Car & Cars Pte Ltd v Volkswagen AG and Another
[2009] SGHC 233

Case Number : Suit 960/2008, RA 136/2009

Decision Date : 19 October 2009

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Lok Vi Ming SC, Koh Kia Jeng and Vanessa Yong Shuk Lin (Rodyk & Davidson LLP) for the appellant; Chan Kia Pheng, Ang Keng Ling and Audra Balasingam (KhattarWong) for the second respondent

Parties : Car & Cars Pte Ltd — Volkswagen AG; Volkswagen Group Singapore Pte Ltd

Arbitration

19 October 2009 Judgment reserved.

Andrew Ang J:

Introduction

1 The case before me is an appeal against the decision of assistant registrar Saqib Alam ("the AR") in Summons No 261 of 2009 granting the second respondent's application for an order that all further proceedings in the action brought by the appellant against the second respondent in Suit No 960 of 2008 be stayed in favour of arbitration.

Background

The parties

2 The appellant, Car & Cars Pte Ltd, is a company incorporated in Singapore. Between 1999 and 2004, it was the importer of Volkswagen passenger cars and commercial vehicles pursuant to an agreement made between itself and the first respondent ("the Importer Agreement").

3 The first respondent, which this present appeal does not concern, is a company incorporated in Germany, named Volkswagen Aktiengesellschaft. It is in the business of manufacturing Volkswagen vehicles. The first respondent was not represented at the hearings before me.

4 The second respondent, Volkswagen Group Singapore Pte Ltd, is a company incorporated in Singapore. It is a subsidiary of the first respondent.

The facts

5 The appellant and the first respondent entered into the Importer Agreement in 1999. By that agreement, the appellant was granted the right to import into Singapore, and to distribute, vehicles carrying the Volkswagen marque. These included passenger cars and commercial vehicles. Based on its understanding that the parties would work together on a long-term basis, the appellant made investments to build up the Volkswagen brand in Singapore.

6 However, the respondents later became desirous of importing the Volkswagen vehicles directly on their own. The appellant was initially reluctant to terminate the Importer Agreement but eventually a Memorandum of Understanding ("MOU") was entered into between the appellant and the first

respondent on 2 November 2004. Clause 2 of the MOU provided that "conditional upon the signing of a definitive agreement … the parties [were] prepared to accept the following in principle:"

(a) the second respondent would "officially take over the importer function and responsibilities for Volkswagen passenger cars" by 1 January 2005 and the Importer Agreement would be terminated by 31 December 2004;

(b) the appellant would "remain as the Importer for After-Sales business (service and parts)" and would be "the single VW dealer with effect from 01/01/2005" and "get a standard VW dealer contract (varied as mutually agreed) with agreed sales quota"; and

(c) in the event that the appellant could not "achieve the sales quota agreed jointly at any point in time" due to its own fault or if the appellant lacked "the resources to cope with market demand", the respondents would have the right to appoint other dealers.

In addition, cl 3 of the MOU provided:

> The parties will on good faith and best endeavour basis negotiate and conclude all terms and condition and enter into a definitive agreement in respect hereof within 4 weeks from the date of this Memorandum of Understanding, failing which this Memorandum of Understanding shall expire. Upon expiry, the parties shall be under no obligation to proceed further.

7 The appellant's understanding of the terms of the MOU was that it would give up the Importer Agreement in exchange for sole or exclusive dealership status. However, the latter never came to pass.

8 The MOU expired in due course. Nevertheless, on 9 December 2004, the appellant and the first respondent entered into a formal written agreement that superseded the terms of the MOU ("the 2004 Agreement"). By cl 2 of the 2004 Agreement, the appellant and the first respondent agreed to terminate the Importer Agreement with regard to only the import of Volkswagen passenger cars. The termination took effect on 31 December 2004 and the second respondent became the Singapore importer for Volkswagen passenger cars. By cl 3 of the same 2004 Agreement, the appellant assumed the status of an authorised dealer of Volkswagen passenger cars for the second respondent from 1 January 2005 onwards. The eventual dealership arrangement between the appellant and the second respondent was made partly in writing and partly by conduct. Meanwhile, the appellant also continued to be the importer of Volkswagen commercial vehicles and products other than passenger cars.

9 Despite these adjustments, the relationship between the appellant and the respondents was not to last. By way of a letter dated 16 November 2006, the second respondent purported to give the appellant 12 months' notice of its intention to terminate the dealership agreement. The parties later mutually decided to terminate the dealership before the expiry of the notice period and to terminate, in addition, what was left of the Importer Agreement, ie, with regard to the importing of Volkswagen commercial vehicles and products other than passenger cars. In the terms used by the appellant, there was to be a "clean break" between the appellant and respondents.

10 To facilitate the parting of ways, the parties entered into four written agreements:

(a) an agreement dated 31 January 2007 made between the appellant and the first respondent in respect of the termination of the Importer Agreement ("the Termination of Importer Agreement");

(b) an agreement dated 31 January 2007 made between the appellant and the second respondent in respect of the termination of the Dealership Agreement ("the Termination of Dealership Agreement");

(c) a Sale of Assets and VW Parts Agreement dated 31 January 2007 made between the appellant, Group Exklusiv Pte Ltd ("GEPL"), and the second respondent ("the Sale of Assets and VW Parts Agreement"); and

(d) an assignment of the lease (of certain units at 247 Alexandra Road ("the premises") where the appellant carried on its business) dated 1 February 2007 made between GEPL and the second respondent ("the Assignment of Lease Agreement").

11 For a fuller understanding, it ought to be explained that the appellant is a subsidiary of GEPL, which was party to the Sale of Assets and VW Parts Agreement and the Assignment of Lease Agreement. However, GEPL is not a party to the present dispute. Also, it ought to be mentioned at this point that the appellant regarded these four agreements as a "global settlement", *ie*, one single and indivisible arrangement, whereas the second respondent took the view that the four documents "were intended at law to be, standalone [*sic*] agreements each creating different legal rights and obligations as set out in the respective agreements". I am inclined to agree with the second respondent for reasons which will be explained below (at [44]).

12 By the terms of the Termination of Importer Agreement, the appellant was to receive a payment of $1.2m from the first respondent. Similarly, under the Termination of Dealership Agreement, the second respondent would pay the appellant $800,000. In each agreement, it was agreed that by the payment of the named sum, "neither Party shall have any claim against the other Party for any breach, default, contravention or other non-observance of any nature whatsoever of any term …". Also, both agreements provided that the respective payments were to be made to Volkswagen Financial Services Singapore Pte Ltd ("VFS") to be set off against an outstanding sum owed by the appellant to that entity. The payment of these sums was timed to take place on 1 February 2007.

13 Unfortunately, the respondents did not make the requisite payments on the stipulated date. On 2 February 2007, despite not having been paid, the appellant made its own arrangements to settle the sum it owed to VFS. The second respondent later paid its dues on 6 February 2007. However, the first respondent did not give its cheque for the sum of $1.2m to the appellant until 20 March 2007. By that time, the appellant had elected to treat the failure to pay as repudiatory conduct and, as such, the appellant did not present the cheque for payment.

14 In the main action, namely, Suit No 960 of 2008, the appellant alleges that the failure of the second respondent to pay the $1.2m in a timely fashion constituted a repudiation of not just the Termination of Dealership Agreement but all four agreements. The appellant alleged that its rights against both respondents before the agreements were concluded had been restored as a result of the second respondent's repudiatory conduct. As such, it could once again make claims against both respondents because the terms of the four agreements were no longer effective. Accordingly, the appellant made a claim, *inter alia*, for loss and damages arising from the breach of the Importer Agreement and, in the alternative, loss and damages arising from the breach of an agreement to appoint the appellant as the exclusive or sole dealer of Volkswagen vehicles.

15 Subsequent to the commencement of the suit, the second respondent came before the AR, in Summons No 261 of 2009, seeking a stay of the action brought by the appellant in favour of arbitration. The provision on which the second respondent based its application was contained in cl 6 of the Termination of Dealership Agreement, which reads as follows:

> This agreement herein shall be governed by and its provisions interpreted in accordance with the law of Singapore. Any disputes arising out of or in connection with this agreement herein shall be referred to arbitration in the Singapore International Arbitration Centre in accordance with *the Rules of the Singapore International Arbitration Centre for the time being in force*. [emphasis added]

As already mentioned above, the AR granted the application. He took the position that by the wording of cl 6, the rules of the Singapore International Arbitration Centre ("SIAC") in force at the time of the commencement of the arbitration (*ie*, SIAC Rules (3rd Ed, 2007) ("SIAC Rules 2007") applied to the dispute rather than the rules in force at the time of the conclusion of the agreement (*ie*, the SIAC Domestic Arbitration Rules (2nd Ed, 2002) ("SIAC Domestic Arbitration Rules") or the SIAC Rules (2nd Ed, 1997) ("SIAC Rules 1997"), both of which have since been repealed).

16 Rule 32 of the SIAC Rules 2007 provides:

> Where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the International Arbitration Act …

Accordingly, the AR found that that the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") applied and, by force of that statute, the grant of a stay was mandatory. In addition, the AR found that even if the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") was the applicable statute, a stay ought not to be granted. He found that there was no good reason for him to exercise his discretion to deny the application for a stay because there was no real risk of multiplicity of proceedings and it would be an injustice if the appellant was released from its obligation to comply with the valid arbitration agreement it entered into with the second respondent.

The issues

17 From the submissions of counsel before me, it emerged that the crux of the matter hinged on two related issues:

(a) whether the disputed arbitration clause was governed by the AA or the IAA; and

(b) assuming the clause was governed by the AA, whether judicial discretion should be exercised to deny the application for a stay of proceedings.

I will deal with each issue in turn.

Whether the IAA or the AA is applicable

Significance of the difference between the IAA regime and the AA regime

18 As already mentioned above (at [17]), the starting point of the inquiry is whether the disputed arbitration clause is governed by the AA or the IAA. The significance of this issue lies in the difference in the extent of judicial intervention which is permitted when the court is faced with an application to stay court proceedings in favour of arbitration.

19 Section 6 of the IAA provides:

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

In other words, if the agreement is not null and void, inoperative or incapable of being performed, and if the proceedings are in respect of a matter which is the subject of the agreement, the grant of a stay will be mandatory.

20 There has been no suggestion that the agreement is null and void, inoperative or incapable of being performed. Therefore, since the subject of the main dispute (*ie*, the non-payment of the $1.2m and the legal effect thereof) is clearly in respect of a matter falling within the ambit of the Termination of Dealership Agreement, if I find that the IAA applies, I will be obliged to grant the stay of proceedings.

21 By contrast, s 6 of the AA provides:

> **6**. — (1) Where any party to an arbitration agreement institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) *may, if the court is satisfied* that –
>
> (*a*) *there is no sufficient reason* why the matter should not be referred to in accordance with the arbitration agreement; and
>
> (*b*) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration,
>
> *make an order, upon such terms as the court thinks fit, staying the proceedings so far as the proceedings relate to that matter*. [emphasis added]

In other words, the court has the discretion to grant or refuse a stay of proceedings within the ambit of s 6(2) of the AA should that regime apply. If I find that the AA applies, then there is room for me to exercise my discretion whether to refuse or grant the stay.

Interpretation of the phrase "for the time being in force"

22 The parties disputed whether the words "for the time being in force" in cl 6 of the Termination of Dealership Agreement referred to (a) the rules of the SIAC at the time of the conclusion of the contract ("Scenario 1"), or (b) to the rules of the SIAC at the time of the commencement of the arbitration ("Scenario 2").

23 If Scenario 1 is correct, then a further issue that would need to be answered is whether the parties have chosen the SIAC Domestic Arbitration Rules or the SIAC Rules 1997, both of which were in force at the time of the conclusion of the agreement. The use of the SIAC Domestic Arbitration Rules would lead to the AA being the generally applicable statute, whereas applying the SIAC Rules 1997 would lead to the IAA being the operative law.

24 If Scenario 2 is correct, then the SIAC Rules 2007, which replaced both the SIAC Domestic Arbitration Rules and the SIAC Rules 1997, would apply. Rule 32 of the SIAC Rules 2007 provides:

> Where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the International Arbitration Act (Chapter 143A, 2002 Ed, Statutes of the Republic of Singapore) or its modification or re-enactment thereof.

Since cl 6 of the Termination of Dealership Agreement clearly chooses Singapore as the seat of arbitration, if Scenario 2 is correct, the IAA will apply to the dispute and I would be obliged to grant the stay.

25 After considering the submissions made by counsel, I am persuaded that Scenario 2 is correct, *ie*, the rules that are applicable are those in force at the time of the commencement of the arbitration and the SIAC Rules 2007 apply. As a matter of construction, it may be fairly argued that the employment of general phraseology referring to rules "for the time being in force" points to rules that presently cannot be precisely identified. Were the intention to refer to rules existing at the date of the contract, there would not have been need for the general words. The particular set of rules could easily have been identified by name. *A fortiori*, in the present case where there were two sets of rules in force at the date of the contract, a choice between the two would have had to be made if the rules applicable at the date of the contract were applicable.

26 In their recent decision in *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2009] SGCA 45 ("*Navigator Investment Services*"), the Court of Appeal were of the view that (at [34]):

> … *Prima facie*, the rules for the time being (as opposed to the rules applicable at the time the contract was made) are applicable where the contract provides that disputes are to be decided in accordance with the rules of a particular tribunal.

The dictum bolsters my view that the parties meant to refer to the rules in force at the time of the commencement of the arbitration, *ie*, the SIAC Rules 2007. Accordingly, pursuant to r 32, the IAA applies so that I am obliged, as explained earlier, to grant the stay.

27 At least two English cases also support the interpretation that "rules for the time being in force" do not *prima facie* refer to the rules applicable at the time when the contract was made.

28 In the first case of *National Coal Board v Galley* [1958] 1 WLR 16, the defendant entered into a written contract of service in 1949 with the National Coal Board. That document provided, *inter alia*,

that his wages should be (at 19):

> … [R]egulated by such national agreement and the county wages agreement *for the time being in force* and that this contract of service shall be subject to those agreements and to any other agreements relating to or in connexion with or subsidiary to the wages agreement and to statutory provisions *for the time being in force* affecting the same. [emphasis added]

In 1952, the National Association of Colliery Overmen and Deputies and Shotfirers ("NACODS") negotiated an agreement. Dispute arose between the defendant and his employers, pursuant to which an action was brought. One of the issues before the court was whether the defendant was bound by the NACODS agreement. Notwithstanding the fact that the agreement was negotiated in 1952, three years *after* the contract, the court held by the defendant's personal contract, his wages were to be regulated by national agreements for the time being in force, and since the NACODS agreement was a national agreement, the defendant was bound by it (at 23). Pearce LJ, reading the judgment of the court, clearly interpreted the phrase "agreement for the time being in force" to mean the agreement in force at the time the dispute arose and not at the time of the conclusion of the contract.

29 In the second case, *Mayor, &c., of Westminster v The Army and Navy Auxiliary Co-Operative Supply, Limited* [1902] 2 KB 125, the English court encountered a similar problem. Section 45 of the Valuation (Metropolis) Act 1869, provided (at 126, fn 1):

> … 'The valuation list *for the time being in force* shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall for all or any of the purposes in this section mentioned be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein. …' [emphasis added]

The issue at hand, which was whether the respondents were liable to pay the difference between the rateable sum of a valuation made under an old valuation list and a new list despite not being given notice of the change, turned on the question of how the phrase "the valuation list for the time being in force" might be interpreted. Channell J held (at 133):

> … in substance the expression 'the valuation list for the time being in force' means this: after the time when the valuation list is to come into force according to the preceding section, and until the moment when the next valuation list has come into force, the valuation list shall be deemed to have been duly made. …

In other words, the valid valuation list was the one that was in force *at the time of the dispute arising*, just as the NACODS agreement in *National Coal Board v Galley* ([28] supra) was binding as it was validly made and in force at the time that the dispute occurred.

30 I am also fortified in my decision (that the applicable rules are those in force at the time of the commencement of the dispute) by the case of *Black & Veatch Singapore Pte Ltd v Jurong Engineering Ltd* [2004] 4 SLR 19 ("*Black & Veatch*"). At [19], the Court of Appeal approved of the position taken in *Bunge SA v Kruse* [1979] 1 Lloyd's Rep 279 at 286 that there is:

> … a *prima facie* inference that where the rules contained mainly procedural provisions, then the rules in force at the time of commencement of arbitration would be the ones that applied to the arbitration. However, if the rules contained mainly substantive provisions, then those in force as at the date the contract was entered into would apply.

The rationale for making such an inference is explained succinctly in the case of *Peter Cremer v Granaria BV* [1981] 2 Lloyd's Rep 583, which was also cited by the Court of Appeal at [20]. At 592–593, Robert Goff J said:

> Indeed, if one looks at it as a matter of common-sense, I do not think it can be expected that arbitrators in any particular case should have to look at the date of the contract, ascertain the relevant procedure for arbitrations which were in force as at that date and then, regardless of the fact that new procedures, which may or may not be fundamental, may have been introduced and applicable and keing [*sic*: being] applied at the date when the arbitrators were appointed, go back to and apply the old procedure in force as at the date when the contract was made. …

On the basis that there was no suggestion by the appellant that the SIAC Rules contained mainly substantive provisions, the Court of Appeal held that the rules in force at the time of commencement of the arbitration were applicable. It ought to be noted that, in that case, one of the grounds on which the appellant sought to avoid the inference was by arguing that there were substantive differences in the restriction of appeals under the IAA and the AA. However, its submissions were rejected on the basis that the disputed arbitration clause did not refer directly to primary legislation but to the rules promulgated by the SIAC.

31 The facts of the present case are similar to those of *Black & Veatch*. The appellant in the present case argues that there are substantive differences between the IAA and the AA regime and, but for the repeal of the SIAC Domestic Arbitration Rules, the parties would have had their arbitration governed by the AA. Its contention is that this is a substantive change which parties could not have intended. However, the disputed arbitration clause did not refer directly to either the IAA or the AA but to the rules of the SIAC, as was the case in *Black & Veatch*. The rules of the SIAC are clearly procedural in nature, even if they can eventually have substantive impact. They deal with matters such as the appointment of arbitrators, the conduct of proceedings and admissibility of evidence by experts and other witnesses. These are all procedural rather than substantive matters. As such, following the decision of *Black & Veatch*, the rules at the time of the commencement of the arbitration, *ie*, the SIAC Rules 2007 ought to apply. By virtue of r 32 of the SIAC Rules 2007, the statutory regime under the IAA applies.

Applicability of the SIAC Domestic Arbitration Rules and Jurong Engineering v Black & Veatch Singapore Pte Ltd

32 In *Jurong Engineering Ltd v Black & Veatch Singapore Pte Ltd* [2004] 1 SLR 333, the High Court laid down the rule that where parties agree to adopt SIAC's rules generally, the SIAC Domestic Arbitration Rules would apply to domestic cases and the SIAC Rules 1997 would apply to international cases. In reliance on this authority, the appellant argues that since cl 6, which is the arbitration clause, is worded generally and the subject matter of the present dispute is domestic, the SIAC Domestic Arbitration Rules ought to apply and, consequently, the statutory regime under the AA applies.

33 The appellant also argues for the same result based on r 1.1 (b) and (c) of the SIAC Domestic Arbitration Rules. I set out rule 1 below:

> **Rule 1 Scope of Application**
>
> 1.1 These Rules apply to all cases:

(a) where the parties have agreed in writing that their dispute is to be submitted or referred for arbitration under these Rules and where the case is a domestic case; or

(b) where the parties have agreed in writing that their dispute is to be submitted or referred to the Centre for arbitration under rules of the Centre generally and where the case is a domestic case; or

(c) where the parties have agreed in writing that their dispute is to be submitted or referred to the Centre for arbitration without specifying any particular set of rules and where the case is a domestic case.

According to the appellant, the SIAC Domestic Arbitration Rules are applicable, and the AA applies because the present matter falls within the scope of sub-paragraphs 1.1(b) and (c).

34 Both of the above points, however, are premised on the assumption that Scenario 1 is correct, *ie*, it is the rules at the time of the conclusion of the agreement that are relevant and a choice needs to be made between the SIAC Domestic Arbitration Rules and the SIAC Rules 1997. However, in the light of my finding that only the rules at the time of the commencement of the arbitration are applicable, *ie*, the SIAC Rules 2007 (at [25] above), I am unable to accept either point. Schedule 1, Article 1, of the SIAC Rules 2007 makes clear that the SIAC Domestic Arbitration Rules have since been repealed:

Article 1 – Repeal

The Domestic Arbitration Rules of the Singapore International Arbitration Centre, 2nd Edition, 1 September 2002 (SIAC Domestic Arbitration Rules) shall cease to apply to arbitrations administered by the Centre.

35 The SIAC Rules 2007 does make special provision in the form of Schedule 1 for instances where the SIAC Domestic Arbitration Rules have been expressly referred to:

Article 2 – Transitional Provision

1. Where parties have by agreement *expressly referred* to arbitration under the SIAC Domestic Arbitration Rules, the agreement shall be deemed to be a reference to arbitration under these Rules and to this Schedule.

2. Notwithstanding Rule 32 [of the SIAC Rules 2007], the law of the arbitration to which this Schedule applies shall be the Arbitration Act (Chapter 10, 2002 Ed, Statutes of the Republic of Singapore) or its modification or re-enactment thereof. [emphasis added]

However, since the parties have not "expressly referred to arbitration under the SIAC Domestic Arbitration Rules" in cl 6 or anywhere else in the Termination of Dealership Agreement, Schedule 1 cannot aid the appellant and does not change my holding that the IAA applies.

Interaction of s 3 of the AA with Part II of the IAA

36 Counsel for the appellant also reasoned why the AA ought to apply based on the interaction between s 3 of the AA and s 5 of the IAA. For convenience, I set out the two provisions below. Section 3 of the AA reads:

> **Application of this Act**
>
> **3**. This Act shall apply to any arbitration where the place of arbitration is Singapore and where Part II of the International Arbitration Act (Cap. 143A) does not apply to that arbitration.

Section 5 the IAA reads:

> **Application of Part II**
>
> **5**. — (1) This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration.
>
> (2) Notwithstanding Article 1 (3) of the Model Law, an arbitration is international if —
>
> (a) at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore; or
>
> (b) one of the following places is situated outside the State in which the parties have their places of business:
>
> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
>
> (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
>
> (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.
>
> (3) For the purposes of subsection (2) —
>
> (a) if a party has more than one place of business, the place of business shall be that which has the closest relationship to the arbitration agreement;
>
> (b) if a party does not have a place of business, a reference to his place of business shall be construed as a reference to his habitual residence.
>
> (4) Notwithstanding any provision to the contrary in the Arbitration Act (Cap. 10), that Act shall not apply to any arbitration to which this Part applies.

For a fuller understanding of s 5 of the IAA, I also set out Article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration:

Article 1. Scope of application

…

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(iii) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

37 Reading s 5 of the IAA with s 3 of the AA, it may be concluded that the AA will apply where the place of the arbitration, as in the present case, is Singapore, and:

(a) all the parties to the arbitration agreement have their place of business in Singapore;

(b) the place of arbitration is the State in which the parties have their places of business;

(c) the place where a substantial part of the obligations of the commercial relationship is the State in which the parties have their places of business;

(d) the place with which the subject-matter of the dispute is most closely connected is the State in which the parties have their places of business;

(e) the parties have not expressly agreed that the subject-matter of the arbitration agreement relates to more than one country; and

(f) the parties have not agreed in writing that Part II of the IAA, or the UNCITRAL Model Law on International Commercial Arbitration will apply.

38 Counsel for the appellant essentially made the argument that all these factors have been met. I agree with counsel for the appellant with regard to the first five factors. First, the appellant and the second respondent have their respective places of business in Singapore. Second, the place of arbitration, as chosen in cl 6, is also Singapore. Third, the obligations under the Termination of Dealership Agreement were all to be performed in Singapore. Fourth, the subject-matter of the dispute is also most closely connected with Singapore for various reasons, which include the fact that the Termination of Dealership Agreement was concluded in Singapore, the parties are Singaporean entities, the seat of arbitration is in Singapore, and the governing law is Singapore. Fifth, there was

no evidence before me that the parties expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

39 However, while there was no suggestion made that the parties have agreed in writing to apply the UNCITRAL Model Law on International Commercial Arbitration, counsel for the second respondent argued strenuously that by the wording of cl 6 of the Termination of Dealership Agreement, the parties agreed in writing that Part II of the IAA will apply. The crux of the issue is therefore whether by the wording of cl 6 of the Termination of Dealership Agreement the parties agreed in writing that Part II of the IAA will apply.

40 The Court of Appeal was confronted with a similar problem in *Navigator Investment Services* ([26] *supra*). In that case, the arbitration clause read as follows (see [28]):

> Any dispute arising out of or in connection with this Agreement [*ie*, the Distributorship Agreement] will be negotiated in good faith by the Parties with a view to a resolution of such dispute. If the dispute [is] not resolved within thirty (30) days of the date of the dispute first arising, *it shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the [SIAC] for the time being in force. The Arbitration Rules shall be deemed to be incorporated by reference into this Agreement*. [emphasis in original]

The issue before the Court of Appeal was whether the parties had agreed that Part II of the IAA would apply. There was no dispute between the parties in that case that the phrase "for the time being in force" referred to the rules in force at the time of the commencement of the arbitration, *ie*, the SIAC Rules 2007 (see [34]). Accordingly, the appellant argued that the parties, by adopting the SIAC Rules 2007 which provided that the IAA was applicable (pursuant to Rule 32), had thereby opted for the IAA to apply (see [29]). The respondent, on the other hand, argued that the IAA was not applicable because there was no agreement that the IAA or the Model Law was to apply, and the requisite factors set out in s 5(2) of the IAA were also not satisfied (see [30]). The Court of Appeal held that the IAA was the applicable legislation.

41 The decision of the Court of Appeal was based on the holding that s 5(1) of the IAA contemplates not only agreements which expressly state that the IAA is to apply (see [35]), but extends to agreements adopting institutional rules which in turn expressly stipulate that the IAA shall apply (see also *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 at [52]). Therefore, since the SIAC Rules 2007 were "deemed to be incorporated by reference" into the agreement, r 32 operated to make the IAA the governing law.

42 The facts of the case before me bear some similarity to those of *Navigator Investment Services* ([26] *supra*). Like the arbitration clause in that case, cl 6 stipulates that disputes under the Termination of Dealership Agreement will be resolved in accordance with the rules of the SIAC "for the time being in force", *ie*, SIAC Rules 2007. However, there are two distinguishing features that I ought to point out. First, whereas there is a dispute as to the applicable SIAC rules in the present case, in *Navigator Investment Services*, there was agreement that "the Arbitration Rules of the [SIAC] for the time being in force" referred to the SIAC Rules 2007. Second, the arbitration clause in *Navigator Investment Services* expressly provided that "the Arbitration Rules shall be deemed to be incorporated by reference" into that agreement, whereas cl 6 makes no similar mention. Neither of them prevents me from following the Court of Appeal's holding that by adopting the SIAC Rules 2007 the parties agreed in writing that Part II of the IAA should apply. This is because although there was contention between the parties as to the applicable rules, I have decided, for reasons set out in [22] to [31] above, that by adopting the rules "for the time being in force" the parties in this case had

chosen the rules in force at the time of the commencement of the arbitration, *viz*, the SIAC Rules 2007. As for the second distinguishing feature, it makes little difference, once the SIAC Rules 2007 are found to apply, whether one goes on to say that they are deemed incorporated within the agreement.

Relevance of the Sale of Assets and VW Parts Agreement

43 It was also submitted before me, on behalf of the appellant, that the express choice to apply the AA in the Sale of Assets and VW Parts Agreement pointed to the intent of the parties to apply the AA to the Termination of Dealership Agreement. This argument was made on the basis that the two agreements were part of the same "global settlement" that comprised four agreements in all.

44 The appellant's arguments favouring a "global settlement" do have some intuitive appeal. However, the fact remains, that all four agreements had different dispute resolution clauses. As the learned AR pointed out, the parties chose to enter into that global settlement in the form of separate contracts, each with separate and distinct procedures for dispute resolution (*Cars & Cars Pte Ltd v Volkswagen AG* [2009] SGHC at 77 at [75]). For that reason, the dispute resolution clause in the Sale of Assets and VW Parts Agreement is of no assistance to the appellant. If at all, it only serves to highlight that the AA had not been chosen to apply in the Termination of Dealership Agreement.

On the assumption that the AA applies, whether the stay should be granted

45 Having already found that the SIAC Rules 2007 apply and that, pursuant to r 32 thereof, the IAA applies, the learned AR was right to grant the stay. I would add that even if the AA applied, so that it was within his discretion to grant or refuse the stay, he had not incorrectly exercised that discretion.

46 Under s 6 of the AA, the court has the discretion to grant a stay if it is satisfied that (a) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and (b) the applicant remains ready to do all things necessary to the proper conduct of the arbitration.

47 The appellant's main argument against granting a stay of proceedings is that there would be a multiplicity of proceedings and a possibility that the court and the arbitration tribunal would reach inconsistent findings. The appellant's argument was premised on the basis that the appellant and the respondents had entered into a "global settlement", and that the first respondent's failure to pay the $1.2m was a repudiation of all four agreements under the "global settlement" such that the appellant's prior rights against both respondents before entering into the settlement were restored. The appellant's position was that following the default of payment it could initiate claims against both respondents for breach of those prior rights.

48 However, while multiplicity of proceedings is an important factor for refusing a stay of proceedings, it is not a wholly decisive ground. This principle has been reiterated in Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) at 477–478:

> Where the grant of a stay would involve one or all of the parties in the delay and extra expense involved in having the same issues debated in more than one jurisdiction, this is a strong ground – albeit not a decisive ground – for refusing a stay.

49 The question then is, what grounds could justify granting or refusing a stay where there is risk of multiplicity of proceedings. I would venture to suggest that one such ground is that parties should

normally be held to their contractual agreements (see also *Taunton-Collins v Cromie* [1964] 1 WLR 633 at 637). A risk of multiplicity of proceedings alone will not automatically mean that a stay must be granted or denied, especially when parties have by contractual agreement deliberately arranged their dispute resolution procedures in such a fashion that almost inevitably such risks would materialise. Another ground on which a stay could be granted or denied despite the presence of risk of multiplicity of proceedings is when the needs of justice outweigh the risk of multiplicity. Therefore, in *Yee Hong Pte Ltd v Tan Chye Hee Andrew* [2005] 4 SLR 398 at [43], the learned judge stayed proceedings in favour of arbitration despite the risk of multiplicity of proceedings because the judge found that "justice would be best served if the three parties proceeded to determine their respective claims, defences and counterclaims if any".

50 In the present instance, even if the parties had entered into a "global settlement", they had expressly chosen to enter into four separate agreements with significantly different dispute resolution clauses, each worded differently. It can be said that the parties could have foreseen that there would be a risk of multiplicity and inconsistent decisions should disputes arise out of these agreements. Therefore, as in the case of *Bulk Oil (Zug) AG v Trans-Asiatic Oil Ltd SA* [1973] 1 Lloyd's Rep 129 (where the court found that the parties had expressly arranged their affairs in such a fashion despite such risk) the appellant and the second respondent ought to be held to their respective contractual bargains and should proceed to arbitration under the SIAC.

51 I am bolstered in my decision by the Malaysian High Court case of *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd* [2008] 3 MLJ 872 ("*Sunway Damansara*"). In that case, a stay of proceedings was granted in favour of arbitration because the court found that any risk of multiplicity had been brought about by the plaintiff's own actions. The plaintiff was pursuing claims against two parties on two separate agreements in one action and, therefore, the perceived multiplicity was induced by the way the plaintiff had initiated its case.

52 The present case is similar to *Sunway Damansara* in that the risk of multiplicity can be said to have been induced by the way the appellant had chosen to bring its claims. I agree with the analysis of the learned AR at [44]–[47] ([44] *supra*):

44 In my view, the issues that are to be determined in arbitration between the plaintiff and the 2nd defendant are not similar to the issues for trial in the plaintiff's case against the 1st defendant. There is only one alleged repudiation in the present case: the 1st defendant's failure to pay the $1.2 million timeously. Before the court, the issue to be determined is whether the 1st defendant's failure to pay timeously is a repudiation of the Termination of Importer Agreement, and whether this repudiation restores the rights of the plaintiff against the 1st defendant. The issue before the arbitration tribunal will be whether the 1st defendant's alleged repudiation of the Termination of Importer Agreement (if found by the court) restores the rights of the plaintiff against the 2nd defendant. This is a case of two separate causes of action, based on two separate agreements that provided for two different procedures for dispute resolution.

45 The evidence against the 1st defendant at the trial (essentially, evidence of the 1st defendant's repudiatory conduct) is also different from the evidence that is to be adduced against the 2nd defendant at arbitration (presumably, to show the relationship between the 1st defendant and the 2nd defendant, and that the parties had entered into a "global settlement"). For this reason, as there is little overlap between the issues and evidence, I was of the view that there is no prima facie multiplicity of proceedings.

46 The issues to be determined only overlap in relation to the plaintiff's allegation that the parties entered into a "global settlement". Only the arbitration tribunal will rule on this issue. As I have noted above, the arbitration tribunal will not be deciding *whether* the 1st defendant's failure to pay timeously is a repudiation of the Termination of Importer Agreement. The arbitration tribunal will be deciding whether, on the facts, the 1st defendant's failure to pay timeously under the Termination of Importer Agreement restores the plaintiff's rights against the 2nd defendant. Whichever way the tribunal rules on this, I do not see any risk of inconsistent findings, because the fact remains, the arbitration tribunal will only be deciding the issue in relation to the 2nd defendant only. In no way will the arbitration tribunal's decision have a bearing on the plaintiff's rights against the 1st defendant, or on the 1st defendant's culpability, because that matter, which is a part of a separate agreement altogether, will be decided by the courts.

47 The plaintiff has framed its claim in a way that creates an illusion that there will be a multiplicity of proceedings. By choosing to pursue its case against both the 1st defendant and the 2nd defendant as one action, using the umbrella of a "global settlement" to tie the claims together, the plaintiff has moulded its claim in such a manner that having them heard in two different forums gives an *appearance* that there is a multiplicity of proceedings. In fact, there are two separate issues arising from two different agreements. For this reason, the plaintiff cannot now come to court and point to a potential prejudice on its part if the claims are not heard together.

[emphasis in original]

53 In the light of the above considerations, it would be unjust if the appellant was released from the arbitration agreement that it freely entered into with the second respondent.

Conclusion

54 For the reasons above, I dismiss the appeal with costs.