IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHCR 9

Suit No 102 of 2018

Between

(1) A co
(2) H Co
(3) C Co

… *Plaintiffs*

And

(1) D
(2) E

… *Defendants*

JUDGMENT

[Arbitration] – [Stay in favour of arbitration]
[Arbitration] – [Case management stay]

A co and others
v
D and another

[2018] SGHCR 9

High Court — Suit No 102 of 2018 (Summons No 1304 of 2018)
Tan Teck Ping Karen AR
2, 9, 23 and 31 May 2018

20 June 2018 Judgment reserved.

Tan Teck Ping Karen AR:

Introduction

1 This application to stay proceedings in favour of arbitration is the latest salvo in the long string of court proceedings between the parties to the joint venture agreement which led to creation of the joint venture company, A co.

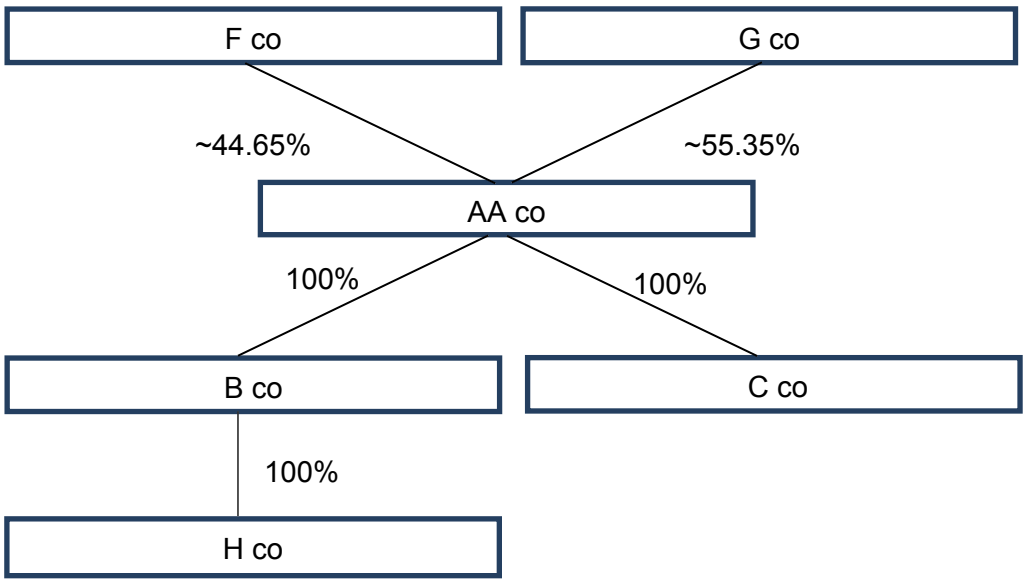
2 In Summons 1304/2018, D & E seek an order that the present suit be stayed in favour of arbitration pursuant to section 6 of the International Arbitration Act (Cap 143A) ("IAA"). Alternatively, D & E seek a case management stay pursuant to the Court's inherent jurisdiction.

3 I decline to grant a stay of proceedings on both of the grounds advanced by D & E and give my reasons below.

Background facts

The parties

4 The relationship between parties are set out in the diagram below which was provided by D & E:



5 A co is incorporated in Singapore pursuant to a joint venture between F co and G co.

6 On 8 December 2009, A co, F co and G co, among others, entered into an investment agreement ("IA") which governs the relationship of the parties to the joint venture.

7 The shares in A co are currently held by G co (55.35%) and F co (44.65%). A co is the investment holding company of, *inter alia*:

(a) B co who is the parent company of H co; and

(b) C co.

8 Both H co and C co are incorporated in Singapore.

9 D has at all material times been the Executive Chairman and the Chief Executive officer of G co. He is also a director and the Chairman of A co.

10 E, is the son of D and is a director of A co. E was the managing director of C co and resigned from this position on or about 18 July 2016.

11 It is alleged that D & E were at all material times *de facto* and/or shadow directors of H co and D was at all material times a *de factor* and/or shadow director of C co.

Commencement of the suit: Suit 102 of 2018 ("Suit 102")

12 On 26 January 2018, Pang Khang Chau JC ("Pang JC") granted F co leave under Section 216A of the Companies Act (Cap. 50) in HC/OS XD/2016 ("OS XD") to bring an action against D & E on behalf of A co, H co and C co (collectively the "Companies"). Appeals to the Court of Appeal against Pang JC's decision have been filed.

13 In Suit 102, it is alleged that D & E, as directors of the Companies, are in breach of their fiduciary duties as they have placed themselves in a position of conflict, failed to make full and frank disclosure of their interest in related party transactions and have benefited from these related party transactions.

The legal proceedings between parties

14 To date, the parties have been involved in numerous legal proceedings.

15 The 1st proceeding. HC/OS XE/2015 ("OS XE") is an application filed pursuant to section 199 of the Companies Act by a director on the Board of A co for documents from A co. On 11 March 2016, the Court made an order that the director and his appointed public accountant, KordaMentha Pte Ltd ("KordaMentha") have access to relevant documents from A co. On 15 July 2016, KordaMentha prepared a preliminary report ("KordaMentha Report").

16 The 2nd proceeding. Based on the findings in the KordaMentha Report, F co commenced OS XD seeking leave under section 216A of the Companies Act to bring proceedings against D & E in the name of the A co, H co and C co for alleged breaches of fiduciary duties. On 26 January 2018, Pang JC granted leave to F co to bring a derivative action on behalf of A co, H co and C co against D & E. As mentioned above, both parties have filed notices of appeal against this decision.

17 3rd proceeding. On 14 June 2016, F co commenced arbitral proceedings against A co in SIAC/ARB XA/2018 ("ARB XA") seeking a declaration that it is entitled to exercise its rights under clause 10.4 of the IA to, *inter alia*, appoint an independent firm of accountants to prepare and provide information under clause 10.1.1 of the IA and enquire into and report on A co and its subsidiaries as required by F co, and to be indemnified by A co for the accountants' costs. A co has brought a counterclaim for the loss of profits allegedly suffered due to F co's alleged failure to approve certain related party transactions since 3 June 2015.

18 4th proceeding. HC/OS XB/2017 ("OS XB") is an application by F co for declarations that approval of the annual accounts of A co and its subsidiaries for the financial year ending 31 December 2015 ("2015 Accounts") by A co's board of directors and its shareholders are void and *ultra vires* and for an

injunction restraining A co from distributing the 2015 Accounts until the same are properly approved and adopted. A co applied for a stay of proceedings in favour of arbitration which I granted at first instance. On appeal, the Vinodh Coomaraswamy J ("Coomaraswamy J") reversed this decision and accordingly, there is no stay in favour of arbitration in OS XB. An appeal to the Court of Appeal has been filed and OS XB is stayed pending the appeal.

19 5th proceeding. HC/OS XC/2018 ("OS XC") is an application by A co for a declaration that the arbitral tribunal in ARB XA has no jurisdiction to hear the dispute placed before the tribunal in accordance with the expedited procedure ("Expedited Procedure") under the SIAC Rules 2013 ("SIAC Rules"). Belinda Ang Saw Ean J ("Ang J") heard OS XC and made no orders. A co has file an application for leave to appeal against Ang J's decision which is pending.

Issues to be determined

20 D & E are not signatories to the IA which contains the arbitration agreement. Therefore, the issues which arise in this application are:

(a) Whether D & E are party to the arbitration agreement and are entitled to seek a stay of proceedings pursuant to s6 of the IAA; and

(b) Alternatively, whether this present Suit 102 should be stayed pursuant to the Court's inherent powers of case management.

Section 6 of the International Arbitration Act ("IAA")

21 Section 6 of the IAA provides as follows:

> 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]

22 The core issue is whether D & E, who are not signatories to the IA, are considered parties to the arbitration agreement contained in the IA.

23 D & E say they should be considered "parties" to the arbitration agreement on the following bases:

(a) It was the intention of the parties that D & E should be entitled to invoke the arbitration agreement.

(b) Though D & E are non-parties to the arbitration agreement, they can compel the Companies to arbitrate the dispute under the arbitration agreement.

The intention of the parties to the Investment Agreement

24 D & E acknowledge that they are not signatories to the IA and are not parties to the arbitration agreement. Nonetheless, D & E take the position that the signatories to the IA intended D & E to be entitled to invoke the arbitration agreement.

25 D & E argue that a non-signatory can be considered to be a party to an arbitration agreement if parties intended the non-signatory to be party to the arbitration agreement. They refer to *International Commercial Arbitration, Volume I: International Arbitration Agreements* (Wolters Kluwer, 2nd Ed, 2014)32 ("*Gary Born*") at p 1486:

> The touchstone should be whether the parties intended that a non-signatory be bound and benefitted by the arbitration clause. Answering that question cannot be achieved through abstract generalizations, but requires considerations of the arbitration clause's language and the relations and dealings among the parties in a specific factual setting.
>
> [Emphasis added]

26 Clause 1.1 of the IA provides as follows:

> 1. Interpretation
>
> …
>
> "**Affiliate**" means:
>
> …
>
> (c) with respect to G co:
>
> (i) D and any Controlled Person or Relative of D;
>
> (ii) any Controlled person of G co
>
> …
>
> "**Group**" (except where specifically defined otherwise) means [A co] and its subsidiaries for the time being (including, for the avoidance of doubt, [B co and … and C co] with effect from Completion) and any New Holding Company, and "**Group Company**" shall be construed accordingly

27 D & E submit that as defined in the IA, D is an Affiliate and E, as the son of D, also falls under the definition of Affiliate. In addition, it is submitted that A co, H co (as the subsidiary of B co) and C co all fall under the definition of Group Company.

28 Flowing from *Gary Born* read with the above definition in the IA, D & E submit that the objective intention of the signatories to the IA was that the arbitration agreement was intended to apply to disputes where claims are made by Group Companies (which include the Companies) against Affiliates (which include D & E) in relation to all matters arising out of or in connection with the IA. D & E say that this amounts to consent by the signatories to extending the arbitration agreement to D & E as Affiliates. It is submitted that this intention is supported by the holistic reading of numerous sections of the IA, including clause 11.4 (below) and clause 29.2 (which contains the arbitration agreement). The concomitant consent of D & E is said to be evident by their conduct in making this stay application. Reliance is placed on *The Titan Unity* [2014] SGHCR 4 at [35] for this point.

29 In *The Titan Unity*, the plaintiff ("Portigon") provided financing to Onsys Energy Pte Ltd ("Onsys") for the purchase of fuel oil. As the holder of bills of lading, Portigon commenced a claim for misdelivery against the 1st defendant demise charterer ("Oceanic") and the second defendant shipowner ("Singapore Tanker") on the basis that both were the carriers and persons in physical possession of the cargo. Singapore Tanker applied to set aside and strike out the action by Portigon and the Assistant Registrar considered the question of whether the court should order Singapore Tanker to be joined to the arbitration proceedings between Portigon and Oceanic. The court reviewed Singapore as well as foreign cases and came to the conclusion at [35] that:

> The cases above illustrate the principle that where the objective circumstances and parties' conduct reveal that the parties to the arbitration agreement have consented to extend the agreement to a third person who is not a party to the agreement, and that third party has shown by its conduct to accept to be bound by the agreement, parties can be found to have impliedly consented to form an agreement to arbitrate where this has been clearly and unequivocally shown to be the parties' objective intention. … In particular, implied consent is

> determined from the parties' intention to extend the written arbitration agreement to a non-party who accepts to be bound by it…

30 Bearing the above principle in mind, I turn to consider whether there is any objective circumstance and conduct which show the parties to the arbitration agreement in the IA have consented to extend this agreement to D & E.

Clauses of the Investment Agreement

31 D & E submit that the objective intention to extend the arbitration agreement is supported by the holistic reading of various clauses of the IA. Though a number of clauses of the IA were cited in D & E's supplemental submissions, I will focus on clause 11.4 and clause 29.2 as these were the two main clauses which D & E relied on during their main submissions.

Clause 11.4

32 D & E submit that it is apparent from Clause 11.4 of the IA that the parties specifically contemplated that claims made by A co and its subsidiaries against either (i) G co and its Affiliates, or (ii) F co and its Affiliates, would be prosecuted by the respective nominee directors. D & E fall within the definition of G co's Affiliates. Since this is an action by A co against D & E, who are G co's Affiliates, clause 11.4 applies to this action.

33 Clause 11.4 provides:

> 11.4 Notwithstanding any other provision of this Agreement or the Articles of Association, any right of action which [A co] or [any subsidiary of A co] may have against (a) [F co] (or any of its Affiliates) shall be prosecuted on behalf of [A co] solely by [G co Directors], and (b) G co (or any of its Affiliates) shall be prosecuted on behalf of [A co] solely by [F co Directors], including any such right of action which may arise under or

> pursuant to any Transaction Document. In such event, the [G co Directors] or [F co Directors] (as the case may be) shall have full authority on behalf of [A co] to negotiate, litigate and settle any claim arising out of such right of action or in the case a right of action by [any subsidiary of A co], to exercise the rights and powers as a direct or indirect shareholder of such [subsidiary of A co] to negotiate, litigate and settle any claim arising out of such right of action….

34 D & E submitted that clause 11 of the IA is the "bedrock" of this present Suit 102 and is the "main point" of their present application for a stay under section 6 of the IAA.

35 In their supplemental submissions filed on 23 May 2018, D & E's counsel went on to state that clause 11.4 is "a unique clause which makes the case for holding that D & E are parties to the [a]rbitration [a]greement even stronger than all the cases cited during the hearings of [this Summons]."

36 D & E claim that the subject matter of this entire Suit 102 revolves around related party transactions as the complaint is that D & E have acted in breach of their fiduciary duties in allowing A co to enter into related party transaction without the consent of both G co and F co. Related party transactions were originally governed by clause 11.1/11.2 read with paragraph 10 of schedule 7 of the IA and the IA governs the standard as to whether a related party transaction has been properly entered into and so the entire scope of the complaints in this action revolve around whether the controls in the IA have been observed.

37 With respect to D & E, I find their submissions totally unmeritorious. In my view, the purpose of clause 11.4 is to state clearly that the F co directors have control of any proceedings which are initiated by A co against the affiliates of A co, including D & E. This clause provides legitimacy to any decision made solely by the F co directors in such proceedings, and ensures there is no

challenge to any decision made by them on the basis that such a decision is not made with the authority of the Board of Directors of A co. In other words, this is merely a clause which provides which members of the Board of Directors of A co have "control" of the proceedings by A co.

38 The effect of Clause 11.4 is that, as in this present Suit 102. where A co has a right of action against D & E, who are affiliates of G co, the suit will be prosecuted on behalf of A co solely by the F co directors who shall have "full authority on behalf of [A co] to negotiate, litigate and settled any claim arising out of such right of action". There is nothing in this clause which indicate or reveal in any way that the signatories to the IA consented to or had the intention to extend the arbitration agreement contained in the IA to Affiliates of G co. Apart from submissions on the interpretation of Clause 11.4, D & E have provided no objective circumstances or conduct by parties to support the D & E's position that the signatories to the IA intended to extend the arbitration agreement through this clause to D & E.

Clause 29.2 : The arbitration agreement

39 D & E submitted that the express wording of the arbitration agreement in clause 29.2 demonstrates a clear intention by all parties for any matter "arising out of or in connection with" the IA to be resolved by arbitration:

> 29.2 Any dispute, controversy or conflict arising out of or in connection with this Agreement including any question regarding its existence, validity or termination (a "Dispute"), shall be referred to and finally resolved by arbitration in Singapore and administered by the Singapore International Arbitration Centre (the "SIAC") in accordance with the Arbitration Rules of the SIAC for the time being in force which rules are deemed to be incorporated by reference into this clause 29.

40 The Companies' solicitors disagree. They submit that if the parties had intended the arbitration agreement to apply to any matter which arises from the IA, then they would have stated so expressly. They refer to the Deed of Adherence which is at schedule 13 of the IA where there was an express incorporation of the arbitration agreement. It was submitted that this shows that parties had applied their mind to when they wished to incorporate the arbitration agreement and have specifically stated when it is to apply. As such, if it was the parties' intention that the arbitration agreement was to apply to any matter concerning the disputes in this action, this would have been specifically provided by the parties.

41 I agree with the Companies. The objective circumstances and parties conduct reveal that if parties wished to extend the arbitration agreement to the D & E, they would have expressly provided for it as they have done in other agreements in the IA. The mere wording of the arbitration agreement would not be sufficient to imply that there was an intention that the arbitration agreement would apply to this present Suit 102 between A co and D & E.

42 Therefore, for the above reasons, I am of the view that there is no objective intention or any agreement between the signatories to the arbitration agreement to extend this agreement to D & E.

Can a non-party compel a party to the arbitration agreement to arbitrate?

43 Alternatively, D & E submit that, though they are not parties to the arbitration agreement, they are entitled to compel the Companies to arbitrate given that the alleged wrongful acts in this action all arise from their behaviour or in their capacity as directors, who are agents of A co or as directors of H co and C co who are Group Companies which the Defendants say are both governed by A co and whose businesses are regulated by the IA. This position

is based on the "agency principle" set out in United States case of *Kiskadee Communications v Philip Father* 2011 US Dist Lexis 34974 ("*Kiskadee*"). D & E admit that this is a novel point and the situation where a non-signatory to an arbitration agreement are considered agents of a signatory has not been considered in Singapore but argue that this should be a basis for granting the stay under section 6 of the IAA.

44 In *Kiskadee*, the plaintiff, Kiskadee Communications (Bermuda) Ltd ("Kiskadee Bermuda"), entered into a joint venture agreement with ProtoStar Ltd ("ProtoStar") to form a joint venture company, ProtoStar Kiskadee (Bermuda) Ltd ("PKB"). The joint venture agreement contained an arbitration clause. The defendants are directors of PKB. They were also key officers of ProtoStar. The defendants were not party to the joint venture agreement. Shortly after the joint venture agreement was concluded, ProtoStar filed for Chapter 11 bankruptcy. Kiskadee Bermuda alleges that the defendants misrepresented ProtoStars's financial condition to Kiskadee Bermuda and falsely represented that ProtoStar would be able to fulfil its obligations under the joint venture agreement. The US District Court referred to a number of United State ("US") cases and held at [12]:

> In certain circumstances, a nonsignatory to an arbitration clause may compel a signatory to arbitrate. See Britton v. Co-op Banking Group, 4 F.3d 742, 744 (9th Cir. 1993); Letizia v. Prudential Bache Sec., Inc., 802 F.2d 1185, 1188 (9th Cir. 1986). In order to compel a signatory to arbitrate, a nonsignatory must be (1) a third-party beneficiary to the contract, (2) a successor in interest to the contract, or (3) an agent intended to benefit from the arbitration clause. Britton, 4 F.3d at 745-48. "[A]gents of a signatory can compel the other signatory to arbitrate so long as (1) the wrongful acts of the agents for which they are sued relate to their behavior as agents or in their capacities as agents (Letizia) and (2) the claims against the agents arise out of or relate to the contract containing the arbitration clause (Britton)." Amisil Holdings Ltd. v. Clarium Capital Mgmt., 622 F. Supp. 2d 825, 832 (N.D. Cal. 2007) (Judge Jenkins).

45 The US Court held that as the defendants, who are directors of PKB, were being sued for actions relating to their behaviour as officers and directors of ProtoStar and as each of the claims against them had a significant relationship to the joint venture agreement, the defendants have a right to enforce the arbitration clause and compel Kiskadee Bermuda to place the dispute before an arbitral tribunal.

46 The Companies point out that the "agency principle" set out in *Kiskadee* has not been accepted in Singapore. Further, it is not persuasive authority because the legal test for stay of proceedings in favour of arbitration in the US is significantly broader than section 6 of the IAA.

47 Section 3 of the Federal Arbitration Act provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceedings with such arbitration.
>
> [Emphasis added]

48 The Companies point out that Section 3 of the Federal Arbitration Act does not require the party seeking the stay to be a party to the arbitration agreement in order for a stay of proceedings to be granted. All that is required is that there is an issue which may be referred to arbitration under the arbitration agreement. In contrast, in Singapore, section 6 of the IAA is only applicable when a party to an arbitration agreement seeks a stay of proceedings against any other party to the arbitration agreement.

49 Further, the Companies submit that *Kiskadee* may be distinguished on the facts. In *Kiskadee*, the alleged breach of fiduciary duties by the defendants was in relation to the formation of the joint venture agreement and were owed to Kiskadee Bermuda, a party to the joint venture agreement. The claim brought against the defendants pertained to their acts *qua* agents of ProtoStar in the process of forming the joint venture company. In contrast, in the present Suit 102, the alleged breaches of fiduciary duties arise from acts done by D & E as directors of the Companies in relation to related party transactions. The acts complained of in the present Suit 102 have nothing to do with the formation of the joint venture agreement.

50 I agree with the Companies in relation to both submissions raised in respect of section 3 of the Federal Arbitration Act as well as the argument that *Kisdadee* may be distinguished on its facts.

51 I would also add that D & E have, in their submissions, given the impression that the "agency principle" is the accepted position of the US Courts. It is disappointing that they failed to inform the Court that the "agency principle" has not been unanimously accepted by the US Courts. In *Gary Born*, the learned author observed at p 1479:

> … some U.S. courts have permitted the officers and directors of a corporate party to invoke the arbitration clause in that party's underlying commercial contracts, notwithstanding the fact that the individual officers, directors and employees are not parties to the underlying contract under ordinary contractual principles. In these circumstances, a number of U.S. decisions have held that corporate employees, sued for actions taken in the course of their employment, may invoke arbitration clauses contained in their employer's contracts with the adverse third party. As one U.S. court reasoned, with a degree of overstatement, a company can only act through employees and officers, and "an arbitration agreement would be of little value if it did not extend to them.'"

> **These decisions are not unanimously followed even in the United States**. One U.S. court rejected them on the following grounds:
>
> > "courts must not offer contracts to arbitrate to parties who failed to negotiate them before trouble arrives. To do so frustrates the ability of persons to settle their affairs against a predictable backdrop of legal rules – the cardinal prerequisite to all dispute resolution."
>
> [Emphasis added]

52 If D & E wish the Singapore courts to consider whether the "agency principle" should be adopted in Singapore, then what should have been done was to refer to US cases which adopted the "agency principle" to explain the rationale for this principle and also distinguish the US cases which have declined to adopt this principle so that the Singapore court may come to an informed decision as to whether this principle should be adopted. Having failed to do this, it insufficient for D & E to simply refer to the US case of *Kiskadee* and invite this court to adopt the "agency principle" merely because it has been adopted in this US case.

Third party rights

53 Clause 27.9 of the IA provides:

> 27.9 Third party rights
>
> Except where expressly provided otherwise in this Agreement, a person who is not a party to this Agreement has no right under the Contract (Rights of Third Parties) Act to enforce any term of this Agreement, but this does not affect any right or remedy of a third party which exist or is available apart from the Contract (Rights of Third Parties) Act. Where, pursuant to the terms of this Agreement, a third party has been expressly granted rights under the Contracts (Rights of Third Parties) Act, the consent of such third party shall not be required for the variation of this Agreement of [sic] the waiver of any provision in it. [Emphasis added]

54 As D & E are not parties to the IA which contained the arbitration agreement, at the end of oral submissions, I asked parties to provide further submissions on the impact, if any, of clause 27.9 of the IA on the arguments and issues raised by the parties in this application.

55 Section 2 of the Contracts (Rights of Third Parties) Act ("CRTPA") provides:

> **Right of third party to enforce contractual terms**
>
> 2 –(1) Subject to the provisions of this Act, a person who is not a party to a contract (referred to in this Act as a third party) may, in his own right, enforce a term of the contract if –
>
> (a) the contract expressly provides that he may; or
>
> (b) subject to subsection (2), the terms purports to confer a benefit on him.

56 D & E submit that the CRTPA does not have any impact on the arguments made as set out above because they are not relying on any rights accrued under the CRTPA. They point out that a party seeking to rely on a right derived from the CRTPA must expressly state this. See *Tembusu Growth Fund v ACTAtek Inc* [2017] SGHC 251 at [87] and *Straits Advisors Pte Ltd v Michael Deeb (alias Magdi Salah El-Deeb) and others* [2014] SGHC 94 at [115].

57 D & E submitted that they "arguably could not bring arguments premised on the CRTPA" as D & E enjoyed only an incidental benefit. Where a contract does not expressly allow a third party to enforce a term of the contract, the CRTPA allows such an enforcement only upon satisfaction of a two limb test as per Woo Bih Li J in *Columbia Asia Healthcare Sdn Bhd and another v Hong Hin Kit Edward and another and other suits* [2014] 3 SLR 87 ("*Columbia Asia*"):

> 272 The first limb is s2(1)(b). Under this limb, the court has to consider whether the contractual term purports to confer a benefit on the third party.
>
> 273 If so, the second limb has to be considered. If it appears that the parties to the contract did not intend for the contractual term to be enforced by the third party, the third party will not be entitled to enforce it, notwithstanding that the term purports to confer a benefit on him.

58 Woo J went on to hold that the term "confer" requires proof that the third party is an intended, and not just an incidental, beneficiary:

> 276 In *Dolphin Maritime & Aviaion Services Ltd v Sveriges Angfartygs Assurans Forening* [2009] Lloyd's Rep 123 (at [74[), the English High Court was of the view that as regards the English equivalent of the first limb:
>
> > A contract does not purport to confer a benefit on a third party simply because the position of that third party will be improved if the contract is performed. The reference in the section to the term purporting to 'confer' a benefit seems to me to connote that the language used by the parties shows that one of the purpose of their bargain (rather than one of its incidental effects if performed) was to benefit the third party.
>
> 277 This suggest that the English court was of the view that the distinction between the intended and the incidental beneficiaries applies to the first limb.
>
> 278 This is logical. It is only when a third party establishes that it is an intended beneficiary of the contract that the burden then shifts, under the second limb, to the party giving the indemnity or warranty ("the Warranting Party") to show that notwithstanding that the third party is an intended beneficiary, the parties to the contract did not intend the term to be enforceable by the third party. …

59 D & E submitted that the inclusion of the arbitration agreement was not specifically targeted as a benefit for D & E but was intended to be of general application for all disputes arising from or connected to the IA. Therefore, D & E are not the intended beneficiary of the arbitration agreement and enjoy only an incidental benefit and this is the reason no arguments were raised under the CRTPA.

60 The Companies point out that in making this submission, D & E have conceded that the signatories to the IA had not intended to confer a benefit on D & E. This is a direct contradiction of the D & E's earlier position that the signatories of the IA had intended D & E to be entitled to invoke the arbitration agreement when an action is brought by A co against the G co Affiliates.

61 I agree with the Companies. D & E's submissions as to the reasons they have chosen not to rely on the CRTPA reinforces and supports my earlier conclusion that there was no intention by the signatories of the IA that D & E were entitled to invoke and/or enjoy the benefit of the arbitration agreement.

62 Further, D & E submitted that an arbitration agreement is not a "benefit" for the purpose of the CRTPA. However, the Companies have pointed out that section 9(2)(a) read with section 2 of the CRPTA does provide that an arbitration agreement may be enforced by third parties under the IAA where the arbitration agreement is intended to benefit those third parties. In my view, it does appear that a third party's right to enforce an arbitration agreement entered into under the IAA is a benefit which a third party may enforce under the CRPTA.

63 Since D & E have stated they are not relying on any rights under the CRTPA, I do not have to come to any finding in relation to the CRTPA. However, it is noteworthy that the explanation given by D & E as to the reason they chose not to rely on the CRTPA supports my earlier conclusion that the signatories to the IA did not intend to confer the benefit of the arbitration agreement in the IA on D & E such that D & E are entitled to enforce the arbitration agreement and seek a stay of the present Suit 102 in favour of arbitration.

Conclusion on section 6 of the IAA

64 In conclusion, I am of the view that D & E are not parties to the arbitration agreement which is contained in the IA as:

(a) There is no objective intention between the signatories to the arbitration agreement to extend this agreement to D & E; and

(b) The "agency principle" does not apply in Singapore and D & E, as non-parties to the arbitration agreement, cannot compel the Companies to arbitrate the issues in these proceedings.

65 Therefore, as D & E are not parties to the arbitration agreement in the IA, one of the conditions for stay of proceedings under section 6 of the IAA has not been satisfied and it is not necessary to proceed further to determine whether the dispute between parties is subject to the arbitration agreement.

66 Accordingly. for the reasons stated above, no stay of the present Suit 102 in favour of arbitration pursuant to section 6 of the IAA is granted.

67 I would add that there is dispute between the Companies and D & E whether H co and C co, are parties to the IA and thus a party to the arbitration agreement. In this judgment I have focused on the relationship between A co and D & E. There is no dispute that A co, is a party to the IA. Since I have found that D & E are not parties to the arbitration agreement with A co, it is not necessary to go further to determine whether H co and C co, are parties to the IA and consequently, the arbitration agreement.

Stay pursuant to the Court's inherent powers of case management.

68 The alternative submission by D & E is that this present Suit 102 be stayed pending the final determination of ARB XA. This would be a stay pursuant to the court inherent powers of case management.

The Law

69 In the leading case of *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen")*, the Court of Appeal examined how the courts of Australia, Canada, England and New Zealand addressed the situation where a dispute falls to be resolved in part by arbitration and in part by court proceedings. The Court of Appeal set down these principles which guide the court's decision whether to grant a case management stay:

> 186 …The unifying theme amongst the cases is the recognition that the court, as the final arbiter, should take the lead in ensuring the efficient and fair resolution of the dispute as a whole. The precise measures which the court deploys to achieve that end will turn on the facts and the precise contours of the litigation in each case.
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> 187 … We recognise that a plaintiff's right to sue whoever he wants and where he wants is a fundamental one. But, that right is not absolute. **It is restrained only to a modest extent when the plaintiff's claim is stayed temporarily pending the resolution of the related arbitration, as opposed to when the plaintiff's claim is shut out in its entirety** … In appropriate cases, that right may be curtailed or may even be regarded as subsidiary to holding the plaintiff to his obligation to arbitrate where he has agreed to do so.
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> 188 … This does not mean that if part of a dispute is sent for arbitration, the court proceedings relating to the rest of the dispute will be stayed as a matter of course. **The court must in every case aim to strike a balance between three higher-order concerns that may pull in different considerations: first, a plaintiff's right to choose whom he wants to sue and where; second, the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and third, the court's inherent power to manage its processes**

> **to prevent an abuse of process and ensure the efficient and fair resolution of disputes. The balance that is struck must ultimately serve the ends of justice.** … [Emphasis added]

Second order concern

70 Parties did not raise any issue with the first order concern raised by the Court of Appeal in *Tomolugen*.

71 In respect of the second order concern, namely, "the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause", D & E submitted that F co is seeking to circumvent the arbitration agreement in the IA by commencing the present Suit 102. It is D & E's submission that the main complaint in this action is that D & E, as directors of A co, had entered into transactions without the approval of F co. This falls within clause 11 of the IA and the correct procedure would have been for F co to commence arbitration proceedings against G co and its affiliates under clause 11.4 of the IA. It is submitted that to avoid the arbitration clause, F co has instead commenced this action in the name of A co against D & E.

72 The Companies made preliminary submissions that the issue of arbitration and case management stay had already been argued in OS XD before Pang JC and, therefore, once leave had been granted to commence derivative action pursuant to section 216A of the Companies Act, there arose an issue estoppel or abuse of process (i.e. the extended doctrine of *Res Judicata*) which barred this stay application. In light of these submissions, the Companies were directed to seek clarification from Pang JC on this point.

73 On 8 May 2018, Pang JC clarified as follows:

> (a) The issue concerning arbitration arose in [OS XD] in the context of whether it was open to [F co] to bring a claim by way of arbitration

directly against [D] and [E] and whether that would be sufficiently viable and adequate remedy for F co, so as to render it inappropriate or unnecessary for leave to be granted to F co under s 216A of the Companies Act to bring a derivative claim in the name and on behalf of [A co], [H co] and [C co].

(b) Parties' submissions in [OS XD] did not address whether the eventual derivative claim, if leave is to be granted under s 216A, should be brought by way of court proceedings or by way of arbitration. This was therefore not an issue which arose for decision by the Court in OS XD/2016.

(c) Section 216A envisages that a derivative claim could be brought by way of court proceedings or by way of arbitration. In using the word "actions" in ORC XF/2018, the Court was merely adopting the language used by F co in the originating summons. The intention was simply to grant leave for the derivative claim to be brought and not to preclude any option which may be available for the pursuit of the derivative claim by way of arbitration.

74 It is clear that, having considered parties' submissions, leave was granted to commence a derivative action and that in this leave, Pang JC has clarified that the order did not preclude the option for the derivative action to be commenced by way of arbitration. Since leave has been granted to commence action in the name of the Companies who have the option of commencing the action by way of court proceedings or arbitration, I am of the view that any finding that the commencement of Suit 102 is an abuse of process would be a back-door appeal against Pang JC's decision to grant leave to commence proceedings, be it by way of arbitral proceedings or proceedings in court.

75 In any event, I had earlier held that D & E are not parties to any arbitration agreement with A co and are not entitled to enforce the arbitration agreement in the IA. Since there is no arbitration agreement between A co and D & E, F co cannot be said to be circumventing any arbitration clause by commencing this action as no arbitration clause exist between the parties.

76 Therefore, for the reasons stated above, I am of the view that there is no basis to find that the Companies are seeking to circumvent the operation of the arbitration agreement when they commenced this action. Accordingly, the second order concern raised by *Tomolugen* is not a basis to grant a case management stay.

Third order concern

77 In *Tomolugen*, the third order concern was expressed as follows:

> … third, the court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes. The balance that is struck must ultimately serve the ends of justice. …

78 D & E submit that a case management stay should be granted pending the resolution of ARB XA as the substance of the claims in ARB XA and this present Suit 102 are the same. In ARB XA, F co claims that A co failed to provide documents in relation to certain related party transactions in compliance with its obligations under clause 10.1.1 of the IA and this has triggered F co's rights to appoint an independent accountant. A co has brought a counterclaim in which it is alleged that it has suffered a loss of profits due to F co allegedly failing to approve certain related party transactions since 3 June 2015. In this present Suit 102, F co, through A co, alleges that D & E acted in breach of their fiduciary duties to A co, C co and H co as they are in a position of conflict and have benefitted from and failed to make timely and full and frank disclosure of

their interest in certain related party transactions. D & E submit that there will be an overlap in findings as both the arbitral tribunal and the court will have to determine the issue of whether the transactions in question are related party transactions.

79 The Companies submit that there is no overlap between ARB XA and this present Suit 102. They say that ARB XA is a purely a claim against A co for access to documents pursuant to F co' contractual rights under the IA. In contrast, this present Suit 102 is a claim by the Companies, through a derivative action commenced by F co, for alleged breaches of fiduciary duties owed by D & E as directors of the Companies in relation to a number of related party transactions which have been entered into since 2011 on the basis there was non-disclosure and conflict of interest.

80 While there *may* be some overlap, for the reasons stated below, it is not necessary for this court to determine the question of whether there is indeed any overlap between ARB XA and this action and whether this overlap is such that a case management stay should be granted.

Inconsistent position taken by the Defendants

81 In this present Suit 102, D & E are seeking a stay of the present suit in favour of the arbitration proceedings in ARB XA. On the other hand, as mentioned above, in OS XC, A co is seeking a declaration that the arbitral tribunal in ARB XA has no jurisdiction to hear the dispute in accordance with the Expedited Procedure.

82 In my view, D & E have taken an inconsistent position by filing both this application for a stay of the present Suit 102 and OS XC. On one hand, D & E are seeking a stay of the present proceedings in favour of the arbitration

proceedings in ARB XA. On the other hand, A co takes the position that the arbitral tribunal in ARB XA has no jurisdiction under the Expedited Procedure over the claims before it. D & E are effectively taking the position that the current action in Suit 102 should be stayed in favour of arbitration proceedings but it is this same arbitration proceeding which D, through A co, say has no jurisdiction under the Expedited Procedure to hear the issues before it. If a case management stay is granted in favour of ARB XA and if the jurisdiction challenge to the arbitral tribunal is upheld in OS XC, then the end result is that there will be a significant delay in the resolution of the disputes between the parties as the present Suit 102 before the courts will be stayed while the arbitral tribunal is re-constituted to determine the disputes between the parties. This would be an untenable position. It does not serve the ends of justice for the disputes between the parties to be left unresolved while the arbitral tribunal is re-constituted when the present Suit 102 has been commenced and may proceed to determine the issues between the parties.

83 I note that OS XC has been heard by Ang J who held that no orders are to be made in respect of OS XC. Being dissatisfied with this decision, A co has filed a Summons for leave to appeal against Ang J's decision. A co's decision to file the Summons for leave to appeal clearly shows that A co took and continues to take the position that the arbitral tribunal in ARB XA has no jurisdiction to hear and determine the issues before it. This means that it remains a very real possibility that, if leave is granted to appeal in OS XC, and if a case management stay is granted in this present Suit 102, there will be a significant delay in the determination of issues between the parties.

84 I would pause to note that it may be argued that the applicant in OS XC is A co and not D & E. In my view, this ignores reality. In OS XC, it was D who signed the affidavits in support of the application. This shows that the decision

to file the application in OS XC to challenge the jurisdiction of the tribunal was made in consultation with and/or approved by D as director of A co. Therefore, I cannot turn a blind eye to the reality that the decision to file this application to seek a case management stay in favour of arbitration proceedings in ARB XA and the decision to file OS XC were both made by D.

Whether a stay of proceedings with conditions should be granted

85 When the D & E's counsel was queried on the impact of OS XC on this present application for stay of proceedings, it was submitted that a stay can be granted on terms and the stay will be lifted if the terms are not met. D & E say that this is in line with *Gulf Hibiscus Ltd v Rex International Holding Ltd and another* [2017] SGHC 210 where the Aedit Abdullah JC (as he was then) granted a stay of court proceedings on condition that if the tiered dispute resolution was not triggered within three months or an arbitration not commenced within give months from the date of the judgment, the parties would be at liberty to apply to the court to lift the stay.

86 I see a number of issues in respect of the proposal for a conditional stay of proceedings in Suit 102. First, the jurisdiction of the tribunal in ARB XA is being challenged with leave being sought to appeal to the Court of Appeal in respect of Ang J's decision not to make a declaration that the arbitration tribunal has no jurisdiction. It would serve no purpose to stay this present Suit 102 and direct the Companies to include the issues to be determine in this action as part of the arbitration in ARB XA which D & E say has no jurisdiction under the Expedited Procedure. This would just lead to a significant delay in the resolution of these issues. Second, directing the issues in this present Suit 102 to be determined by way of arbitration is an indirect acknowledgement that D & E are party to the arbitration agreement in the IA. Third, as D & E are not parties

to the arbitration agreement, I foresee issues in determining who would be the appropriate party to commence arbitration proceedings against D & E in respect of the alleged breach of fiduciary duties owed to the Companies. Taking into account the fractured relationship between the parties and the litigious position which the parties have taken in past proceedings, I am of the view that it is extremely improbable that F co, A co, D & E would be able to come to an agreement as to the commencement of any arbitration to determine the issues in this present Suit 102. Any conditional stay in favour of arbitration is likely to only cause significant delay in the proceedings with no measurable fruitful gain. For these reasons, I am of the view that this would not be an appropriate case to impose a stay of proceedings in favour of arbitration with conditions.

87 For the reasons above, I decline to grant a case management stay in favour of arbitration pursuant to the court's inherent jurisdiction.

Conclusion

88 In all the circumstances and for the above reasons, a stay pursuant to section 6 of the IAA and a case management stay are not granted.

Tan Teck Ping Karen
Assistant Registrar

Mr Niklas Wong See Keat and Ms Thara Gopalan (TSMP Law Corporation) for the plaintiffs;
Mr Mahesh Rai, Mr Raeza Ibrahim and Ms Grace Morgan (Drew & Napier LLC) for the defendants.
