab 23.

276 I reject the plaintiff's submission. The decision in *Re Utility Oil Corporation*, and the line of US cases which follow it is of no relevance to an application to set aside an award under Article 34 of the Model Law. These US cases concerned an application for an order to compel a respondent to arbitrate a dispute under s 4 of the USAA. That is, in effect, an application for relief *in the nature of specific performance* of the arbitration agreement. The courts considering those applications were therefore required under the rules of equity to try and reach a "fair and equitable interpretation" of the agreement (*Re Utility Oil Corporation* at 680–681).

277 An application to set aside an award under any of the grounds set out in Art 34 of the Model Law is of a wholly different nature to an application under s 4 of the USAA. An applicant who seeks relief under Article 34 is not asking the court to grant relief in the nature of specific performance of the arbitration agreement. If the criteria underlying one of the grounds for setting aside an award which are set out in Article 34 are established, the application succeeds. Otherwise, the application fails. Whatever may be the position of a court hearing an application under s 4 of the USAA, there is no scope for a court hearing an application under Article 34 of the Model Law to try and reach a "fair and equitable interpretation" of the parties' arbitration agreement.

278 There is also no principle of general application which justifies construing an arbitration agreement in "a fair and equitable" manner in order to determine whether a ground for setting aside an arbitration award under Article 34 has been established. An arbitration agreement is to be construed like any other contract: by applying a contextual interpretation to the words chosen by the parties to ascertain objectively what the parties intended.

279 Further, in *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 ("*Triulzi Cesare*"), Belinda Ang J held that a departure from the parties' agreed procedure is not a ground for setting aside an award if the departure was the result of the applicant's own conduct, failures or strategic choices (at [51]):

> On the other hand, Art 34(2)(*a*)(iv) of the Model Law is *not* engaged if the non-observance of either an agreed procedure (Art 19(1)) or the minimum procedural requirements of Art 18 is *not* due to circumstances attributable to the arbitral tribunal but **is derived from the applicant's own doing**. A helpful commentary that stresses the same point is made in respect of the purpose of Art 18 in the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations, 2012) ("the 2012 Digest") at p 98, para 7:
>
> > … The purpose of article 18 is to protect a party from egregious and injudicious conduct by an arbitral tribunal, and it is **not intended to protect a party from its own failures or strategic choices**.
>
> [emphasis in original in italics; emphasis added in bold]

280 The plaintiff's formal challenge to jurisdiction of the tribunal and its informal challenge to the defendant's nominee on grounds of a lack of independence are not valid contractual reasons for its failure to exercise its right to nominate an arbitrator within the thirty-day period stipulated in cl 25.9. This is a case in which the plaintiff was well aware of the thirty-day period and of the consequences of refusing or failing to nominate an arbitrator within that period. At the very latest, the plaintiff became aware of this when it received the SIAC's letter of 12 October 2015. This is also a case where the plaintiff refused or failed to nominate an arbitrator as a deliberate strategic choice. The plaintiff *declined* to nominate an arbitrator by its email of 9 December 2015. That was its only correspondence after the plaintiff nominated its arbitrator. The plaintiff's main complaints from October 2015 until September 2016 were about the tribunal's lack of jurisdiction and the defendant's nominee's apparent

lack of independence from the defendant (at [251]–[258] above), not about being allowed to appoint an arbitrator out of time. The first time it asked to be allowed to nominate an arbitrator out of time was 22 September 2016. This was a good ten months after the deadline for the plaintiff to nominate an arbitrator had expired on 20 November 2015.

281 Having made a strategic choice not to exercise its right to nominate an arbitrator and having made a strategic choice to abstain from the contractually-stipulated appointment process, the plaintiff cannot now turn around and say that the SIAC or the tribunal should nevertheless have constituted a three-member tribunal. The tribunal was constituted precisely in accordance with the parties' agreement set out in cl 25.9 of the Distributor Agreement. It was constituted in this way because of the plaintiff's own deliberate strategic choices.

282 In the circumstances, the provision in cl 25.9 on the consequences of one party's failure to appoint an arbitrator within the thirty-day period must have effect in accordance with its plain meaning. The composition of the tribunal does not depart from the procedure agreed to by the parties. The plaintiff's attempt to set aside the award under Art 34(2)(*a*)(iv) fails.

283 I will add, as a final point, that the defendant argued that even if there was any breach of the parties' agreement on the composition of the tribunal, the court should exercise its discretion not to set aside the award because there was no prejudice, citing *AQZ v ARA* ([101] *supra*). I have some reservations about whether such discretion is as wide as the defendant submits. In *Triulzi Cesare*, Ang J engaged in a comprehensive survey of the authorities surrounding the court's discretion to set aside an award, and concluded (at [64]):

> Understood in the context of a general discretion, my view is that prejudice is a factor or element relevant to, *rather than* a legal requirement for the application of Art 34(2)(*a*)(iv) of the Model Law. In other words, prejudice is merely a relevant factor that the supervising court considers in deciding whether the breach in question is serious and, thus, whether or not to exercise its discretionary power to set aside the award for the breach. As the Hong Kong Court of Appeal observed in *Grand Pacific* at [105]:
>
> > … How a court may exercise its discretion in any particular case will **depend on the view it takes of *the seriousness of the breach*. Some breaches may be so egregious that an award would be set aside *although the result could not be different*.**
>
> It can be gleaned from this passage that the Hong Kong Court of Appeal recognises that there may be certain instances where the court will nonetheless set aside an award despite the absence of prejudice.
>
> [emphasis in original in italics; emphasis added in bold]

284 I endorse, with respect, the reasoning in these paragraphs. That the plaintiff may not have suffered prejudice from having a sole arbitrator determine the defendant's claim is relevant, but not determinative. Given the importance of party autonomy in arbitration, it would seem that an actual departure from the parties' agreement on the constitution of the tribunal will be taken seriously unless it is clearly of a technical or trifling nature. Nonetheless, as I have found that there was no departure from the agreed procedure in cl 25.9 of the Distributor Agreement, these observations are *obiter*.

**Conclusion**

285 For all the reasons I have set out above, I have dismissed the plaintiff's application with costs.

Vinodh Coomaraswamy
Judge

Khoo Boo Teck Randolph and Liu Chenghan, Aloysius
(Drew & Napier LLC) for the plaintiff;
Toh Chen Han, Chan Yong Neng and Rakesh Nelson
(MPillay) for the defendant.