IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 157

Originating Summons No 1238 of 2017

Between

Sinolanka Hotels & Spa (Private) Limited

… Plaintiff

And

Interna Contract SpA

… Defendant

JUDGMENT

[Arbitration] — [Agreement]
[Arbitration] — [Arbitral tribunal] — [Jurisdiction]
[Arbitration] — [Award] — [Recourse against award] — [Setting aside]

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v
Interna Contract SpA

[2018] SGHC 157

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Ang Cheng Hock JC
30 May 2018

6 July 2018 Judgment reserved.

Ang Cheng Hock JC:

Introduction

1 This is an application by the Plaintiff under the provisions of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") for a ruling on the jurisdiction of an arbitral tribunal and or, alternatively, an order that the award issued by the arbitral tribunal be set aside on the basis that it lacked jurisdiction to hear and determine the dispute between the Plaintiff and the Defendant.

The parties

2 The Plaintiff is a fully-owned subsidiary of Canwill Holdings Pvt Ltd ("Canwill").[1] Both the Plaintiff and Canwill are Sri Lankan incorporated

[1] Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at para 6(a).

companies. Canwill's shareholding is owned by the Sri Lanka Insurance Corporation (a state owned insurance company in Sri Lanka), Litro Gas PLC (the largest distributor of LP Gas in Sri Lanka) and the Employees Provident Fund of Sri Lanka.[2]

3 The Plaintiff is the developer of the Grand Hyatt Colombo Project for Hyatt International (Europe Africa Middle East) LLC, which was a project that, at the tender stage, was planned to include the development and construction of a 47-storey high rise hotel that would feature 54 suites, 265 king rooms and 150 twin rooms covering a total floor area of over 1.1 million square feet. This was to be the first Hyatt-branded hotel in Sri Lanka.[3]

4 The Defendant is a company incorporated in Italy. It is a part of a group of companies of which the ultimate parent is Interna Holding SpA, headquartered in Italy. The Defendant is a specialist in furnishing and finishing in turnkey projects in the luxury market, and provides comprehensive and bespoke solutions. The Defendant claims to be a global leader in its field, being one of the top ten to fifteen companies worldwide, with clientele including well-known names such as Louis Vuitton, Cartier, Chanel, Ritz Carlton, Hilton and BMW, to name a few.[4]

Background to the dispute

5 After a tender exercise and a period of negotiations, the Defendant was awarded by the Plaintiff the contract to provide interior fit out and furnishing works for the Grand Hyatt Colombo Project. On 7 January 2015, a document

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2 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at para 6(a).

3 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at para 5.

4 Diego Travan's affidavit (27 Feb 18) at para 12.

titled "Contract Agreement" was signed, together with a document titled "Memorandum of Understanding".[5] In the meantime, even before these two documents were executed, the Defendant had already commenced work on the project, as instructed by the Plaintiff.

6 Not long later, there was a wholesale change in the board of directors of the Plaintiff.[6] Disputes then arose between the parties. The Plaintiff purported to terminate the contract on several grounds, including the ground that the Defendant had failed to furnish a performance guarantee as required for under the contract.[7] By this time, the Defendant had completed a portion of the contracted works and had incurred significant expenditure in relation to such works.

7 On 20 August 2015, the Defendant referred the disputes with the Plaintiff to the International Chamber of Commerce ("ICC") for arbitration.[8] This was in accordance with an arbitration clause in a letter issued by the Plaintiff dated 22 December 2014 titled "Letter of Acceptance", which was one of the documents parties had agreed formed part of the contract between them. The clause in question read: "*All disputes arising out of or in connection with the Contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The arbitration venue shall be in Singapore and arbitration proceedings shall be in English language*" (the "ICC Arbitration Clause").[9]

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5 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at para 22.

6 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at paras 26 and 27.

7 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at para 36.

8 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at para 37.

8 On 17 December 2015, the ICC constituted the three-man arbitral tribunal.[10] As the parties could not agree on the seat of the arbitration, on 24 March 2016, the ICC International Court of Arbitration determined that the seat of the arbitration should be Singapore.[11]

9 At an early stage of the arbitral proceedings, the Plaintiff, who was the respondent in the arbitration, raised objections to the jurisdiction of the tribunal.[12] The argument made by the Plaintiff was that the parties had not agreed to the ICC arbitration clause found in the Letter of Acceptance. Instead, what parties had agreed to was one of the particular conditions which was issued with the tender document. This particular condition was titled: "*Sub Clause 20.6 – Arbitration*" and it read as follows: "*Item (a) of first paragraph of Clause 20.6 is deleted and replaced with: (a) the dispute shall be finally settled as per the Arbitration Act No. 11 of 1995 of Sri Lanka and the place of Arbitration shall be of Colombo*" (the "Sri Lankan Arbitration Clause").[13]

10 In short, the Plaintiff argued that the Sri Lankan Arbitration Clause was the applicable one because the Defendant had made its offer to contract on the basis of that clause and it had been accepted by the Plaintiff when the parties signed the Contract Agreement and Memorandum of Understanding on 7 January 2015. While there had been intervening negotiations between the parties on the possibility of using ICC rules of arbitration and changing the venue of arbitration to Singapore, the parties eventually never agreed to the ICC

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9 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at p 42, cl 9.

10 Diego Travan's affidavit (27 Feb 18) at para 24.

11 Diego Travan's affidavit (27 Feb 18) at para 25.

12 Diego Travan's affidavit (27 Feb 18) at para 27.

13 Diego Travan's affidavit (27 Feb 18) at p 34.

Arbitration Clause contained in the Letter of Acceptance of 22 December 2015. Thus, according to the Plaintiff, the Sri Lankan Arbitration Clause which appeared in the tender package documentation was never "*displaced*" and remained applicable as the contractually agreed clause between the parties.

11 What is not in dispute though is that the tribunal did not make a preliminary ruling on this jurisdictional dispute at any stage of the arbitral proceedings. The Plaintiff had also not requested the tribunal to make such a ruling. Instead, the parties proceeded with the evidential hearing dealing with all issues, which took place over 9 days in two tranches from 7 to 11 November 2016 and 31 January to 3 February 2017.[14]

12 The Plaintiff made submissions on its objections to the tribunal's jurisdiction on both the first and final days of the evidential hearing.[15] Both parties also dealt with the jurisdiction objections in their post-hearing written submissions to the tribunal.

13 On 29 September 2017, the tribunal issued its final award. The award dealt with both the jurisdictional issue and the substantive dispute between the parties which as mentioned earlier involved the question of whether the Defendant had defaulted on its contractual obligations by failing to issue a performance guarantee. The tribunal ruled against the Plaintiff on both jurisdiction and the merits, and awarded the Defendant damages in the sum of €7,432,062.79, plus interest, legal costs and costs of the arbitration.[16]

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14 Diego Travan's affidavit (27 Feb 18) at para 26.

15 Diego Travan's affidavit (27 Feb 18) at para 28.

16 Diego Travan's affidavit (27 Feb 18) at para 31.

The parties' cases

14 By this application, the Plaintiff seeks two distinct remedies. First, that the Court rule, pursuant to s 10 of the IAA read with Art 16(3) of the Model Law, that the tribunal lacked jurisdiction to hear and determine the dispute between the parties. Second, further and or alternatively, that the Court set aside the arbitral award pursuant to s 3 of the IAA read with Art 34(2)(*a*)(i) of the Model Law because the tribunal had founded its jurisdiction on an invalid arbitration agreement. The Plaintiff essentially raised the same arguments and relied on the same facts to substantiate its case for both remedies.

15 Before me, the Plaintiff's point was simply that the operative arbitration agreement between the parties was the Sri Lankan Arbitration Clause found in the particular conditions that came with the tender package, and not the ICC Arbitration Clause. It was argued that the Court should not simply look at the labels which the parties had titled their correspondence, such as the Letter of Acceptance issued by the Plaintiff. Rather, when the correspondence and language used was viewed through a legal prism, one would conclude that there was never any agreement between the parties to arbitrate in Singapore under ICC rules. This was because the Letter of Acceptance was legally a counter-offer by the Plaintiff, which had not been unequivocally accepted by the Defendant. Further, this was an issue that was governed by Sri Lankan law, and the Plaintiff's Sri Lankan law expert, Mr Mohamed Faisz Musthapha ("Mr Musthapha"), had reviewed the correspondence and opined that the parties had never reached an agreement in the terms of the ICC Arbitration Clause.[17]

16 Given that the arbitration had proceeded on the basis of the ICC

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17 Mohamed Faisz Musthapha's affidavit (19 Dec 17) at p 17 para 71(a).

Arbitration Clause, it followed that the tribunal had acted without jurisdiction. The Plaintiff argued that it was thus entitled to a ruling that tribunal did not have jurisdiction, and alternatively, that the award should be set aside on the basis that parties had never agreed to the ICC Arbitration Clause.

17 The Defendant's position was that a plain reading of the terms of the Contract Agreement of 7 January 2015 would make it clear that the Letter of Acceptance was a contractual document, and the terms therein bound the parties. Thus, the tribunal was right in giving effect to the ICC Arbitration Clause found in the Letter of Acceptance. Not only that, when the pre-contractual negotiations leading to the signing of the Contract Agreement was examined, it would make it doubly clear that parties did share a common intent to have any disputes arbitrated under ICC Rules in Singapore. As for Sri Lankan law, the Defendant's law expert, Mr Kanaganayagam Kanag-Isvaran ("Mr Kanag-Isvaran"), came to the opposite conclusion as Mr Musthapha, and opined that the parties had come to an agreement in the terms of the ICC Arbitration Clause.[18]

18 As such, the tribunal proceeded on the basis of an arbitration clause which the parties had agreed to, and the award could not be impeached on the basis that the tribunal acted without jurisdiction. In addition, as for the Plaintiff's prayer for a ruling that the tribunal lacked jurisdiction, the Defendant argued that the Court had no power to make such a ruling under s 10(3) of the IAA or Art 16(3) of the Model Law because the tribunal had not ruled on its jurisdiction as a preliminary question, but as part of its final award.

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[18] Kanaganayagam Kanag-Isvaran's affidavit (7 Mar 18) at p 16 para 6.23.

Issues

19 The primary issue before me was therefore a determination of what was the operative arbitration agreement between the parties – was it the ICC Arbitration Clause or the Sri Lankan Arbitration Clause? The secondary issue was whether the Plaintiff is entitled to the remedies it seeks.

The parties' arbitration agreement

20 I will deal first with the issue of the arbitration agreement between the parties, before dealing with the issue of the remedies sought by the Plaintiff.

21 It was not disputed by the parties that the court's task in these proceedings is to undertake a *de novo* hearing on the issue of the jurisdiction of the arbitral tribunal. This is the standard of review whether in an application for a jurisdictional ruling under Art 16(3) of the Model Law, or an application to set aside an arbitral award on the ground of lack of jurisdiction to hear the dispute under Art 34(2)(*a*) of the Model Law: *Jiangsu Overseas Group Ltd v Concord Energy Pte Ltd* [2016] 4 SLR 1336 ("*Jiangsu Overseas Group*"); *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536; *BCY v BCZ* [2017] 3 SLR 357.

22 Let me first recount the facts leading to the execution of the Contract Agreement of 7 January 2015. The Defendant was invited to tender for the interior fit out and furnishing works for the Grand Hyatt Colombo Project.[19] The Invitation to Tender, with the tender documents enclosed, was sent to the Defendant on 14 July 2014. Prior to this, in 2013, the Plaintiff had engaged the Defendant to do a mock-up guest room and this was successfully completed by

[19] Diego Travan's affidavit (27 Feb 18) at para 13.

the Defendant.[20] Presumably, the Plaintiff was happy with what the Defendant had done, and the Defendant was thus invited to tender for this project.

23 The Plaintiff's Invitation to Tender enclosed the FIDIC Conditions of Contract – General Conditions 1999 Edition ("FIDIC General Conditions") because that was the form of the contract that the successful tenderer would be expected to agree to. The Plaintiff had included certain particular conditions with the FIDIC General Conditions ("Particular Conditions").[21] These Particular Conditions were intended to be amendments and additions to the FIDIC General Conditions.[22] One of these Particular Conditions was an amendment to Sub Clause 20.6 of the FIDIC General Conditions. The Plaintiff had amended this in the manner described at [9] above to provide for arbitration in Colombo under the provisions of the Arbitration Act No. 11 of 1995 of Sri Lanka.[23]

24 On 13 September 2014, the Defendant made its tender submission for the project, pursuant to the Invitation to Tender.[24] Accompanying its tender submission, on that same date, was a letter sent by the Defendant to the Plaintiff setting out a series of contractual questions.[25] These were questions the Defendant had regarding several terms of the proposed form of contract. The Defendant indicated that it wanted to discuss and negotiate the issues raised by the questions after its tender submission. One of the questions raised by the

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20 Defendant's Closing Submissions at para 14.

21 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at para 13.

22 Defendant's Closing Submissions at para 17

23 Diego Travan's affidavit (27 Feb 18) at p 34 and Defendant's Closing Submission at para 21.

24 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at para 11.

25 Diego Travan's affidavit (27 Feb 18) at pp 274-280

Defendant was:[26]

> "20.6
>
> Arbitration, it should be decided which International Chamber of Commerce Rules will be followed (London? Paris?)"

25 Subsequently, there were meetings between the Plaintiff and the Defendant. One such meeting took place on 9 October 2014 in Colombo.[27] The form of the arbitration clause was discussed at this meeting. The minutes of the meeting record the discussion as:[28]

> "[the Defendant] request for arbitration rules and venue was rejected and [the Plaintiff] informed that venue could be Singapore and rules of arbitration to be agreed upon by parties before contract finalization".

26 On 15 October 2014, the Defendant sent the Plaintiff a letter setting out the terms of what it described as its "final offer".[29] While the letter referred to the discussions held during the meeting in Colombo on 9 October 2014, there was no reference to any arbitration clause. This was not unexpected given that it had been discussed at the meeting on 9 October 2014 that the content of the arbitration clause would only be agreed by parties at a later stage before the contractual terms were finalized.

27 In these proceedings, the Plaintiff had initially taken the position that the Defendant's letter of 15 October 2014 included, as an enclosure, amongst other documents, the Particular Conditions that had been part of the Plaintiff's tender

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26 Diego Travan's affidavit (27 Feb 18) at p 280.

27 Defendant's Closing Submissions at para 24.

28 Enclosure to letter from KSCGP (Defendant's solicitors) dated 31 May 2018. Defendant's Bundle of Documents (Vol 2), tab 3 p 15 and Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at p 484

29 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at pp 22-23.

package, including Sub-Clause 20.6.[30] In fact, the Plaintiff's managing director, Don Rajendra Prasad Abeyasinghe ("Mr Abeyasinghe"), exhibited to his affidavit of dated 22 December 2017 the Defendant's letter of 15 October 2014 with a set of enclosures that included the Particular Conditions.[31] The pages setting out the Particular Conditions also bore the initials of the Plaintiff's and the Defendant's representatives. Mr Abeyasinghe's purpose was evidently to emphasise the point that the Defendant had made its offer for the project on the basis of the Sri Lankan Arbitration Clause.

28 This was disputed by the Defendant's Diego Travan in his affidavit in reply dated 25 April 2018.[32] He unequivocally stated that the Defendant's letter of 15 October 2014 did not enclose the Particular Conditions, but instead only a pricing summary for the works to be done.

29 At the hearing, in a surprising turn, counsel for the Plaintiff informed me that he was not taking issue with Mr Travan's account that the Particular Conditions were not in fact enclosed to the Plaintiff's letter of 15 October 2014.[33] Counsel for the Defendant explained that the initials were made on the pages containing the Particulars Conditions when parties eventually signed the Contract Document on 7 January 2015. This was because a complete set of all the contractual documents was initialled by the parties.[34] Counsel for the Plaintiff also did not take issue with this explanation.

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30 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at para 13; Don Rajendra Prasad Abeyasinghe's affidavit (5 Apr 18), para 10(b) to (e).

31 Pp 22, 27 to 34.

32 Diego Travan's affidavit (25 Apr 18) at para 10-13.

33 Transcript of oral arguments, pp 115-116.

34 Transcript of oral arguments, p 157.

30 On 22 December 2014, the Plaintiff issued the Letter of Acceptance to the Defendant.[35] It is pertinent to note that this letter referred to the tender submission of 13 September 2014 and the "*subsequent final negotiated offer*" of 15 October 2014 by the Defendant. It went on to state that the latter was "*accepted*".

31 The letter also set out 10 items or clauses which it stated would form "*part and parcel of the Contract (specimen as per Tender)*". One of these items (clause 9) was the ICC Arbitration Clause, the terms of which have been set out at [7]. The concluding two paragraphs of the letter stated:

> "In addition to the above Clauses 1 – 10, all other Conditions, Particular Conditions & Appendices to Tender in connection with the Contract shall remain valid. Changes, alterations additions or amendments requested by the Contractor during tender negotiation shall have no validity unless expressly agreed upon between Parties.
>
> You are hereby instructed to proceed with the execution of Works in accordance with the Contract documents".

32 The Defendant wrote to the Plaintiff by its letter dated 3 January 2015, expressing its thanks to the Plaintiff "*for the acceptance of our tender and final negotiated offer*", and also confirming that it would proceed with its work on the project.[36] The letter also indicated that the parties would be meeting in Colombo on 6 and 7 January 2015 to discuss certain issues and for the execution of the contract.

33 On that same day, 3 January 2015, the Plaintiff's Chandraguptha Weerakoon emailed the Defendant a soft copy of the draft contract and FIDIC General Conditions, including the Particular Conditions.[37] In the latter, Sub

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35 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at pp 41-42.

36 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at p 43.

Clause 20.6 of the FIDIC General Conditions had been amended to provide for arbitration in accordance with the ICC rules with the arbitration venue stated to be Singapore.[38]

34 On 7 January 2015, in Colombo, parties executed the Contract Agreement.[39] This was a short document, with only 4 clauses. Clause 2 of the Contract Agreement provided in its material parts as follows:

> "The following documents shall be deemed to form and be read and construed as part of this Agreement. For the purposes of interpretation priority of documents shall be in accordance with the following sequence.
>
> (a) Memorandum of Understanding dated 07th January 2015.
>
> (b) The Letter of Acceptance dated 22nd December 2014 and Contractor's letter of acknowledgement dated 3rd January 2015.
>
> …
>
> (d) The Conditions of Contract, General conditions and Particular Conditions…"

35 The Memorandum of Understanding referred to in the Contract Agreement was executed by the parties on that same day.[40] The intent of this document is clear from its recitals which stated:

> "**WHEREAS** the Contractor and the Procurement Committee (PC) of the Employer carried out negotiations on commercial & contractual terms of the Tender submission made by the Contractor on 9th October 2014 and based on the "in principal" understanding between the Parties, the Contractor submitted its final negotiated offer subject to terms & conditions therein on 15th October 2014 for acceptance by the Employer.

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37 Diego Travan's affidavit (27 Feb 18) at pp 282-301.

38 Diego Travan's affidavit (27 Feb 18) at p 298.

39 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at pp 44-45.

40 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at pp 46-49.

> **AND WHEREAS** the Employer having considered the said offer by the Contractor issued a Letter of Acceptance dated 22nd December 2014 accepting the offer made by the Contractor for Tender Package 2 (Guest Rooms, Guest Room Lobbies & Corridors) for a price of Euro 28,869,372.00 subject to the terms of the Contract & such other deviations as agreed between the Parties during the aforesaid negotiations.
>
> **AND WHEREAS** the Parties here to are desirous of entering into this Memorandum of Understanding ("MOU") in order to incorporate any deviations, to amend, delete or add new terms and conditions in the Contract documents".

The Memorandum of Understanding proceeded to then set out 23 numbered paragraphs where the parties agreed to certain terms and also changes to clauses found in the tender document appendices and the Particular Conditions.

36 There was no arbitration clause in the Contract Document or the Memorandum of Understanding. Nor were the Particular Conditions specifically amended to include Sub-Clause 20.6 in the form set out in Mr Weerakoon's email of 3 January 2015.

37 One of the main points of contention between the parties was obviously the effect of the Letter of Acceptance. The Plaintiff submitted that the Letter of Acceptance must not be taken literally as an acceptance of the Defendant's offer to contract. According to the Plaintiff, if one examines the words used in the Letter of Acceptance, it was a proposal by the Plaintiff that the ten numbered clauses be added as terms of the contract or that the terms of the proposed offer by the Defendant be varied by those clauses. According to the Plaintiff, Clause 9 – the ICC Arbitration Clause – was being proposed by the Plaintiff together with the other nine clauses as a package of new terms for the Defendant to accept. In other words, the entire contents of the Letter of Acceptance was legally a counter-offer by the Plaintiff, which had to be accepted or rejected by the Defendant.

38 The Plaintiff submitted that the letter of 3 January 2015 from the Defendant in response was not an acceptance of the Plaintiff's counter-offer, but rather an attempt to continue negotiating certain terms. The Defendant only indicated its acceptance of two of the ten clauses offered by the Plaintiff, that is, the time for completion being 240 days (clause 2 of the Letter of Acceptance) and the performance guarantee (clause 3 of the Letter of Acceptance).[41] That was why further meetings were proposed to be held on 6-7 January 2015 for more negotiations to take place.

39 According to the Plaintiff, that meant that, as at 3 January 2015, Particular Condition Sub Clause 20.6 containing the Sri Lankan Arbitration Clause "*still applied*" and was "*valid and subsisting even at that stage*".

40 As for the documents executed on 7 January 2015, the Plaintiff argued that the parties' intention was that any variations to the tender document conditions were to be all incorporated into the Memorandum of Understanding. The ICC Arbitration Clause was not mentioned in the Memorandum of Understanding and this showed that the clause was never agreed to by the parties. The Plaintiff's proposed clause 9 of the Letter of Acceptance had thus been discarded by the parties. This meant that the Sri Lankan Arbitration Clause continued to apply.

41 With respect, I found the Plaintiff's arguments difficult to follow. The language in the Letter of Acceptance, Contract Document and Memorandum of Understanding, as I have set out above, contradicted the Plaintiff's characterization of the purpose of these documents.

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[41] Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at pp 41.

42 I agree with counsel for the Defendant that the proper starting point in the analysis is the Contract Agreement signed by the parties on 7 January 2015. This document was executed by the parties after the tender process, exchange of letters and negotiations. The terms of the Contract Agreement are plain and unambiguous in stating that the Letter of Acceptance was a part of the agreement between the parties. It did not state that only portions of the Letter of Acceptance were part of the parties' contract. Thus, in my view, there was quite clearly a valid arbitration agreement between the parties to arbitrate using ICC rules in Singapore because the ICC Arbitration Clause was clause 9 of the Letter of Acceptance.

43 Clause 2 of the Contract Agreement also sets out a priority of the contractual documents when it comes to questions of interpretation. I read this to mean that, if there is an inconsistency or conflict between two or more terms set out in the contractual documents, the term found in the contractual document with higher priority will prevail over those found in contractual documents with lower priority. Applying this rule of construction which the parties had agreed to, the ICC Arbitration Clause in the Letter of Acceptance prevailed over the Sri Lankan Arbitration Clause in the Particular Conditions.

44 I cannot accept the contention by the Plaintiff that there was no inconsistency or ambiguity in the contractual documents that would attract the application of the priority rule set out in clause 2 of the Contract Agreement. From the positions taken by the parties, there was clearly a contest between the applicability of two arbitration clauses found in two contractual documents. In my judgment, this was precisely the type of scenario to which the priority rule was intended to apply.

45 I accepted the Defendant's argument that, since there was no arbitration clause in the Memorandum of Understanding, even though it ranked in priority over the Letter of Acceptance, there was nothing in the Memorandum of Understanding that would override the ICC Arbitration Clause found in the Letter of Acceptance.

46 Both counsel also submitted that I should look at the context of the agreement, in the form of the correspondence and pre-contractual negotiations leading to the Contract Agreement of 7 January 2015. I did so and an examination of the relevant context only confirms my view that the parties had agreed to the ICC Arbitration Clause.

47 The conduct of the parties leading up to the Letter of Acceptance left me in little doubt that, during negotiations, the parties had differing views as to what the appropriate arbitration rules and venue should be. There were discussions on the issue in the Colombo meeting on 9 October 2014, but no resolution was reached then. I find that the parties proceeded on the basis that the Defendant should nonetheless proceed with its "final offer", which it did so on 15 October 2014, and that the Plaintiff needed time to consider the Defendant's proposals on the arbitration rules and venue. The minutes of the 9 October 2014 Colombo meeting did note that they would agree on the arbitration rules before the contract was finalised.

48 Then came the Letter of Acceptance that was sent by the Plaintiff to the Defendant on 22 December 2014. I found it difficult to accept the Plaintiff's argument that the Letter of Acceptance was a counter-offer by the Plaintiff. The language used in that document showed that the Plaintiff was quite clearly accepting the offer made by the Defendant in its letter of 15 October 2014,

which the Plaintiff described as the "*final negotiated offer*".

49 It is true that the Plaintiff's "*final negotiated offer*" of 15 October 2014 did not make reference to any arbitration clause, but the minutes of the Colombo meeting on 9 October 2014 did indicate that the parties had discussed the Defendant's wish to have arbitration in accordance with ICC rules and the Plaintiff's indication that it might agree to arbitration being held in Singapore. This showed that both parties had at the very least contemplated that arbitration could be in Singapore. As mentioned earlier, the Plaintiff needed time to consider the matter. I find that the Plaintiff's subsequent inclusion of the ICC Arbitration Clause in the Letter of Acceptance of 22 December 2014 was an acknowledgement of the Defendant's wishes and reflected the acceptance by the Plaintiff that they would be prepared to arbitrate in accordance with the ICC rules in Singapore.

50 If I am wrong that clause 9 of the Letter of Acceptance reflected an arbitration agreement reached by 22 December 2014 for ICC arbitration in Singapore, and I adopt the Plaintiff's analysis that it was counter-offering an arbitration clause requiring ICC arbitration in Singapore, I find that this counter-offer was accepted by the Defendant in its reply letter of 3 January 2015. In this letter, the Defendant thanked the Plaintiff for accepting its offer, and also acknowledged the Plaintiff's instruction to proceed with the contracted works. There is no dispute that the Defendant did commence work accordingly.

51 Alternatively, if the letter of 3 January 2015 was not clear enough to constitute an unequivocal acceptance, I find that the Plaintiff's counter-offer was accepted on 7 January 2015 when the parties executed the Contract Document, which stipulated the Letter of Acceptance to be a contractual

document.

52 Counsel for the Plaintiff placed much store on the Memorandum of Understanding signed on 7 January 2015. But, I found it difficult to accept the Plaintiff's arguments that the Memorandum of Understanding was intended to comprehensively consolidate *all* the changes to the contractual terms into one document and the fact that the Memorandum of Understanding did not include the ICC Arbitration Clause showed that the parties had not agreed to it.

53 I agree with counsel for the Defendant's argument that the purpose of the Memorandum of Understanding was to deal with the contractual issues which remain unresolved as at the time the parties met on 6 and 7 January 2015 to carry out their final negotiations. I think this is made amply clear by the recitals to the Memorandum of Understanding, in particular, the portion which records that the purpose of the document was to "*incorporate any deviations, to amend, delete or add new terms and conditions in the Contract documents*". The fact that the Memorandum of Understanding was listed first in terms of priority of the contractual documents at clause 2 of the Contract Agreement reinforces the point that it was intended to include the very final issues that remained outstanding between the parties.

54 Hence, if it was an issue that had already been agreed earlier, like the ICC Arbitration Clause found in the Letter of Acceptance, there was no need to include it in the Memorandum of Understanding. It continued to remain binding as confirmed by the specific mention of the Letter of Acceptance as a contractual document.

55 I should also add that, if the Plaintiff is right that the Memorandum of

Understanding was intended to exhaustively record all the changes to the FIDIC General Conditions and the Particular Conditions, that would mean that the Letter of Acceptance was no longer a document that the parties should concern themselves with. Yet, if that was the case, there would have been no reason for the Letter of Acceptance to be expressly named by the parties in the Contract Agreement as forming a part of their agreement. The fact that the parties agreed that the Letter of Acceptance was a contractual document shows that its terms were intended to have contractual effect. That in turn meant that the Memorandum of Understanding could not have been an exhaustive record of all the agreed changes to the FIDIC General Conditions and the Particulars Conditions.

Sri Lankan law

56 The parties were in agreement that Sri Lankan law was the proper law of the contract and governed the question of which arbitration clause was applicable. That was the basis upon which the matter proceeded before the arbitral tribunal, with both parties having had Sri Lankan counsel to lead their cases in the arbitration.

57 Before me, while both parties filed two reports each from their respective Sri Lankan law experts, I was not able to discern from their reports any particular principle or statutory provision under Sri Lankan law that would affect my analysis and the conclusions I have reached above. At the hearing, both counsel for the Plaintiff and the Defendant confirmed my view. They were in agreement that the general principles of Sri Lankan law as to the construction of contract terms and the formation of contracts were not materially different from those in English law.[42] In fact, both experts had referred to well-known

English cases on contracts in the course of their reasoning as to whether the parties had indeed reached an agreement on the ICC Arbitration Clause.

58 The disagreement between the experts was whether the Sri Lankan courts would apply purely English law principles when dealing with contracts of a commercial nature. Mr Musthapha, the Plaintiff's expert, was of the view that the law applying to such contracts is the common law of Sri Lanka, *i.e.*, Roman Dutch law, insofar it has been modified based on developments in English law.[43] On the other hand, Mr Kanag-Isvaran, the Defendant's expert, was of the view that it is the settled law of Sri Lanka that the legal principles governing the interpretation of contracts of commercial nature are the principles of English law.[44] I do not think that this distinction was particularly material in the context of this case because, as pointed above, both experts proceeded to analyse the issue of which was the applicable arbitration agreement using familiar principles of English law. I was fortified in this view by the Plaintiff's counsel's submission at the hearing, to which the Defendant's counsel did not disagree, that this Court can decide the disputed issue by applying principles of English and Singapore contract law.[45]

59 Applying such principles, and for the reasons set out above, I find that the parties had agreed to the ICC Arbitration Clause found at clause 9 of the Letter of Acceptance. It follows that the tribunal did have jurisdiction to hear and determine the substantive dispute between the parties.

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42 Transcript of oral arguments, pp 133, 134, 154, 167, 169-170.

43 Musthapha's affidavit (5 Apr 18), p 5, para 12.

44 Kanag-Isvaran's affidavit (7 Mar 18), p 12, para 5.20

45 Transcript of oral arguments, pp 134.

The Plaintiff's reliance on new evidence

60 Since the nature of the court's review of the issue of jurisdiction of the arbitral tribunal was by way of a *de novo* hearing, it was permissible for parties to adduce fresh evidence for the court's consideration. However, the court has the discretion to decide on the admissibility of or attach the appropriate weight to such evidence: *Jiangsu Overseas Group* ([21] *supra*) at [53].

61 In the proceedings before me, the Plaintiff relied on a number of new documents in an attempt to shore up its arguments on jurisdiction. These documents were new in the sense that they had not been put in evidence before the arbitral tribunal, although some of them were available at the time of the arbitration hearings. The Defendant strongly objected to these documents, describing them as irrelevant and a blatant attempt to baselessly tar the Defendant in the eyes of the court. I deal with these documents below.

(i) Plaintiff's board minutes of 16 December 2014

62 The Plaintiff relied on the minutes of a board meeting of the Plaintiff held on 16 December 2014[46] and the draft minutes of that meeting (described by the Plaintiff as a "Board Paper"),[47] which it claimed was only found after the arbitration hearing. The Plaintiff pointed out that these minutes stated that the Plaintiff's board of directors had advised the then managing director, Mr Piyadasa Kudabalage ("Mr Kudabalage"), to award the tender to the Defendant with the proviso that any variations to the terms were to be incorporated into a memorandum of understanding which would form part of the contract.[48]

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46 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at pp 38-40.

47 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at para 17, pp 35-37.

48 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at p 39.

According to the Plaintiff, this showed that the clear understanding and intention of the Plaintiff that any variations not set out in the Memorandum of Understanding would not have any legal effect.

63 The Defendant objected to the Plaintiff's reference to these minutes on several grounds. First, both the draft and finalised minutes had not been produced in the course of the arbitration, even though the Defendant had specifically asked for them to be produced. It was pointed out that the Plaintiff's managing director, Mr Abeyasinghe, had testified during cross-examination at the arbitration that these minutes were not in the possession of the Plaintiff.[49] Mr Abeyasinghe also gave different dates as to when the Plaintiff first found these minutes. Second, the Defendant also drew my attention to the fact that the draft minutes differed materially from the finalised minutes, and there was no explanation by the Plaintiff as to why this was so. Third, both sets of minutes had not been signed by the chairman of the board. The Defendant argued that I should not give any weight to these minutes because they were probably manufactured for the purposes of these proceedings.

64 While I had my doubts as to the provenance of these minutes, it is not necessary for me to make a finding in that regard. As I pointed out to counsel for the Plaintiff at the hearing, ultimately, this was an internal document of the Plaintiff, and there is no suggestion that it was ever communicated to the Defendant at the material time.[50] As such, these minutes, even if authentic, cannot form part of the factual matrix within which I can construe the terms of the agreement between the parties: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125].

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49 Diego Travan's affidavit (25 Apr 18) at para 27 - 28.

50 Transcript of oral arguments, pp 179-180.

Thus, I gave no weight to these minutes.

(ii) Documents relating to the Plaintiff's allegations of corruption against its previous board of directors

65 After Mr Maithripala Sirisena defeated Mr Mahinda Rajapaksa in the Presidential Election held on 8 January 2015 to become the new President of Sri Lanka, a new board of directors for the Plaintiff was appointed on 26 February 2015 because there had been allegations of malpractice and corruption against the previous directors.[51]

66 The new board of directors ordered a forensic audit into the financial affairs of the Plaintiff by SJMS Chartered Accountants. Two investigative audit reports produced by these accountants were referred to by counsel for the Plaintiff at the hearing. The two reports were both issued in July 2015.

67 One report dealt with irregularities in the tender process for the purchases of steel by the Plaintiff for the Grand Hyatt Colombo Project.[52] There was no suggestion that this had anything to do with the Defendant, and I agree with counsel for the Defendant that this report was completely irrelevant.

68 The other report by the accountants was a more wide-ranging one which covered the period from the time of the establishment of Canwill up to 8 January 2015.[53] The subject companies were Canwill and its subsidiaries, which are the Plaintiff and Helanco Hotels & Spa (Pvt) Ltd. The scope of the report was to determine "*whether major malpractices, misconduct, irregularities, and breach*

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51 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at, para 25 – 26.

52 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at p 50

53 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at p 247 and p 256 under "Scope".

of procedures, have occurred and … recommending improvements to the governance and internal control systems and procedures".[54]

69 As can be seen from its scope, there was no assistance that I could derive from this report in relation to the issues in these proceedings. While counsel for the Plaintiff informed me that, as a consequence of the report, several former key officers of the Plaintiff who had dealt with the Defendant were being investigated by the Sri Lankan authorities, he was not able to point to any portion of the report which even suggested that the Defendant had been aware of the alleged misconduct of the Plaintiff's officers. Not only that, I noted that the Plaintiff did not raise in the arbitration any issues regarding the validity of the contract with the Defendant being affected by fraud or corruption, nor were the two accountants' reports put into evidence before the tribunal, even though they were available at that time.

70 In any event, this present application did not concern an attempt by the Plaintiff to set aside the arbitral award on the grounds of corruption or that it was contrary to public policy. As such, I found the attempt by the Plaintiff to rely on the accountants' reports in these proceedings to be wholly without basis.

71 At the hearing, counsel for the Plaintiff also referred to another report,[55] this time of a "*special committee*" of three persons who are "*outsiders*", that had been appointed by the Plaintiff to give an "*independent assessment*" of the ongoing works for the Grand Hyatt Colombo Project.[56] The report, issued in April 2015, did highlight certain corporate governance and due diligence

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54 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at p 256.

55 Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at pp 315-404.

56 Transcript of oral arguments, p 182.

failings on the part of the Plaintiff's officers in the award of the contract to the Defendant, but there was no suggestion that the Defendant was privy to or aware of any such wrongdoing. As such, for the same reasons I found the two accountants' reports to be completely irrelevant to the proceedings before me, I found the Plaintiff's reliance on this report to be entirely misplaced as well.

72 Finally, counsel for the Plaintiff referred to two complaints that Mr Abeyasinghe had made to the Commission to Investigate Allegations of Bribery or Corruption in May and July 2017.[57] The complaint in May 2017 concerned Mr Hiran de Silva ("Mr de Silva"), the Plaintiff's former project consultant, having wrongfully amended the minutes of the board meeting of 16 December 2014 and Mr Kudabalage, the Plaintiff's former managing director, having *"suspiciously*" amended the contract to change the arbitration clause from the Sri Lankan Arbitration Clause to the ICC Arbitration Clause in the Letter of Acceptance. The complaint went on to describe the latter action as being *"highly unfavourable*" to the Plaintiff. The second complaint made in July 2017 was about certain actions taken by Mr de Silva and Mr Kudabalage concerning a contract for works involving the Grand Hyatt Colombo Project which the Plaintiff had awarded to Trans Gulf Electro-Mechanical LLC.

73 Unsurprisingly, counsel for the Plaintiff was unable to explain to me the relevance of these two complaints. I found both these complaints to be completely irrelevant to the issues that I had to decide. I must add that they should not have even been included in the Plaintiff's affidavits in these proceedings.

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[57] Don Rajendra Prasad Abeyasinghe's affidavit (22 Dec 17) at pp 405-412

The remedies sought

74 The Plaintiff's first prayer is for the court to decide on the jurisdiction of the tribunal pursuant to s10(3) of the IAA and Art 16(3) of the Model Law. I have already decided that the arbitral tribunal did have jurisdiction to decide the dispute between the parties because the parties had agreed to the ICC Arbitration Clause, and not the Sri Lankan Arbitration Clause. But, even if I had found otherwise, there was a serious difficulty with such an application.

75 Section 10(1) to (3) of the IAA states:

> 10.-(1) This section shall have effect notwithstanding Article 16(3) of the Model Law.
>
> (2) An arbitral tribunal may rule on a plea that it has no jurisdiction at any stage of the arbitral proceedings.
>
> (3) ***If the arbitral tribunal rules –***
>
> (a) ***on a plea as a preliminary question that it has jurisdiction***; or
>
> (b) on a plea at any stage of the arbitral proceedings that it has no jurisdiction,
>
> ***any party may, within 30 days after having received notice of that ruling, apply to the High Court to decide the matter.***
>
> ….
>
> [emphasis added ***bold italics***]

76 Article 16 of the Model Law states:

> Article 16. *Competence of arbitral tribunal to rule on its jurisdiction*
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and

> void shall not entail *ipso jure* the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
>
> (3) ***The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter***, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.
>
> [emphasis added in ***bold italics***]

77 As would be clear from the highlighted language used in these two provisions, an application to the High Court for a jurisdictional ruling is only available if the tribunal had ruled as a *preliminary question* that it has jurisdiction. In this case, as I pointed out earlier, the tribunal had decided the issue of its own jurisdiction and made the positive jurisdictional finding as part of its final award. That award also dealt with the merits of the case. Given the clear wording of the statutory language, I had no power to make any determination of the tribunal's jurisdiction under s 10(3) of the IAA or Art 16(3) of the Model Law.

78 This same issue arose in *AQZ v ARA* [2015] 2 SLR 972. In that case, there was an attempt to seek relief under s 10(3) of the IAA and Art 16(3) of the Model Law notwithstanding the fact that the arbitrator's decision that he had

jurisdiction was in an award which also dealt with the merits of the dispute.

79 Prakash J (as she then was) reviewed the drafting history of the Model Law and concluded that its drafters did not intend that an award that dealt with the merits of the dispute, however marginally, could be subject to challenge under Art 16(3) (at [65]). This point in *AQZ v ARA* was recently followed by Ramesh J in *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd & Others* [2017] SGHC 195. I respectfully agree with these decisions.

80 I find that the Plaintiff has no basis to seek relief under s 10(3) of the IAA and Art 16(3) of the Model Law given that the final award of the tribunal disposed of the objections to the jurisdiction of the tribunal and the substantive merits of the dispute between the parties. In such situations, the appropriate remedy would be for the Plaintiff to seek recourse against the final award, in the form of setting aside the award pursuant to Art 34(2)(*a*)(i) of the Model Law. The Plaintiff has done so and it is to that remedy I now turn.

81 The Plaintiff's counsel confirmed at the hearing that reliance was placed on the following highlighted words in Art 34(2)(*a*)(i) of the Model Law:[58]

> *Article 34. Application for setting aside as exclusive recourse against arbitral award*
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> *(a)* the party making the application furnishes proof that:

[58] Transcript of oral arguments, pp 5–6.

> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or ***the said agreement is not valid under the law to which the parties have subjected it*** or, failing any indication thereon, under the law of this State; or
>
> …
>
> [emphasis added in ***bold italics***]

82 The Plaintiff's argument is that the arbitration agreement which formed the entire basis of the arbitration, that is, the ICC Arbitration Clause, was not valid because the parties had not agreed to that clause. Given my conclusion that the parties had indeed agreed to the ICC Arbitration Clause, it follows that the relief of setting aside sought should be denied.

Conclusion

83 Accordingly, I dismiss the Plaintiff's application in its entirety. The Defendant shall be entitled to the costs of this application, which I fix at S$15,000, and with disbursements to be agreed or taxed.

Ang Cheng Hock
Judicial Commissioner

Andre Arul and Ezra Daniel Renaro (Arul Chew & Partners) for the plaintiff;
Deborah Barker SC (instructed) and Ushan Premaratne (Khattar Wong LLP), P Padman and Munirah Mydin (KSCGP Juris LLP) for the defendant.