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Tjong Very Sumito and others
v
Antig Investments Pte Ltd

[2009] SGCA 41

Court of Appeal — Civil Appeal No 171 of 2008 (Suit No 348 of 2008)
Andrew Phang Boon Leong JA and V K Rajah JA
2 February; 26 August 2009

Arbitration *— Stay of court proceedings — Mandatory stay under International Arbitration Act (Cap 143A, 2002 Rev Ed) — What constituted a dispute — Judicial policy towards arbitration — Whether court should assess merits of defence or genuineness of dispute — Significance of admission by defendant — Significance of silence or prevarication on part of defendant — Section 6 International Arbitration Act (Cap 143A, 2002 Rev Ed)*

Civil Procedure *— Costs — Whether indemnity costs should be ordered when defendant instituted court proceedings in breach of arbitration clause*

Civil Procedure *— Stay of proceedings — When stay of court proceedings would not be granted*

Facts

The appellants and the respondent entered into a Shares Sale and Purchase Agreement ("the SPA"), under which the appellants agreed to sell 72% of the paid-up share capital of a company, PT Deefu Chemical Indonesia, to the respondent. The SPA contained an arbitration clause which provided for "all disputes, controversies and conflicts arising out of or in connection with [the SPA]" to be settled by arbitration under the SIAC Rules. The payment terms in the SPA were later varied by a supplemental agreement, under which the respondent was to, *inter alia*, pay Aventi Holdings Limited ("Aventi") US$3.7m on 13 June 2008. Aventi requested early settlement of the US$3.7m. The respondent, without notifying the appellants, acceded to Aventi's request and was granted a discount of US$207,200. Subsequently, the appellants' solicitors notified the respondent that the sum of US$3.7m was to be paid to the appellants, and that no further payments were to be made to Aventi. When the respondent failed to respond to this letter and the subsequent notice that court proceedings would be initiated if payment was not made to their clients, the appellants commenced proceedings for an injunction to restrain the respondent from effecting payment of the US$3.7m to any party other than the appellants, as well as for damages. After service of the writ, the respondent's solicitors replied, stating that the appellant's suit was misconceived as all disputes arising out of or in connection with the SPA were subject to a binding arbitration clause. The respondent then entered appearance and applied for a stay of court proceedings in favour of arbitration. The assistant registrar dismissed the respondent's stay application. However, the respondent succeeded on appeal, and was granted a stay of proceedings in favour of arbitration. The appellants appealed.

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Held, dismissing the appeal with indemnity costs:

(1) In order to obtain a stay of proceedings in favour of arbitration under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), the party applying for a stay had to show that he was party to an arbitration agreement and that the proceedings fell within the terms of the arbitration agreement. If the applicant could show this, the court had to grant a stay of proceedings unless the party resisting the stay could show that one of the statutory grounds for refusing a stay existed, *ie*, that the arbitration agreement was "null and void, inoperative or incapable of being performed": at [22].

(2) If the arbitration agreement provided for arbitration of "disputes", then the subject matter of the proceedings would fall outside the terms of the arbitration agreement if: (a) there was no "dispute"; or (b) where the alleged "dispute" was unrelated to the contract which contained the arbitration agreement: at [23].

(3) The need to respect party autonomy, in deciding both the method of dispute resolution as well as the substantive law to govern the contract, had been accepted as the cornerstone underlying judicial non-intervention in arbitration. Courts should be slow to find reasons to assume jurisdiction over a matter that the parties had agreed to refer to arbitration. The whole thrust of the IAA was geared towards minimising court involvement in matters that the parties had agreed to submit to arbitration. Concurrent arbitration and court proceedings were to be avoided unless it was for the purpose of lending curial assistance to the arbitral process: at [28] and [29].

(4) In line with the prevailing philosophy of judicial non-intervention in arbitration, the court would interpret the word "dispute" broadly, and would readily find that a dispute existed unless the defendant had unequivocally admitted that the claim was due and payable. The court would not assess the merits of a denial/defence or the genuineness of a "dispute" since these matters should properly be left to the arbitrator to assess in accordance with the parties' contractual bargain to arbitrate: at [33], [34], [40], [56] and [59].

(5) It was sufficient for a defendant to simply assert that he disputed or denied the claim in order to obtain a stay of proceedings in favour of arbitration. The court was not to examine whether there was "in fact" a dispute. While the respondent's silence prior to the issuance of the writ might have been equivocal, the matter clearly morphed into a dispute when the respondent's solicitors wrote to the appellants averring that their suit was "without merit and misconceived". The fact alone that the respondent was making assertions to the effect that it had discharged its obligations was a dispute which should properly be resolved by arbitration: at [49] and [51].

(6) The court would recognise an exception to judicial non-intervention and refuse to grant a stay where there had been a clear and unequivocal admission. However, the court should not be astute in searching for an admission of a claim, and would ordinarily be inclined to find that a claim was not admitted in all but the clearest of cases: at [59] and [61].

(7) Apart from an express denial or rejection of the claim, the court could also infer that the claim was not admitted from the previous inconclusive discussions between parties, prevarication or even silence. Silence on the part of a defendant

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(even in the face of repeated claims), without more, was often equivocal at best and might be insufficient to constitute the clear and unequivocal admission necessary to exclude the existence of a "dispute", since there might be good reasons why a party remained silent: at [61] and [69].

(8) There was prevarication where a defendant unequivocally admitted the claim, but then later purported to deny the claim on the ground that the admission was mistaken, or fraudulently obtained, or was never made. In such a case, there might well be a "dispute" before the court, both over the substantive claim as well as over whether the defendant could challenge the alleged earlier admission, and the matter should ordinarily be referred to arbitration: at [62].

(9) If a defendant made an unequivocal admission extending to both liability and quantum, then there was no dispute mandatorily referable to arbitration; and the claimant might apply to a court for summary judgment. However, the claimant had to come armed with compelling evidence of the defendant's admission, because once that admission was challenged with any semblance of credibility, the court would ordinarily be inclined to decide that a "dispute" had arisen, and order a stay of proceedings for the arbitral tribunal to resolve the "dispute". If a defendant made a clear and unequivocal admission as to liability but not to quantum, then there was a dispute referable to arbitration: at [63] and [64].

(10) Where it could be established by a successful application for a stay or an anti-suit injunction as a remedy for breach of an arbitration or jurisdiction clause that the breach had caused the innocent party reasonably to incur legal costs, those costs should normally be recoverable on an indemnity basis. It had to have been clear to the appellants that there was a dispute here. In light of this, the appellants should not have pursued this entirely unmeritorious appeal, causing the respondent to incur additional costs. Accordingly, the appeal was dismissed with indemnity costs: at [19] and [71].

Case(s) referred to

A v B (No 2) [2007] 1 Lloyd's Rep 358 (folld)

Amec Civil Engineering Limited v The Secretary of State for Transport [2004] EWHC 2339 (refd)

Amec Civil Engineering Ltd v Secretary of State for Transport [2005] 1 WLR 2339 (refd)

Baltimar Aps Ltd v Nalder & Biddle Ltd [1994] 3 NZLR 129 (refd)

Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd [2005] BLR 63 (refd)

Coop International Pte Ltd v Ebel SA [1998] 1 SLR(R) 615; [1998] 3 SLR 670 (refd)

Dai Yun Shan, The [1992] 1 SLR(R) 461; [1992] 2 SLR 508 (refd)

Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd [2005] 4 SLR(R) 646; [2005] 4 SLR 646 (refd)

Ellerine Brothers (Pty) Ltd v Klinger [1982] 1 WLR 1375 (folld)

Getwick Engineers Limited v Pilecon Engineering Limited [2002] 1020 HKCU 1 (refd)

Glencore Grain Ltd v Agros Trading Co [1999] 2 Lloyd's Rep 410 (refd)

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Gulf Canada Resources Ltd v Avochem International Ltd 66 BCLR (2d) 114 (refd)

Halki Shipping Corporation v Sopex Oils Ltd [1997] 1 WLR 1268 (refd)

Halki Shipping Corporation v Sopex Oils Ltd [1998] 1 WLR 726 (folld)

Halvanon Insurance Co Ltd v Companhia de Seguros do Estado de Sao Paulo [1995] LRLR 303 (refd)

Hayter v Nelson Home Insurance Co [1990] 2 Lloyd's Rep 265 (refd)

Jian He, The [1999] 3 SLR(R) 432; [2000] 1 SLR 8 (refd)

Kwan Im Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd [1998] 1 SLR(R) 401; [1998] 2 SLR 137 (refd)

Nigel Peter Albon v Naza Motor Trading Sdn Bhd (No 3) [2007] EWHC 665 (refd)

Sabah Shipyard (Pakistan) Ltd v Government of the Islamic Republic of Pakistan [2004] 3 SLR(R) 184; [2004] 3 SLR 184 (refd)

Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR(R) 86; [2007] 3 SLR 86 (refd)

Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd [1992] 3 SLR(R) 595; [1993] 1 SLR 876 (refd)

Legislation referred to

Arbitration Act (Cap 10, 2002 Rev Ed) s 6(2)

Evidence Act (Cap 97, 1997 Rev Ed) s 60(2)

International Arbitration Act (Cap 143A, 2002 Rev Ed) ss 6, 6(1), 6(2) (consd)

Arbitration Act 1950 (c 27) (UK)

Arbitration Act 1975 (c 3) (UK)

Arbitration Act 1996 (c 23) (UK) ss 9, 9(4)

Hri Kumar Nair SC and Wong Chin Soon Wilson (Drew Napier LLC), Sree Govind Menon (Manjit Govind & Partners) for the appellants;
Michael Hwang SC and Charis Tan En Pin (Chambers of Michael Hwang SC), Nicholas Jeyaraj s/o Narayanan (Nicholas & Co) for the respondent.

[Editorial note: The decision from which this appeal arose is reported at [2009] 1 SLR(R) 861.]

26 August 2009

V K Rajah JA (delivering the grounds of decision of the court):

1 "Dispute" is a protean word that derives its meaning from its context. The word is deceptively simple to understand in everyday usage but elusively difficult to explain as a legal term. It has (together with its other less frequently used legal cousins such as "differences" and "controversies") particular significance in the field of arbitration as most arbitration clauses stipulate that before a reference to arbitration can be made, a dispute must exist. As a consequence, it is commonplace for legal challenges to be made on: (a) whether a "dispute" exists; and (b) whether a court or an arbitral

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tribunal has jurisdiction to hear a particular matter. Not surprisingly, such challenges are also usually accompanied by heated debates about whether the alleged dispute is *bona fide*.

2 Unfortunately, the common law courts, particularly those in England, have generated not entirely consistent strands of thought on the meaning of the word; apparently for historical reasons. These historical reasons need not detain us at this juncture; see below at [36]. While the current position appears to be more settled, it continues to be a matter of importance to the arbitral community that there should be clarity as to what constitutes a "dispute". However, attempts to define what constitutes a "dispute" with hard-edged precision will necessarily be unsuccessful, given the infinite circumstances in which disputes may arise or cease to exist. That said, the Sisyphean nature of the task should not deter measured judicial attempts to further illuminate how this word (and like words) may be *ordinarily* interpreted with the *proviso* that all cases must fall to be decided on their own special facts and the frank acknowledgement that further glosses will arise. In these grounds, we explore the existing case law on this topic and the genesis of the present approach to the interpretation of the word "dispute" in Singapore. We shall also elaborate on the current judicial philosophy towards arbitration.

Background facts

3 This case concerns the granting of a stay of proceedings in favour of arbitration under ss 6(1)–6(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") where a party to an arbitration agreement had, despite the existence of the arbitration agreement, commenced proceedings in court.

4 The appellants and the respondent entered into a Shares Sale and Purchase Agreement (the "SPA") on 23 November 2004, under which the appellants agreed to sell and the respondent agreed to buy 72% of the entire paid-up share capital of PT Deefu Chemical Indonesia ("PT Deefu"), a company with interests in coal mining in Indonesia. Section 11.06 of the SPA required the parties to resolve any dispute by arbitration if it could not be resolved by negotiation:

> **Section 11.06 Governing Law and Arbitration**
>
> (1) **Governing Law**
>
> This agreement is governed by the laws of Indonesia.
>
> (2) **Arbitration**
>
> (a) Any and all disputes, controversies, and conflicts between the parties in connection with this Agreement shall, so far as is possible, be settled amicably between the parties through negotiation.

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> (b) Failing such amicable settlement, any and *all disputes, controversies and conflicts arising out of or in connection* with this Agreement or its performance (including the validity of this Agreement) shall be settled by arbitration by a three (3) member arbitration board which will hold its sessions in Singapore in English under the SIAC (Singapore International Arbitration Centre) Rules. The tribunal of three (3) arbitrators shall be appointed by each party with the third member appointed by the Chairman of the SIAC.
>
> [emphasis added]

5 Between 3 January 2005 and 19 August 2005, the parties entered into four further agreements (collectively "the supplemental agreements"):

> (a) a Supplemental Agreement dated 3 January 2005 ("SSPA");
>
> (b) a Second Supplemental Agreement dated 18 February 2005 ("Second SSPA");
>
> (c) a Third Supplemental Agreement dated 19 July 2005 ("Third SSPA"); and
>
> (d) a Fourth Supplemental Agreement dated 19 August 2005 ("Fourth SSPA").

6 Each of these agreements was expressed to be supplemental to the SPA. In particular, the Second SSPA, Third SSPA and Fourth SSPA specifically stated that they were "supplemental to and an integral part of the SPA and the terms and conditions of the SPA are hereby amended, modified, added to and/or varied accordingly to the extent provided herein". The Fourth SSPA also incorporated the terms of the SPA and the first three supplemental agreements in its preamble:

> The term 'SPA' in this Agreement shall refer to the Shares Sale and Purchase Agreement as amended, varied and/or supplemented by the First Supplemental Agreement, Second Supplemental Agreement, the Vendors' Letter and the Third Supplemental Agreement.

7 The appellants and the respondent were the only parties to the SPA and the four supplemental agreements. For the purposes of this appeal, only the Fourth SSPA was relevant. The Fourth SSPA purported to "vary the payment terms of the purchase consideration payable by the [respondent] to the [appellants] for the Sale Shares" (at cl (2)(B)). More particularly, cl 2.2 of the Fourth SSPA provided:

> The parties hereto agree that Section 4.02(2) of the SPA shall be deleted in its entirety and replaced with the following new clause:-
>
> (2) The Parties hereby agree and the Vendors hereby instruct and authorise the Purchaser to pay the Purchase Price due to them in the following manner:-
>
> …

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> (e) the balance US$8,500,000.00 ('Balance Purchase Price') to be paid in the following manner:-
>
> (i) on the date falling 12 months from the Completion Date of which US$2,800,000.00 shall be paid to Vendor 1 and US$2,000,000.00 *shall be paid to Aventi* who is authorised to receive the same for and on behalf of the Vendors; and
>
> (ii) on the date falling 24 months from the Completion Date US$3,700,000.00 *shall be paid to Aventi*, who is authorised to receive the same for and on behalf of the Vendors.
>
> [emphasis added]

8 Aventi Holdings Limited ("Aventi") is a company incorporated in the British Virgin Islands, and was controlled by the original owner of the shares sold by the respondent to the appellants. Under cl 2(e)(i) of the Fourth SSPA, US$2m would become due 12 months after the completion date of 13 June 2006 (*ie*, 13 June 2007). However, on 20 July 2006, Aventi requested early settlement of the US$2m and offered the respondent a discount of 6% in consideration for the early settlement. The respondent, without notifying the appellants, acceded to Aventi's request and was granted a discount equivalent to US$120,000.

9 Under cl 2(e)(ii) of the Fourth SSPA, US$3m would become due 24 months after the completion date of 13 June 2006 (*ie*, 13 June 2008). In late September 2007, Aventi again requested early settlement, of the US$3.7m, in return for a discount of 5.6%. The respondent agreed and released the aggregate sum of US$3,492,800 (less the discount of US$207,200) without notifying the appellants.

10 On 12 November 2007, the first appellant, Mr Sumito, wrote to the respondent requesting "*final settlement* of the Balance Purchase Price":

> I refer to the Shares Sale and Purchase Agreement … dated 23 November 2004, whereby the Vendors agreed to sell and the Purchaser agreed to purchase 396 issued shares … in the capital of PT Deefu, upon the terms and conditions therein contained, as amended varied and/or modified by [the supplemental agreements] …
>
> I have agreed on 29 October 2007 that the *final amount* of the Balance Purchase Price due to me is US$1,138,772. Kindly issue a cheque for the sum of $1,630,038.24 (equivalent to US$1,138,772), being final settlement of the Balance Purchase Price.
>
> [emphasis added]

11 The respondent accordingly paid $1,630,038.24 to Mr Sumito by way of a cheque dated 12 November 2007. The next day, on 13 November 2007, the respondent's parent company, Magnus Energy Group Ltd ("Magnus"), announced over SGXNet that Antig had "completed the settlement of the

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balance purchase price for the acquisition of 72% equity interest in [PT Deefu]", setting out the agreed payment arrangement in sub-cll (i) and (ii) of the Fourth SSPA (see [7] above), and, pursuant to Aventi's requests, early settlement of the US$2m and US$3.7m at a 6% and 5.6% discount respectively.

12 Almost six months later, on 9 April 2008, the appellants' solicitors, out of the blue, notified the respondent that the sum of US$3.7m was to be paid to the appellants, and that no further payments were to be made to Aventi. The respondent did not respond to this letter. The appellants' solicitors sent a reminder on 30 April 2008, but this too failed to elicit any reaction from the respondent. On 8 May 2008, the appellants' solicitors gave notice that court proceedings would be initiated if payment was not made to their clients. Again, there was no response. On 20 May 2008, the appellants commenced proceedings for an injunction to restrain the respondent from effecting payment of the US$3.7m to any party other than the appellants, as well as for damages. It is common ground that the proceedings were not in aid of arbitration proceedings. On 26 May 2008, after service of the writ, the respondent's solicitors, DLA Piper, replied (at para 3):

> We are further instructed that your client's Suit is without merit and misconceived, least of all for the reason that the Share Sale and Purchase Agreement which forms the basis of your client's allegations is governed by Indonesian Law, and all disputes arising out of or in connection with the Share Sale and Purchase Agreement is subject to a binding arbitration clause.

13 The appellants' solicitors replied in a letter dated 28 May 2008:

> Our clients are unable to appreciate your contentions. The point is a simple one – are your clients making payment of US$ 3.7 million to our clients? Your clients are surely not denying that the sum of US$3.7 million is due and payable to our clients as owners of the shares. With respect, there is nothing to dispute and the proposed invocation is not bona fide but if activated, to evade an obvious case for judgment.

14 There was no response to this letter. Instead, the respondent entered appearance on 28 May 2008, and applied for a stay of court proceedings in favour of arbitration on 13 June 2008. The Assistant Registrar ("the AR") dismissed the respondent's stay application on 13 August 2008. However, on 13 October 2008, the respondent's appeal was allowed by Choo Han Teck J ("the judge"), who gave his succinct reasons in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 1 SLR(R) 861 ("the GD").

The AR's decision

15 The AR considered the present case to be similar to the case of *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005]

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4 SLR(R) 646 ("*Dalian*"), where Woo Bih Li J ("Woo J") held that the dispute in question was not referable to arbitration because it did not arise in connection with the contract in which the arbitration agreement appeared. The AR was of the opinion that the payments made to Aventi were distinct from the respondent's obligation under the SPA, and "recourse [could] be had against Aventi in separate proceedings". She found that the respondent's payment to Aventi did "not extinguish the [respondent's] liability to pay the [appellants], in accordance with the [SPA] and its 4 Supplements". In these circumstances, the AR decided that there was no dispute *in connection with the SPA* and dismissed the stay application.

The judge's decision

16 At the outset, the judge restated the principles set out by Woo J in *Dalian*, emphasising in particular (at [4] of the GD) that "*if the defendant at least makes a positive assertion that he is disputing the claim … then there is a dispute even though it can be easily demonstrated that he is wrong*" [emphasis in original]. The judge then rightly distinguished the present case from the facts in *Dalian* (at [6] of the GD):

> *Dalian* involved two separate and distinct contracts. There, the defendant's defence in relation to the plaintiff's claim under the Armonikos contract was that it had a right of set-off under the Hanjin Tacoma contract. On the other hand, the defendant in the present case refers to the fourth supplementary agreement which states that the US$3.7m '*shall be paid to Aventi*' and that '*[Aventi] is authorised to receive the same*'. Its case was that the payment to Aventi extinguished its liabilities under the SPA and they aver that this was collaborated by the first plaintiff's letter dated 12 November 2007. While it could be said that the early payment arrangement between Aventi and the defendant constitutes a 'side agreement', I was of the view that this side agreement could not be seen as separate and distinct from the SPA. In fact, it was one which was inextricably linked to the SPA, *ie,* in the absence of the SPA, the side agreement would never have materialised. There was therefore a dispute referable to the SPA. Of course, the issue of whether the payment made under the side agreement extinguished the defendant's liability under the SPA would be a matter reserved for the arbitrator(s) to decide. [emphasis in original]

17 Further, the judge noted (at [7] of the GD) that "far from admitting the claim, the defendant asserted that 'the plaintiffs' claim is clearly devoid of any merit'". Citing the proposition in *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 WLR 726 ("*Halki*") at 761, that "there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable", the judge held (at [7] of the GD):

> [W]hile there are some minor differences between the English position and the position elucidated by the High Court in *Dalian* (especially in

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> relation to silence on the part of the defendant), the common ground remains that a positive assertion by the defendant that he is disputing the claim would suffice for the purposes of s 6(2) of the IAA. This would be so even if it can be easily demonstrated that the defendant was wrong. Further, it bears mention that '*[t]he court is not to consider if there is in fact a dispute or whether there is a genuine dispute*': *Dalian* at [75]. [emphasis in original]

18 Thus, the judge concluded (at [8] of the GD) that a dispute referable to the SPA existed; and that the respondent had made a positive assertion challenging the appellants' claim, albeit after the commencement of court proceedings. Since either of these grounds would justify a stay of proceedings in favour of arbitration, the judge allowed the appeal.

19 Finally, while the issue of costs was not argued fully before him, the judge noted that costs had been awarded on an indemnity basis in recent English decisions, and heartily endorsed the remarks by Colman J in *A v B (No 2)* [2007] 1 Lloyd's Rep 358 ("*A v B (Costs)*") at [10]–[11] and [15]. These remarks merit reiteration here as we took note of them in making our costs order in this appeal:

> There can be no question but that the procedural consequence of conduct by a party to an arbitration or jurisdiction agreement which amounts to a breach of it and causes the opposite party reasonably to incur legal costs ought to be that the innocent party recovers by a costs order and/or by an award of damages the whole, and not merely part, of its reasonable legal costs. Against that background, it is necessary to ask whether there is any sustainable policy consideration which would require that unless there were some special circumstances, excluding the fact that it was an arbitration or jurisdiction agreement that had been broken, the successful party should have to forego part of its costs or alternatively to bring a separate claim for damages to cover any shortfall on assessment of costs. The relevant considerations point very strongly indeed against either result. To forego part of the loss would be unjust. To be placed in a position where the balance of the recoverable damages could not be quantified until after the costs had been formally assessed would involve delay in obtaining compensation properly due and a formalistic and cumbersome procedure which would in itself involve more costs and judicial time. Where the defendant who had been improperly impleaded in the English courts was outside the jurisdiction, no claim for damages could be brought in the English courts without submitting to the jurisdiction.
>
> In my judgment, provided that it can be established by a successful application for a stay or an anti-suit injunction as a remedy for breach of an arbitration or jurisdiction clause that the breach has caused the innocent party reasonably to incur legal costs, those costs should normally be recoverable on an indemnity basis.
>
> …

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> *The conduct of a party who deliberately ignores an arbitration or a jurisdiction clause so as to derive from its own breach of contract an unjustifiable procedural advantage is in substance acting in a manner which not only constitutes a breach of contract but which misuses the judicial facilities offered by the English courts or a foreign court. In the ordinary way it can therefore normally be characterised as so serious a departure from 'the norm' as to require judicial discouragement ...*
>
> [emphasis added]

The present appeal

20 The sole issue before us was whether the appellants' claim was embraced by the arbitration agreement in the SPA under s 6 of the IAA, which provides:

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

21 The phrase "[n]otwithstanding Article 8 of the Model Law" is not relevant to the present case; in *Dalian* ([15] *supra*) at [18], Woo J explained that it applied "primarily to the second part of Art 8(1) regarding the stage when an application for a stay may be made". Similarly, the learned authors of Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) ("*Merkin and Hjalmarsson*") note at p 19:

> The applicant for a stay may engage s. 6 'at any time after appearance and before delivering any pleading or taking any other step in the proceedings'; this overrides Model Law, art. 8(1) which provides a cut-off point for application when the applicant 'submits his first statement on the dispute'.

22 Section 6 of the IAA acknowledges the primacy of the specific arbitration agreement in question. In order to obtain a stay of proceedings in favour of arbitration under s 6, the party applying for a stay ("the applicant") must first show that that he is party to an arbitration agreement, and that the proceedings instituted involve a "matter which is the subject of the [arbitration] agreement". In other words, the applicant has to show that

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the *proceedings instituted fall within the terms of the arbitration agreement*. If the applicant can show that there is an applicable arbitration agreement, then the court *must* grant a stay of proceedings unless the party resisting the stay can show that one of the statutory grounds for refusing a stay exists, *ie*, that the arbitration agreement is "*null and void, inoperative or incapable of being performed*".

23 If the arbitration agreement provides for arbitration of "disputes" or "differences" or "controversies", then the subject matter of the proceedings would *fall outside* the terms of the arbitration agreement if: (a) there is no "dispute", "difference" or "controversy" as the case may be; or (b) where the alleged "dispute" is unrelated to the contract which contains the arbitration agreement. In the present case, the arbitration agreement provided for "all disputes, controversies, and conflicts arising out of or in connection with [the SPA] or its performance" to be resolved by arbitration. Thus, the issue of whether the appellants' claim was a matter which is the subject of the arbitration agreement under s 6(1) of the IAA turned on a two-fold question. First, did the claim constitute a dispute, controversy or conflict; and second, if the claim did constitute a dispute, controversy or conflict, did it arise out of or in connection with the SPA? Before we discuss these two questions, it is useful to set the context with some prefatory observations.

24 A preliminary point which may sometimes arise (but which was not in issue before us) is whether the court has the jurisdiction to decide whether there is a matter which is the subject of the arbitration agreement. The learned author of Robert Merkin, *Arbitration Law* (Informa, 2008) ("*Merkin*") observes, at paras 8.21 and 8.24, that "it might be argued" that the principle of non-intervention indicates that the arbitrators should be allowed to deal with the question of jurisdiction and that the court should not seek to reach its own determination on the matter until an award on the point has been made or an appeal has been lodged against the award. We recognise that the principle of "*kompetenz-kompetenz*" encapsulated in Art 16 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") may be eroded if the courts take an expansive view of their role when such challenges arise. Unfortunately, there is no silver bullet that can resolve this tension and the best approach to resolving this conceptual difficulty is the robust application of judicial common sense, whilst always bearing in mind the limited role that the courts are expected to play in matters that appear to have been referred to arbitration. We noted that both Woo J in *Dalian* ([15] *supra*) and Lightman J in *Nigel Peter Albon v Naza Motor Trading Sdn Bhd (No 3)* [2007] EWHC 665 (Ch) (in the context of whether an arbitration agreement had been concluded) took the position that it is the court that determines whether the arbitration agreement applies; although Woo J was quick to add the important caveat that if it was at least arguable that the matter is the subject of the arbitration agreement, then a stay of proceedings should be ordered. We agree with the

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measured approach taken by Woo J since the question of whether a matter is the subject of an arbitration agreement is the very threshold to the application of s 6 of the IAA itself. However, it is only in the *clearest* of cases that the court ought to make a ruling on the inapplicability of an arbitration agreement. The court's jurisdiction to grant a stay is satisfied once the prerequisites of s 6 appear to have been met. If there is no binding arbitration agreement or if the arbitration agreement has no application, then the court has no jurisdiction to grant a stay under s 6 of the IAA, although it is of course open to the court to do so under its inherent jurisdiction. This ability to decide on its threshold jurisdiction works in much the same way as the court having the jurisdiction to determine whether an arbitration agreement is "null and void, inoperative or incapable of being performed".

25 Before we clarify, at [33]–[46] below, the contours of what constitutes a "dispute" that must be referred to arbitration, it would be apposite that we first pause to sketch the relevant statutory setting and prevailing judicial policy towards arbitration in Singapore so as to provide some context to our discussion.

Statutory setting

26 While the word "dispute" does not appear in the language of ss 6(1) or 6(2) of the IAA, the prevalence of its usage in arbitration agreements has generated vigorous (but inconclusive) legal debate on what qualifies as a "dispute". The word "dispute" also appeared in the Explanatory Statement to the International Arbitration Bill (Bill 14 of 1994), which described the proposed s 6 as:

> [prescribing] the conditions under which the court is required to stay proceedings before it where there is an agreement between the parties that the dispute should be submitted to arbitration.

27 The second reading of the International Arbitration Bill in Parliament (*Singapore Parliamentary Debates, Official Report* (31 October 1994) vol 63 at cols 624–629 (Associate Professor Ho Peng Kee, Parliamentary Secretary to the Minister for Law) ("Assoc Prof Ho")) noted the widespread adoption of the Model Law. Assoc Prof Ho said:

> [The] Model Law accords full liberty to parties in non-domestic arbitrations to choose laws and arbitrators to resolve their disputes with minimal intervention from domestic courts.
>
> …
>
> … Part II also contains the modifications and clarifications we have made to clarify and improve the Model Law. This was done after studying the experiences of other countries and consulting the UNCITRAL Secretariat.

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> The reason for this approach is to let foreign businessmen and lawyers know at the outset the changes that have been made to the Model Law. This will facilitate their choice of Singapore as a venue for their cases.
>
> Apart from implementing the Model Law, Part II will introduce additional provisions which will facilitate arbitrations. These provide for the confidentiality of court proceedings arising from arbitrations, conciliation proceedings prior to arbitration, immunity of arbitrators for negligence and mistakes, invoking the assistance of the courts in enforcing interim orders or directions, allowing the arbitrators to adopt 'inquisitorial processes' in the Civil Law tradition, awarding of interest and taxation of arbitration costs by the Registrar of the SIAC.
>
> The Bill will also consolidate all provisions on international arbitrations in a single Act by re-enacting substantially unchanged the Arbitration (Foreign Awards) Act (Cap. 10A) in Part III. The Arbitration (Foreign Awards) Act presently gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. This Convention which is set out in the Second Schedule allows arbitral awards made in one Convention country to be recognised and enforced in any of the other Convention countries.

Judicial policy towards arbitration

28 There was a time when arbitration was viewed disdainfully as an inferior process of justice. Those days are now well behind us. An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation, help to effectively unclog the arteries of judicial administration as well as offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with. More fundamentally, the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules to be applied) as well as the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration. In essence, a court ought to give effect to the parties' contractual choice as to the manner of dispute resolution unless it offends the law.

29 There are myriad reasons why parties may choose to resolve disputes by arbitration rather than litigation. The learned authors of Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th Ed, 2004) ("*Redfern and Hunter*") offer two principal reasons: first, the opportunity to choose a "neutral" forum and a "neutral" tribunal (since parties to an international commercial contract often come from different countries); and second, international enforceability of arbitral awards under treaties such as the New York Convention. Under these treaties, an arbitral award, once made, is

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immediately enforceable both nationally and internationally in all treaty states. One would imagine that parties might be equally motivated to choose arbitration by other crucial considerations such as confidentiality, procedural flexibility and the choice of arbitrators with particular technical or legal expertise better suited to grasp the intricacies of the particular dispute or the choice of law. Another crucial factor that cannot be overlooked is the finality of the arbitral process. Arbitration is not viewed by commercial persons as simply the first step on a tiresome ladder of appeals. It is meant to be the first and only step. *Courts should therefore be slow to find reasons to assume jurisdiction over a matter that the parties have* ***agreed*** *to refer to arbitration. It must also be remembered that the whole thrust of the IAA is geared towards minimising court involvement in matters that the parties have agreed to submit to arbitration*. Concurrent arbitration and court proceedings are to be avoided unless it is for the purpose of lending curial assistance to the arbitral process. Jurisdictional challenges must be dealt with promptly and firmly. If the courts are seen to be ready to entertain frivolous jurisdictional challenges or exert a supervisory role over arbitration proceedings, this might encourage parties to stall arbitration proceedings. This would, in turn, slow down arbitrations and increase costs all round. In short, the role of the court is now to support, and not to displace, the arbitral process.

30 As an aside, it should be remembered that the domestic arbitration regime in Singapore is premised on somewhat different policy considerations from that currently applicable in the United Kingdom. *Redfern and Hunter* at para 1–51, commenting on the position in the United Kingdom, note:

> In purely domestic disputes, the question of whether to arbitrate or to litigate may be finely balanced. In the final analysis, much may depend upon the circumstances of each particular case and the reputation and procedures of the local courts. However, where the question arises in an international transaction, the balance comes down very firmly in favour of arbitration.
>
> In a domestic context, parties who are looking for a binding decision on a dispute will usually have an effective choice between a national court and national arbitration.

31 In England, however, there is no distinction between international and domestic arbitrations – a stay is mandatory in both instances. *Merkin* ([24] *supra*) explains, at para 8.3, that this distinction was abolished as a dramatic solution to the problem raised by Art 12 of the European Community Treaty, which outlaws any conduct by a member state which discriminates between nationals of member states on the ground of their nationality. There is no such prohibition in Singapore, and the regimes for international and domestic arbitrations remain bifurcated and are governed by distinct statutory regimes. Given the different underlying philosophies

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between the domestic and international statutory frameworks in Singapore, the courts here do have a somewhat wider role and broader judicial latitude in domestic arbitration; though even this is to be exercised in a guarded manner: see *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86.

32 Having sketched the contextual background in which the present appeal must be viewed, we now turn to examine more closely the law on what constitutes a dispute for the purposes of arbitration agreements in relation to s 6 of the IAA.

What constitutes a dispute

33 We have found one of the most helpful suggested approaches in construing how the word "dispute" and its legal cousins ought to be interpreted in Michael J Mustill and Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) ("*Mustill and Boyd*") at p 118–119:

> *General words such as these confer the widest possible jurisdiction. They must, however, be construed by reference to the subject matter of the contract in which they are included*. Thus, the inclusion in a mercantile contract of an arbitration clause in general terms would not endow the arbitrator with jurisdiction over disputes between the parties concerning, say, personal injuries caused by one to the other, or over allegations of libel. Nor would a clause in a partnership agreement referring 'differences or disputes' to arbitration cover a quarrel about a horse race. But it would, for example, if included in a contract of carriage, embrace claims for damage to the goods, even if framed in tort. It would also embrace all contractual remedies, apart from those which sought to impeach the initial existence of the contract, so that it would cover claims for damages arising from a repudiation or a deviation, claims for rectification, or avoidance on the ground of misrepresentation. It would, of course, include issues of law as well as fact. [emphasis added]

34 In a similar vein, the learned author of Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) ("*Born*") notes, at p 1093, that "most national courts have [in recent years] sensibly adopted *broad* interpretations of the terms 'dispute', 'difference' and 'controversy'" [emphasis added]. *Merkin and Hjalmarsson* ([21] *supra*) summarise the current position in Singapore as follows (at pp 21–22):

> The general definition of dispute requires the making of a claim by one party and its rejection by the other. Whether this has occurred in the course of lengthy correspondence and negotiation between the parties is not always immediately obvious. The making of a formal claim with a time limit for response is perhaps the simplest method of requiring the other party to define his position, but even if this approach is not used a failure by the other party to respond to a claim does not

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> necessarily deny the existence of a dispute particularly where there are clear unresolved disagreements following the conclusion of negotiations. A dispute may also be found to arise even though negotiations are still in progress, at least where it is clear that these are being protracted in an attempt to forestall proceedings. By contrast there is no dispute if a response to the claim is under consideration, if the issues are purely hypothetical or arise between the parties and a third party who is not subject to the arbitration clause. … In *Dalian Hualiang Enterprise Group Co Ltd v. Louis Dreyfus Asia Pte Ltd* it was said that where a defendant refuses to pay or to admit a debt or remains silent because he has no money to pay or simply because he is intransigent, there would be no dispute, although it would be different if the defendant made a positive assertion that he was disputing the claim, in which case there would be a dispute even though it could be easily demonstrated that he was wrong. The quality of the defence is not, therefore, an issue which can be assessed by a court where there is an arbitration clause and accordingly the court cannot give summary judgment even though the outcome of the case is all but inevitable but must stay its proceedings where the matter is arguable so that the arbitrators can resolve the issue between the parties.

35 Citing, *inter alia*, *The Dai Yun Shan* [1992] 1 SLR(R) 461 ("*Dai Yun Shan*"), *Coop International Pte Ltd v Ebel SA* [1998] 1 SLR(R) 615 and *Dalian*, *Merkin and Hjalmarsson* conclude, at p 21, that:

> The position in both England and Singapore is that a stay must be ordered unless the arbitration agreement is null and void, inoperative or incapable of being performed, *the question of whether there is a dispute being redundant*. [emphasis added]

At p 22, they add that, an "admission by a defendant would, generally speaking, be contrary to a finding of a dispute but not every admission would necessarily avoid a stay order". We agree with the contents of this useful summary and shall elaborate on our reasons for this below. Further, we shall also attempt to iron over some creases that have now become apparent.

36 Woo J in *Dalian* ([15] *supra*) at [39]–[40], helpfully quoted at length the judgment of Swinton Thomas LJ in *Halki* ([17] *supra*) at 754–756 and 761–763, which had set out the legislative history leading to s 9(4) of the English Arbitration Act 1996 (c 23), which we will not reproduce here (see also *Merkin* ([24] *supra*) at paras 8.35–8.42.2). It would suffice, for the present discussion, for us to point out that the English Arbitration Acts of 1950 (c 27) and 1975 (c 3) directed the court to stay proceedings "unless satisfied that the arbitration agreement is null and void, inoperable or incapable of being performed *or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred*" [emphasis added]. The phrase "or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred" was deliberately omitted from

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s 9(4) of the English Arbitration Act 1996 (c 23), with the result being that the grounds for refusing a stay under this section are identical to those in s 6(2) of the IAA. *Merkin* summarises the effect of *Halki* thus ([24] *supra* at para 8.42.1):

> The effect of *Halki Shipping Corporation v. Sopex Oils Ltd* is to give the term 'dispute' a wide meaning. Assuming that there has been a proper claim, *Halki Shipping* decides that if the defendant contests liability then, whether or not he has an arguable case on the merits for doing so, there is a dispute and the court must stay its own proceedings, as the existence or otherwise of a valid defence is a matter for the arbitrators. *More complex is the question whether there can be a dispute where there is an admission of liability by the defendant, and the defendant has simply refused to make payment*. Prior to the passing of the Arbitration Act 1996 it had been held that where there had been such an admission the claimant was entitled to summary judgment under what is now Part 24 of the CPR 1998, irrespective of the existence of the arbitration clause. However, it was unclear whether this was so because there was no dispute between the parties and thus nothing to refer to arbitration or because an admission of liability did not prevent a dispute between the parties from arising but in the circumstances the court would refuse to stay its proceedings. … *There is a conflict of authority on the question whether an admission of liability removes the possibility of a dispute and thereby entitles the claimant to summary judgment or whether the claimant is required to enforce the claim through arbitration. In some cases the view was taken that an arbitrable dispute remained, whereas in others a distinction was drawn between the case in which the defendant contested the correctness of a proposition even though he was objectively wrong, and the case in which a person accepted that he was wrong but refused to accept the consequences.* … Post-1996 authority is, however, more clearly in favour of the need to arbitrate where liability is admitted. At first instance in *Halki Shipping* Clarke LJ stated that, even in the case of admitted liability, there should be reference to arbitration: 'I can see an argument for saying that the claimant would be entitled to an award if the respondent then refused to pay.' The Court of Appeal in *Halki Shipping* did not comment specifically on this view. Clarke LJ further noted at first instance in *Halki* that the argument that if there is no dispute then the arbitrators have no jurisdiction over the matter, so that only the court could deal with this situation, was an approach inconsistent with long-established arbitration practice. It might also be commented that in cases decided under the Model Law it has been assumed that an admission of liability prevents any dispute from arising. [emphasis added]

37 *Merkin* cites (at para 8.42.1), *inter alia*, *Getwick Engineers Limited v Pilecon Engineering Limited* [2002] 1020 HKCU 1 ("*Getwick*") as an example of "cases decided under the Model Law [where] it has been assumed that an admission of liability prevents any dispute from arising". We will address this case, as well as the significance and effect of an

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admission, at [56]–[59] below. Before we do so, we shall examine more closely Woo J's opinion in *Dalian*.

38 In *Dalian*, the first plaintiff, DHE, entered into a contract ("the Armonikos contract") with the defendant, LD. DHE then assigned it to the second plaintiff, DJOM. DHE and DJOM sued LD for sums payable under the Armonikos contract, pointing to an admission by a member of LD's China office. LD had also admitted, in its own statement of account, that the sums claimed were payable (see *Dalian* ([15] *supra*) at [14]). LD applied for a stay of proceedings in favour of arbitration, relying on the arbitration agreement in the Armonikos contract. LD also argued that it had a right of set-off against another company, Fuhong, under a different contract ("the Hanjin Tacoma contract"), alleging that Fuhong had a running account with DHE and DJOM. Woo J's decision to refuse a stay boiled down to his finding, at [30], that:

> [T]here was an admission that the sums claimed under the Armonikos contract would be due and payable but for the claim under the Hanjin Tacoma contract. The disputes under the Hanjin Tacoma contract were separate and distinct from the Armonikos contract. Furthermore, neither DHE [nor] DJOM was a party to the Hanjin Tacoma contract. While it was true that the sums claimed by the plaintiffs were payable under the Armonikos contract, the allegation about the running account arose only because of [LD's] claim under the Hanjin Tacoma contract. Furthermore, the issue as to whether there was a running account or not was, in my view, unrelated to the very transaction under the Armonikos contract. Indeed, [LD's submission] was simply that the 'defence of a running account undoubtedly falls within the scope of the arbitration agreement'. This was a bald argument. In my view, it was clear that the set-off issue was not the subject of the arbitration agreement. In the circumstances, I allowed the appeal.

The appeal against Woo J's decision was heard and dismissed by the Court of Appeal on 27 January 2006. However, no grounds of decision were given by this court.

39 Woo J, in allowing the appeal made to him, observed that "the jurisdiction of the court under s 6(2) IAA became academic" (*Dalian* at [31]). Nevertheless, Woo J, in an in-depth forensic analysis, carefully examined the jurisprudence on the circumstances in which the court must order a stay of proceedings in favour of arbitration. He first noted that the mandatory stay under s 6(2) of the IAA was different from its discretionary counterpart, also numbered s 6(2), in the domestic Arbitration Act (Cap 10, 2002 Rev Ed) ("AA"), and made the following important observations (*Dalian* at [75]–[77]):

> As regards s 6(2) IAA, I am of the view that once there is a dispute, a stay must be ordered unless the arbitration agreement is null and void, inoperative or incapable of being performed. The court is not to consider if there is in fact a dispute or whether there is a genuine

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> dispute. The more difficult question is when it can be said that a dispute exists. For example, *is there a dispute when the defendant simply refuses to pay or to admit the claim or remains silent? Although there have been statements that suggest that such conduct is sufficient to constitute a dispute I do not share that view. A defendant may refuse to pay or to admit a debt or remain silent because he has no money to pay or simply because he is intransigent. To my mind that is not a dispute*. It is different if the defendant at least makes a positive assertion that he is disputing the claim. If he is prepared to and does assert that, then there is a dispute even though it can be easily demonstrated that he is wrong. *However, an admission by a defendant will, generally speaking, be contrary to a dispute but not every admission will necessarily avoid a stay order*.
>
> The above approach is not inconsistent with the concept of minimal court involvement which is the regime under the IAA and the Model Law. …
>
> It also seems to me that s 6(2) IAA could have been drafted in terms adopting the previous s 7(2) of the domestic arbitration legislation (before s 6(2) of the Singapore domestic Arbitration Act was enacted) if the intention was to allow the court to consider whether there is in fact a dispute. In my view, the difference in the wording of s 6(2) IAA and the previous s 7(2) of the domestic arbitration legislation is meant to reflect the difference as enunciated by Swinton Thomas LJ in *Halki*, although the legislative history behind the enactment of s 9(4) of the English Arbitration Act 1996 is not exactly the same as that behind the enactment of s 6(2) IAA.
>
> [emphasis added]

40 It is clear that the positions in *Dalian* and *Halki* are in accord in so far as the merits of the dispute are irrelevant to the existence of a dispute. Where these two cases diverge is in relation to the effect of a defendant's admission or silence, and whether the former should be inferred from the latter.

41 Before we address this legal fork, it would be helpful to consider the rationale for the common holding in *Dalian* and *Halki*, bearing in mind that counsel for the appellants would have this court revert to the pre-1996 English position of considering whether there was "in fact" a dispute, or a *bona fide* or genuine dispute. This brief overview will also equip us to address the current, live controversy in relation to the significance of a defendant's admission or silence.

42 The common holding in *Dalian* and *Halki* is best explained with reference to the conceptual basis of judicial non-intervention in arbitration, stemming from the principle of party autonomy over dispute resolution particularly in commercial contracts, see [30] above. *Redfern and Hunter* ([29] *supra*), at para 1–36, concisely sum up the tension between the

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efficient disposal of seemingly indefensible claims and the rigorous and scrupulous enforcement of agreements to arbitrate:

> The problem arises when one party has what it regards as an 'open and shut' case, to which there is no real defence. For example, a party who is faced with an unpaid cheque or bill of exchange may take the view that there cannot be any *genuine* dispute about liability and that, if legal action has to be taken to collect the money which is due, he or she should be entitled to go to court and ask for summary judgment. Such a claim may be met, however, by the argument that there was an arbitration clause in the underlying agreement with the debtor and that the remedy is accordingly to go to arbitration, rather than to the courts. The problem is that, in the time it may take to establish an arbitral tribunal, a judge with summary powers could well have disposed of the case.
>
> The expedient adopted in certain countries, including England, when legislating for the enactment of the New York Convention was to add words that were not in that Convention, so as to allow the court to deal with the case if the judge was satisfied 'that there is not in fact any dispute between the parties with regard to the matter agreed to be referred'. Thus it was possible to avoid a reference to arbitration and to obtain summary judgment if the court was satisfied that there was no ***arguable defence. English law has now followed the strict wording of the New York Convention. It can no longer be argued in England that there is not a genuine dispute, so that the matter should not be referred to arbitration; but such an argument may still remain sustainable in other countries.***
>
> [emphasis in original in italics; emphasis added in bold italics]

43 One ready and persuasive reply to those inclined to press for concurrent court jurisdiction may be found in Lord Saville's The Denning Lecture 1995, "Arbitration and the Courts" at p 13 (quoted in *Redfern and Hunter* at p 20, n 97):

> The action of the Courts in refusing to stay proceedings where the defendant has no defence is understandable. It is, however, an encroachment on the principle of party autonomy which I find difficult to justify. If the parties have agreed to arbitrate their disputes, why should a Court ignore that bargain, merely because with hindsight one party realises that he might be able to enforce his rights faster if he goes to Court?

44 This extract echoed the essence of Lord Saville's earlier more comprehensive but no less forceful reasoning (sitting as a High Court judge) in *Hayter v Nelson Home Insurance Co* [1990] 2 Lloyd's Rep 265 ("*Hayter*") (cited in *Dalian* ([15] *supra*) at [64]). *Hayter* should, however, be read with the caveat, highlighted by Woo J in *Dalian* at [64], that *the decision* was made under the pre-1996 English Arbitration Act. It was observed at 267–269:

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In some cases the suggestion seems to be made that if it can be shown that a claim under a contract is indisputable, i.e. a claim that simply cannot be resisted on either the facts or the law, then there is no dispute or difference within the meaning of the arbitration clause in that contract. …

…

To the extent that such observations are intended to define what is or is not a dispute or difference within the meaning of an arbitration clause of the kind under consideration, I am respectfully unable to agree with them — more importantly they seem to me to be in conflict with the decision of the Court of Appeal in *Ellerine Brothers (Pty.) Ltd. v. Klinger*, [1982] 1 W.L.R. 1375. In my view, to treat the word 'disputes' or the word 'differences' in the context of an ordinary arbitration clause as bearing such a meaning leads not only to absurdity, but also involves giving those words a meaning which (though doubtless one the words are capable of bearing) in context is difficult to support.

The proposition must be that if a claim is indisputable then it cannot form the subject of a 'dispute' or 'difference' within the meaning of an arbitration clause. *If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration.* To my mind such propositions have only to be stated to be rejected — as indeed they were rejected by Mr. Justice Kerr (as he then was) in *The M. Eregli*, [1981] 2 Lloyd's Rep. 169, in terms approved by Lord Justices Templeman and Fox in *Ellerine v. Klinger* (sup). As Lord Justice Templeman put it (at p. 1383):-

> There is a dispute until the defendant admits that the sum is due and payable.

In my judgment in this context neither the word 'disputes' nor the word 'differences' is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them.

In my view this ordinary meaning of the word 'dispute' or the word 'differences' should be given to those words in arbitration clauses. It is sometimes suggested that since arbitrations provide great scope for a defendant to delay paying sums which are indisputably due, the Court

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> should endeavour to avoid that consequence by construing these words in arbitration clauses so as to exclude all such cases, but to my mind there are at least three answers to such suggestions.
>
> In the first place the assumption is made that arbitrations are necessarily slow processes, but whatever the position in the past, I cannot accept that as a general or universal truth today. As Mr. Justice Robert Goff (as he then was) pointed out in *The Kostas Melas*, [1981] 1 Lloyds's Rep. 18, arbitrators have ways and means (in particular by making interim awards) of proceeding as quickly as the Courts — indeed in that particular case quicker than any Court could have acted. If a claimant can persuade the arbitral tribunal that in truth there is no defence to his claim (ex hypothesi not on the face of it a difficult task if the claim is truly indisputable) then there is no good reason why that tribunal cannot resolve the dispute in his favour without any delay at all.
>
> In the second place, and perhaps *more importantly, it must not be forgotten that by their arbitration clause the parties have made an agreement that in place of the Courts, their disputes should be resolved by a private tribunal. Even assuming that this tribunal is likely to be slower or otherwise less efficient than the Courts, that bargain remains — and I know of no general principle of English law to suggest that because a bargain afterwards appears to provide a less satisfactory outcome to one party than would have been the case had it not been made or had it been made differently, that bargain can be simply put on one side and ignored*.
>
> In the third place, if the Courts are to decide whether or not a claim is disputable, they are doing precisely what the parties have agreed should be done by the private tribunal. An arbitrator's very function is to decide whether or not there is a good defence to the claimant's claims — in other words, whether or not the claim is in truth indisputable. Again, to my mind, whatever the position in the past, when the Courts tended to view arbitration clauses as tending to oust their jurisdiction, the modern view (in line with the basic principles of the English law of freedom of contract and indeed International Conventions) is that there is no good reason why the Courts should strive to take matters out of the hands of the tribunal into which the parties have by agreement undertaken to place them.
>
> [emphasis added]

45 While in an open-and-shut case the first of Saville J's answers might not invariably hold true (especially where, as here, three arbitrators must first be appointed to constitute the tribunal), the second and third answers present a principled, sound basis which require parties to be firmly held to their arbitration agreement, despite any practical difficulties, or, possibly, the higher expenses of instituting an arbitral tribunal, even where the arbitration agreement calls for more than one arbitrator or arbitrator(s) with particular expertise. The parties must be held to their original bargain in the absence of a compelling legal basis allowing one of them to

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unilaterally rewrite their agreement to arbitrate. We do not, therefore, share Hirst LJ's scepticism as articulated in his dissenting opinion in *Halki* ([17] *supra*) at 742–743, with regard to the second and third reasons:

> [T]he fact that by their arbitration clause the parties have made an agreement that their dispute should be resolved by a private tribunal … is manifestly a very important consideration, and was echoed by Lord Mustill … in *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd*. [1993] A.C. 334, 356, but that did not prevent him from endorsing the value of the Order 14 procedure, while saying that it should be limited to cases where the defendant 'is not *really* raising a dispute at all' (emphasis added to a word which I interpret as equivalent to 'seriously' or 'genuinely').
>
> Saville J.'s third answer was that the court should not be doing what the parties have agreed should be done by the private tribunal in deciding whether or not the claim is disputable. That is another way of saying that there should not be parallel jurisdictions, which, as I have already noted, has been hitherto regarded as permissible and indeed valuable.
>
> [emphasis in original]

46 We need only say that these inchoate responses to Saville J's reasons undermine parties' freely-agreed arbitration clauses and are contrary to established and fundamental principles of contract law, as well as the practice of international commercial arbitration. Having considered the development of the post-1996 position that a merely asserted dispute suffices to warrant a stay of court proceedings without any inquiry into the genuineness or merits of the defence, we unhesitatingly endorse the judge's application of this approach from *Dalian* and *Halki*. However, it must be noted that the question of whether there is a dispute is not entirely redundant even when it can be shown that there has been an admission. We will examine this issue after disposing of the appellants' arguments on the first point.

Whether there was a dispute, controversy or conflict

47 The error of the appellants' characterisation of the issue and the applicable legal principles should now be patently obvious. The appellants had boldly framed the issue and the applicable principles in their case in the following way:

> There is only one issue and it is this – is there a dispute at law arising from the SPA referable to arbitration?
>
> There can be no dispute to the principle of law that the Court decides whether there is a dispute in fact arising. The adjudication process is judicial in the sense that the Court reviews the material and decides whether there is a bona fide dispute or the invocation is one raised to avoid a clear case for judgment.

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The appellants' sheet anchor was that a mere positive assertion by a defendant denying the claim was insufficient to give rise to a dispute. According to the appellants, there was a distinction between a defendant merely asserting a dispute and the court adjudicating as to whether there was in fact a dispute. To take disputes at face value, based on the conduct of the defendant, would be to allow any defendant to obtain a stay simply by saying baldly, "I dispute the claim". The appellants submitted instead that "The principle of law is that there must be a dispute. Asserting a dispute and the adjudication by the Court as to whether there is in fact a dispute are not synonymous." Further, the appellants submitted, there was no dispute in the present case because the respondent had accepted:

(a) the validity of the SPA;

(b) that payment of the US$3.7m was due on 13 June 2008;

(c) that there could be no variation of the SPA without the written consent of the parties; and

(d) that Aventi was not a party to the SPA.

48 The appellants variously referred to a dispute "in fact" or "at law" or a "*bona fide*" dispute, citing dated cases such as *Baltimar Aps Ltd v Nalder & Biddle Ltd* [1994] 3 NZLR 129 ("*Baltimar Aps*"), *Dalian* ([15] *supra*), *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1992] 3 SLR(R) 595 ("*Uni-Navigation*"), *Kwan Im Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* [1998] 1 SLR(R) 401 ("*Kwan Im Tong*"), and *The Jian He* [1999] 3 SLR(R) 432 ("*Jian He*"), as authority for "what is considered a dispute at law and how the Court sifts the material to ensure that a Defendant who has no bona fide dispute does not abuse the process of Court to stay proceedings when he is aware that he has no defence to the claim". However, the appellants could not, when pressed, credibly explain how even these cases supported their assertion. We noted that *Uni-Navigation* and *Kwan Im Tong* were cases falling within the ambit of the AA (not the IAA) while *Jian He* involved a stay of proceedings on the ground of an exclusive jurisdiction clause (not a stay in favour of arbitration). As such, these cases were of limited relevance to the present appeal. The appellants placed particular reliance on the following passage from the case of *Baltimar Aps* at 135:

> There may be a case for intervention if the party seeking the arbitration is acting in bad faith and thereby abusing the Court's process by applying for a stay, but there is no suggestion of that here. Resort to arbitration in respect of a mere refusal to pay an amount indisputably due can amount to such an abuse.

However, as the respondent rightly pointed out, in *Baltimar Aps*, summary judgment was set aside and a stay of court proceedings was granted. More importantly, the New Zealand court *declined* to adopt the pre-1996 English

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position and instead endorsed *Mustill and Boyd*'s ([33] *supra*) "strong criticism" of the English courts' delving into the reality of the dispute as a result of the *Report of the Committee on the Law of Arbitration* (Cmd 2817, 1927) (MacKinnon Report). Like Woo J, who euphemistically described the cited paragraph from *Baltimar Aps* as "rather interesting" (see *Dalian* at [59]), we too would not set too much store by this reference to bad faith.

49 The short answer to these arguments, and to the crux of the present appeal, is that it *is* sufficient for a defendant to simply assert that he disputes or denies the claim in order to obtain a stay of proceedings in favour of arbitration. This much is amply clear from Woo J's decision in *Dalian* where he undertook a thorough survey of the English cases, including the case of *Halki* ([17] *supra*) where it was held that, at least after the amendments to s 9 of the English Arbitration Act 1996 (c 23), the court is not to examine whether there is "in fact" a dispute, or a genuine dispute. This point is well illustrated by Saville J's famous example of the argument over who won the University Boat Race (see above at [44]). A dispute that a claimant was always likely to succeed in remains, until adjudicated on, none the less a dispute.

50 Furthermore, the language of the arbitration agreement in the SPA extended beyond "disputes" to include "controversies and conflicts". While "controversies" may be practically synonymous with "disputes", the addition of these two terms in the arbitration agreement obviously affirms a broad intention to refer all manner of contentious matters to arbitration. The ordinary meaning of both "dispute" and "conflict" overlap here and must include any sort of disagreement. We should also add for completeness that the phrase "arsing out of or in connection with" that appears in the subject clause has a wide ambit that extends to all manner of issues that have a relationship with the SPA. A generous interpretation should be given to such a phrase: see *Mustill and Boyd* ([33] *supra*) at p 119 and *Sabah Shipyard (Pakistan) Ltd v Government of the Islamic Republic of Pakistan* [2004] 3 SLR(R) 184 at [14]. As a matter of principle, general words such as those mentioned above should be generously interpreted when they appear in arbitration agreements. In this regard, *Born* ([34] *supra*) notes, at p 1092:

> Most arbitration clauses provide for arbitration of all 'disputes' or 'differences,' while some clauses also (or instead) refer to 'claims or 'controversies'. These formulations *encompass any sort of disagreement, dispute, difference, or claim that may be asserted in arbitral proceedings*. [emphasis added]

51 The issues that were being contested in the present case were plain to us. We agreed with the judge that there was a dispute, indeed, likely several disputes, and that the respondent's positive assertion challenging the appellants' claim warranted a stay of proceedings in favour of arbitration. While the respondent's silence prior to the issuance of the writ might have

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been equivocal, the matter clearly morphed into a dispute when DLA Piper wrote to the appellants averring that their suit was "without merit and misconceived". The AR's decision was erroneous in that the fact alone that the respondent was making assertions to the effect that it had discharged its obligations, *was* a dispute, controversy or conflict which should properly be resolved by arbitration.

When a stay of court proceedings will not be granted

52 Before we examine the significance of a defendant's admission or silence, it is useful to briefly consider the circumstances in which a stay of court proceedings will not be granted. The circumstances, in which a stay should be refused, as stated below, are not exhaustive, but they are of a very different nature from the considerations for a summary judgment application. The Court of Appeal of British Columbia provided some examples in *Gulf Canada Resources Ltd v Avochem International Ltd* 66 BCLR (2d) 114 at 120–121 *per* Hinkson JA (cited in *Dalian* ([15] *supra*) at [21]):

> [I]f the court concludes that one of the parties named in the legal proceedings is not a party to the arbitration agreement or if the alleged dispute does not come within the terms of the arbitration agreement or if the application is out of time, the court should not grant the application.

53 To these illustrations we would add cases where the party applying for a stay has waived or may be estopped from asserting his rights to insist on arbitration, such as where the parties have agreed subsequently that disputes may be resolved by litigation. The facts of such a case would fall to be decided in accordance with the usual contractual analysis of estoppel and or waiver on the basis that the arbitration agreement is "inoperative", see s 6(2) of the IAA. There are no impediments, under the IAA, preventing the parties to an arbitration agreement from agreeing to resolve the matter in any other manner that they may find more convenient. In such a case, the agreement to arbitrate will be treated as having been waived as the parties are free to modify their agreement at any time. Generally speaking, a successfully-resisted stay application under s 6(1) of the IAA on the grounds of admission (as opposed to s 6(2) or where the arbitration clause was inoperative because one of the parties had lost the right to refer a matter to arbitration: see *Halvanon Insurance Co Ltd v Companhia de Seguros do Estado de Sao Paulo* [1995] LRLR 303, cited in *Merkin* ([24] *supra*) at para 8.33.2) would necessarily precede a successful summary judgment application, but not every claim that could succeed on summary judgment would result in the court's refusal to grant a stay. The merits of the case, in other words, have absolutely no bearing on the granting of a stay unless the defendant actually admits (by unequivocal words or conduct) the claim.

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54 The *inapplicability* of the arbitration agreement is thus to be distinguished from its *inoperability* (or whether it is null, void, illegal, waived or incapable of being performed). To hold that there is no dispute (or controversy or conflict, as the case may be) arising in connection with the arbitration agreement in question is to, figuratively speaking, walk the thin line between finding an admission despite the defendant's presumable averments to the contrary and scrupulously holding parties to their pre-agreed dispute resolution mechanism.

When a dispute does not exist – the significance of a defendant's admission or silence

55 We now turn to address the issue of the significance and effect of a defendant's admission or silence.

Effect of an admission

56 The relationship between an admission by a defendant and the existence of a dispute had been alluded to by Goh Joon Seng J in the *Dai Yun Shan* where he pragmatically noted that "so long as the claim is not admitted, a dispute exists" ([35] *supra* at [12]).

Or, as Templeman LJ stated with admirable brevity in *Ellerine Brothers (Pty) Ltd v Klinger* [1982] 1 WLR 1375 ("*Ellerine Brothers*") at 1383:

> There is a dispute until the defendant admits that the sum is due and payable ...

Implicit in these attractively concise and oft-quoted statements, however, is the converse proposition that where there has been an admission, there is no longer any dispute and the arbitration agreement does not apply. This raises the problem envisaged by Saville J in *Hayter* ([44] *supra*) and Clarke J in *Halki* ([58] *infra*): that logically, the arbitral tribunal would not have jurisdiction to hear the claim or make an award, and that a mischievous and recalcitrant defendant might use precisely the argument that its defence was hopeless to thwart the arbitration. As Saville J perceptively pointed out, the conundrum created by the analysis that the arbitration agreement does not apply to the claim at hand because the defendant has made a clear and unequivocal admission giving rise to often-inevitable summary judgment, is that, by the same token, the arbitral tribunal would have no jurisdiction and the claimant would only be able to commence litigation proceedings.

57 We now pause to examine the decision of *Getwick* ([37] *supra*). There, the plaintiff was the defendant's sub-contractor and claimed for outstanding amounts under six payment certificates for works done under the sub-contract. The defendant wrote a draft letter stating its intention to make payment of a certified sum (which the plaintiff claimed was less than the amount owing) by three post-dated cheques; the letter also said, "The exact amount of further payment shall be agreed after the completion of

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our final account to this subcontract" (at [10]). Three cheques were indeed issued to the plaintiff, two were honoured. The plaintiff sought summary judgment for, *inter alia*, its claim in the amount stated in the dishonoured cheque. Geoffrey Ma J ordered a stay of proceedings for all of the plaintiff's other claims but granted summary judgment for the amount in the dishonoured cheque. Despite holding that interim payment certificates were not clear and unambiguous admissions of liability for work done, but merely referred to interim payments which did not involve final acceptance by the defendant either that the work done by the plaintiff was up to standard or that the amount stated in the payment certificate was ultimately unequivocally and indisputably due, Ma J held, at [26(4)], that the dishonoured cheque was:

> … *to be regarded as a clear and unequivocal admission on the defendant's part of its liability and quantum (in that amount) under payment certificates*. This cheque was issued following the 28 April letter ... . It was one of three cheques sent to the plaintiff by the defendant as an acknowledgement of its liability under payment certificates which had been issued to the plaintiff ... . In reaching this conclusion, I have borne in mind that cheques are to be regarded as cash and save in exceptional circumstances, no set off or counterclaim will be permitted … . *Two of the three cheques have been honoured. I see no reason why the third cheque should not be seen in the same light. I have not been referred to any case in which a cheque or bill of exchange has been regarded as constituting a clear and unequivocal admission of liability and quantum, but in principle, I do not see why it cannot be so regarded*. [emphasis added]

We agree with Ma J's robust approach in assessing the effect of dishonoured cheques in such limited circumstances.

58 The analysis of an "admission" is also unsatisfactory if one construes "dispute" to mean "unsatisfied claim", regardless of whether liability is admitted, as Clarke J suggested in *Halki Shipping Corporation v Sopex Oils Ltd* [1997] 1 WLR 1268 at 1272:

> It seems to me to make no commercial sense to hold that the parties intended that the arbitrators should have jurisdiction over those parts of either party's claim in respect of which the other party has an arguable defence but not otherwise. *It makes more sense to hold that the parties intended that the arbitrators should have jurisdiction over all claims which either party has refused to pay*. Thus it was contemplated that all such claims should be determined by private arbitration before commercial men and not by the courts.
>
> Mr. Hamblen recognised that the logic of his argument is that the arbitrators have no jurisdiction to make an award in respect of an indisputable part of the claim. He also accepted that they have often made such awards in similar circumstances in the past, but he said that the problem does not arise and will not arise in practice because parties

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> do not take the point that the arbitrators have no jurisdiction on the ground that their defence is hopeless. In my judgment, that is or would not be a satisfactory state of affairs. It seems to me to be almost inconceivable that the parties to a contract of this kind intended to confer the kind of limited jurisdiction upon the arbitrators which Mr. Hamblen's submissions would involve, if they were right.
>
> I am not persuaded that parties might not take the point in the future. *A respondent who had no defence to a claim might well sit back and do nothing while a claimant obtained an award and then resist enforcement proceedings on the basis that the arbitrators had no jurisdiction, by which time the claimant might be out of time to bring court proceedings unless he was alive to the point and issued a protective writ.*
>
> [emphasis added]

59 For our part, we would recognise an exception to judicial non-intervention and refuse to grant a stay only in obvious cases such as *Getwick* ([37] *supra*) (or, more exemplary, in the case envisaged by Woo J where the defendant had admitted liability but was simply unable to pay, in which case a stay application really ought not to be made at all) where there has been a clear and unequivocal admission. This is not to say that the claimant would be unable to prosecute its claim in arbitration; given the competence of the arbitral tribunal to decide whether it has jurisdiction. The only commonsensical response to the recalcitrant defendant envisaged by Clarke J would be for the arbitral tribunal to rule that it has jurisdiction and to make a summary award. Under the IAA, such an award, even if technically contrary to the logic of Clarke J's reasoning in *Halki* ([58] *supra*), would not be impeachable for an error of law alone, and indeed we cannot imagine a court entertaining any challenge to such an award by a defendant who had admitted liability but refused to pay and then resisted arbitration on the ground that there was no dispute because of its own admission. It is, thus, not an inevitable conclusion that the arbitration agreement would be inapplicable and the deplorable state of affairs envisaged by Clarke J above would come to pass. The proper analysis of a claim brought in spite of an arbitration agreement where there has been clear and unequivocal admission by the defendant, therefore, is as an *exception* to the scrupulous enforcement of arbitration agreements. *This exception will only be made where there has been a clear and unequivocal admission, and it can thus be said that there exists no dispute mandatorily referable to arbitration.*

Effect of silence and prevarication

60 We now consider the effect of silence on the part of the defendant. In *Ellerine Brothers* ([56] *supra*) (affirmed in *Hayter* ([44] *supra*) and *Halki* ([17] *supra*)), the English Court of Appeal held that silence on the defendant's part did not amount to an admission of liability and thus did

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not preclude the existence of a dispute. Templeman LJ elaborated on this point at 1381, stating:

> Again by the light of nature, it seems to me that section 1(1) is not limited either in content or in subject matter; that *if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary, for a dispute to arise, that the defendant should write back and say 'I don't agree.' If, on analysis, what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation.* [emphasis added]

61 With respect, we prefer Templeman LJ's reasoning and approach to Woo J's general *dicta* on the effect of silence in *Dalian* ([15] *supra*), which has been set out above at [39]. In our view, a defendant's silence (even in the face of repeated claims against it), without more, may be insufficient to constitute the clear and unequivocal admission necessary to exclude the existence of a dispute (or controversy or conflict). We note with interest that pursuant to Art 25(b) of the Model Law, even if the respondent fails to submit its statement of defence, the arbitral tribunal is required to continue the proceedings "without treating such failure in itself as an admission of the claimant's allegations". In our view, non-admission is not constituted only by an express denial or rejection of the claim, but may also be inferred from previous inconclusive discussions between parties, prevarication and even silence. Silence, on its own, is often equivocal at best. We accept, as Woo J pointed out in *Dalian* at [75], that a party may be silent because he has no money to pay or may even want to delay a just resolution of a claim. Even so, there may be good reasons why a party remains silent. A failure by a party to respond is equivocal, especially when there are unresolved issues or there has been earlier prevarication: see *Amec Civil Engineering Limited v The Secretary of State for Transport* [2004] EWHC 2339, affirmed in *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] 1 WLR 2339; and *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* [2005] BLR 63 (Court of Appeal, UK). Further, in some cases, a party may think (rightly or wrongly) a claim so preposterous that "silent treatment" is the most appropriate response. In other cases, a party may view the need to place its stand on record unimportant or even disadvantageous. For example, a defendant who adopts a policy of "masterly inactivity" has not made an admission. Judges must also bear in mind that commercial persons usually do not accord the same importance and urgency to documenting responses as lawyers do. One must also be particularly mindful when dealing with cross border transactions, since there may even be cultural reasons for silence: in certain societies, a non-confrontational approach is prized. It is impossible to generalise on the effect of silence and each matter must be assessed contextually. *In essence, we are of the view that*

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generally speaking, the court ought to be ordinarily inclined to find that there has been a denial of a claim in all but the clearest of cases. It should not be astute in searching for admissions of a claim.

62 What about the case where the defendant prevaricates; first making an admission and then later purporting to deny the claim on the ground that the admission was mistaken, or fraudulently obtained, or was never made? In such a case, there might well be a dispute before the court, both over the substantive claim as well as over whether the defendant can challenge the alleged earlier admission, and the matter should ordinarily be referred to arbitration. Thus, the lack of a meritorious defence does not entitle a claimant to bypass the prior agreed dispute resolution mechanism *unless the defendant has admitted the claim*, and an open-and-shut case must be distinguished from an admission, with summary judgment almost always being the inevitable logical conclusion of a refusal to stay proceedings on the ground that there has been an admission (though not every single admission will necessarily be enough to avoid a dispute; s 60(2) of the Evidence Act (Cap 97, 1997 Rev Ed) provides that the court may, in its discretion, require that facts admitted to be proved otherwise than by such admissions). The line between an admission and an open-and-shut case may sometimes blur or become very fine, especially when the court prefers the evidence of an admission over a defendant's subsequent prevarications. The court, recognising that a finding of no dispute is to some extent artificial because the fact remains that the defendant is resisting in some way the claimant's claim, will therefore be very slow to allow a claimant to circumvent the arbitration agreement unless there has indeed been a clear and unequivocal admission by the defendant. Indeed, *Merkin* ([24] *supra*) notes at para 8.42.2:

> Despite apparent comments to the contrary, it now seems to be settled that a refusal to make payment after an admission of liability remains a dispute for the purposes of an arbitration clause. In [*Glencore Grain Ltd v Agros Trading Co Ltd* [1999] 2 All ER (Comm) 288] Clarke LJ reasserted his view at first instance in *Halki* that the fact that liability had been admitted did not prevent a dispute from arising, at least where a *Scott v. Avery* arbitration clause has been used. … The effect of the *Scott v. Avery* arbitration clause had been to make it clear that there could be recourse to court only where there had first been an arbitration award, and the admission of liability was irrelevant to that structured approach. Clarke LJ expressly refused to engage in any wider discussion of the meaning of the word 'dispute' in other contracts. What can be said as a result of *Glencore* is, therefore, that if the arbitration clause is in *Scott v. Avery* form, an admitted liability does not prevent a dispute from arising and accordingly the claimant must seek an arbitration award which is then to be enforced by an application to the court, rather than a direct application to the court for summary judgment. Although the decision is not direct authority for the proposition that refusal to pay following an admission of liability

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> remains a dispute, Clarke LJ clearly favoured this approach, and indeed commented that an important purpose of arbitration machinery was to obtain an award enforceable under the New York Convention 1958, and such an award could (in enforcement terms) be at least as valuable, if not more so, than a judicial decision.

Admission must be to both liability and quantum

63 As discussed above at [59], if a defendant makes an unequivocal admission extending to both liability and quantum (where relevant), then there is no dispute *mandatorily* referable to arbitration; and the claimant may apply to a court for summary judgment. However, a claimant seeking to obtain summary judgment in court despite a valid arbitration agreement would be well advised to come armed with compelling evidence of the defendant's admission, because once that admission is challenged by the defendant with any semblance of credibility, the court will ordinarily be inclined to decide that a "dispute" has arisen and order a stay of proceedings for the arbitral tribunal to resolve the "dispute". This is effectively a limited exception to judicial non-intervention in arbitration. To some extent, this would also be what Hirst LJ referred to in *Halki* ([17] *supra*), at 742, as the law taking a "very pragmatic view, whatever the theoretical objections", as evidenced by the innumerable cases of uninhibited concurrent arbitration and court proceedings. In our view, however, there is only a very narrow scope for circumventing an arbitration agreement (see [43]–[46] above). Even admitted (but unsatisfied) claims may evolve into disputes that warrant arbitration in accordance with the existing agreement to arbitrate. The precise scope and effect of each individual arbitration clause will then be a matter for parties to assess based on their specific concerns.

64 In contrast, if a defendant makes a clear and unequivocal admission as to liability *but not to* quantum, then there *is* a dispute referable to arbitration. In this respect, we agree with the observations made by Ma J in *Getwick* ([37] *supra*) where he stated, at [23(3)]:

> The existence or non-existence of a dispute or difference as envisaged under the relevant arbitration agreement between the parties is crucial to the granting of a stay. For this purpose, a dispute will exist unless there has been a *clear and unequivocal admission not only of liability but also quantum*: see *Louis Dreyfus v. Bonarich International (Group) Limited* [1997] 3 HKC 597; *Tai Hing Cotton Mill Limited v. Glencore Grain Rotterdam BV* [1996] 1 HKC 363, at 375A-B. In the absence of admissions as to both these aspects, *a mere denial of liability or of the quantum claimed, even in circumstances where no defence exists, will be sufficient to found a dispute* for the purposes of section 6 of the Ordinance (and Article 8 UNCITRAL Model Law). [emphasis added]

That there must be an admission as to both liability and quantum before a dispute ceases to be a dispute has also been recognised in *Glencore*

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Grain Ltd v Agros Trading Co [1999] 2 Lloyd's Rep 410: see *Merkin and Hjalmarsson* ([21] *supra*) at p 22. In our view, a dispute as to quantum is as much a dispute as a dispute as to liability. As long as a claim is not admitted in full, the parties should be held to their contractual bargain, and the dispute should be resolved by arbitration.

Whether the matter arose in connection with the SPA

65 The appellants argued that the payment arrangement with Aventi was not inextricably linked to the SPA because Aventi was not a party to the SPA and could not vary the terms of the SPA without the appellants' written consent. This argument is a non-starter. It was undisputed that the Fourth SSPA was "supplemental to and an integral part of the SPA" and that cl 2.2 of the Fourth SSPA, providing for the respondent to make payment to Aventi and *expressly authorising* Aventi to receive such payment, was an integral part of the same agreement between the appellants and the respondent which provided for all disputes, controversies and conflicts to be resolved by arbitration. The respondent's assertion that it had settled with Aventi earlier and at a discount, as well as whether the respondent was entitled to come to such an arrangement (in relation to payment dates and quantum) with Aventi, were thus both issues striking at the very core of the payment obligation in the Fourth SSPA, and plainly exemplified the kind of controversy an arbitral tribunal should decide.

66 Unlike in *Dalian* ([15] *supra*), the respondent here did not raise a separate and distinct contract to set off against an admitted claim. Rather, it was disputing the claim head-on under the same contract. Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) describe a situation involving groups of contracts (at para 520):

> … where only the heads of agreement, or framework agreement, contains an arbitration clause to which the other related contracts refer. This case presents no difficulty. The parties' intention is clear: they sought to refer all disputes arising out of the whole set of contracts to arbitration, before a single arbitration tribunal constituted in accordance with the heads of the agreement.

67 We agree with the judge that the Fourth SSPA could not exist independently without the SPA; nor would it make any sense on its own. Like the first three supplemental agreements, its purpose was to supplement and/or modify certain terms of the SPA. The appellants rightly did not argue that the arbitration clause in section 11.06 of the SPA did not apply. In our view, there is equally no question that the dispute arose in connection with the SPA.

68 Finally, while we agree with Woo J's decision in *Dalian*, we would note too that the analysis of whether the defendant's legally erroneous

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defence is a basis for finding that the arbitration agreement does not apply because the dispute at hand is not "in connection with" the contract in which the arbitration agreement is contained, may also potentially undermine the robustness of the approach we have outlined above. Indeed, whether the defence raised is weak, a sham, or completely unrelated to the contract, may often involve a question of law relating to issues such as privity of contract or separate legal personality. On this point, until such a case comes before us, we would reiterate our preferred common-sense approach in enforcing arbitration agreements without delving into the merits of the case.

Conclusion and costs

69 We cannot overemphasise the fact that it will ultimately be the precise terms of the relevant arbitration agreement and the context that will determine how the parties are to resolve matters. Nevertheless, in approaching the question of whether a stay of proceedings pursuant to s 6 of the IAA must be granted, the following propositions should form the broad canvas against which an application to court ought to be evaluated:

(a) In order to obtain a stay of proceedings in favour of arbitration, the party applying for a stay ("the applicant") must show that he is party to an arbitration agreement and that the *proceedings instituted fall within the terms of the arbitration agreement* (see [22] above).

(i) If the applicant fails to show this, the court should refuse to grant a stay of proceedings (unless there is some other legal basis for granting a stay, *eg*, *forum non conveniens*).

(ii) If the applicant can show this, the court *must* (in accordance with s 6 of the IAA) grant a stay of proceedings unless the party resisting the stay can show that one of the statutory grounds for refusing a stay exists, *ie*, that the arbitration agreement is "null and void, inoperative or incapable of being performed" (see [22] above).

(b) If the arbitration agreement provides for arbitration only if "disputes" or "differences" or "controversies" exist, then the subject matter of the proceedings would *fall outside* the terms of the arbitration agreement if:

(i) there is *no "dispute", "difference" or "controversy"* as the case may be (see [23] above); or

(ii) the alleged "dispute" is unrelated to the contract which contains the arbitration agreement (see [23] above).

(c) In line with the prevailing philosophy of judicial non-intervention in arbitration, the court will interpret the word "dispute" *broadly* (see [28], [29], [33] and [34] above), and will readily find that

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a *dispute exists unless the defendant has unequivocally admitted* that the claim is due and payable (see [56] and [59] above). The court should not be astute in searching for an admission of a claim, and would ordinarily be inclined to find that a claim is not admitted in all but the clearest of cases (see [61] above).

(d) There is undoubtedly a "dispute" referable to arbitration if the defendant expressly asserts that he denies the claim (see [49] above).

(e) The court *will not assess the merits of a denial/defence or the genuineness of a "dispute"* since these matters should properly be left to the arbitrator to assess (in accordance with the parties' contractual bargain to arbitrate) (see [40] and [49] above).

(f) Apart from an express denial or rejection of the claim, the court can also infer that the claim is not admitted from the previous inconclusive discussions between parties, prevarication or even silence (see [61]) above.

(i) There is *prevarication* where a defendant unequivocally admits the claim, but then later purports to deny the claim on the ground that the admission was mistaken, or fraudulently obtained, or was never made. In such a case, there might well be a "dispute" before the court, both over the substantive claim as well as over whether the defendant can challenge the alleged earlier admission, and the matter should ordinarily be referred to arbitration (see [62] above).

(ii) The defendant's *silence* (even in the face of repeated claims against it), without more, is often equivocal at best and may be insufficient to constitute the clear and unequivocal admission necessary to exclude the existence of a "dispute", since there may be good reasons why a party remains silent. For example, a party may think (rightly or wrongly) a claim so preposterous that "silent treatment" is the most appropriate response (see [61] above).

(g) If a defendant makes an unequivocal admission extending to *both liability and quantum* (where relevant), then there is no dispute *mandatorily* referable to arbitration; and the claimant may apply to a court for summary judgment. However, the claimant must come armed with compelling evidence of the defendant's admission, because once that admission is challenged with any semblance of credibility, the court will ordinarily be inclined to decide that a "dispute" has arisen, and order a stay of proceedings for the arbitral tribunal to resolve the "dispute" (see [63] above).

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(h) If a defendant makes a clear and unequivocal admission as to liability *but not to* quantum (where relevant), then there *is* a dispute referable to arbitration (see [64] above).

Costs

70 In response to our question about why the present appeal was brought, counsel for the appellants explained that they had no alternative but to initiate court proceedings and to take out the application for an injunction because the respondent did not reply to the appellants' letters dated 9 April 2008, 30 April 2008 and 8 May 2008. This might explain the application before the AR, but it could not justify the present appeal from the judge's lucidly reasoned decision. If it was indeed the respondent's silence that gave the appellants no choice but to seek an injunction, why then did the appellants pursue the appeal when it was clear that the respondent had, by then, made a positive assertion that it was disputing the claim?

71 We also asked counsel for the appellants what the next step in the proceedings would be if we allowed the appeal. He responded that the appellants would then commence proceedings in court, claiming damages for breach of the SPA, and then the respondent would have to file its defence. It is difficult to imagine what response could more tellingly reveal the appellants' knowledge and admission that there certainly existed a dispute arising out of or in connection with the SPA which contained the arbitration clause, or more emphatically beg the question of why this dispute should not be resolved by arbitration. In the circumstances, we can do no better than to adopt the remarks by Colman J in *A v B (Costs)*, cited by the judge at [19] above. The facts of the present case do not involve unexplained silence or an admission by the respondent. It must have been clear to the appellants that there was a dispute here. In light of this, the appellants should not have pursued this entirely unmeritorious appeal, causing the respondent to incur additional costs. Accordingly, we dismissed the appeal with indemnity costs. We should add for good measure that nothing in these grounds should be interpreted as an indication of our views on the merits of the ongoing dispute between the parties.

Reported by Leo Zhen Wei Lionel.