

DCCJ 5399/2020

[2021] HKDC 1166

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL ACTION NO 5399 OF 2020**

BETWEEN

GURKHAS CONSTRUCTION LIMITED Plaintiff

and

CRAFT FAÇADE TECH (HONG KONG) Defendant
COMPANY LIMITED (formerly known as
EFT-CRAFT COMPANY LIMITED)

Before: Deputy District Judge Liza Jane Cruden in Chambers

Date of Hearing: 9 August 2021

Date of Decision: 15 October 2021

DECISION

Introduction

1. This is an application by the defendant for an order that further proceedings in the action be stayed in favour of arbitration pursuant to section 20 of the Arbitration Ordinance, Cap. 609.

Background

2. The plaintiff is a company incorporated in Hong Kong, operating a business providing skilled labour for building construction projects. The defendant is a Hong Kong company trading as a building contractor.

3. The defendant was a contractor for an external façade renovation project at the Peak Galleria (“the Project”). The plaintiff provided labour to the defendant for the Project. The plaintiff is claiming the sum of HK\$1,492,753.80 (“Outstanding Sum”) that was allegedly outstanding under 5 invoices issued by the plaintiff in January to April 2018 based on 4 purchase orders (“POs”) placed by the defendant in September to January 2018. The claim in this action is brought on an alleged settlement agreement (“settlement”) the terms of which are set out in a letter dated 6 April 2020 (“April Letter”).

The April Letter

4. The April Letter is from the plaintiff’s former solicitors to the defendant. It provides:-

“We are instructed that you, through your Ms Shannon Whimpress, have reached an agreement with our client in the Meeting in the following terms:-

1. You hereby acknowledge your indebtedness in the sum of HK\$1,492,753.80 (the “Outstanding Sum”) plus interest at the rate of 1% per annum accrued from 30 May 2018 to date), being due and owing by you to our client, and shall pay the Outstanding Sum to our client by way of cheque

drawn in favour of our client **within 14 days** after receiving the damages from Hien Lee Engineering Co. Ltd (“**Hien Lee**”) under the assessment of damages from the arbitrator(s) in respect of the dispute on the Peak Galleria project between you and Hien Lee, and in any event **no later than 5.30 p.m. on 30 September 2020**, in full and final settlement of the Outstanding Sum.

2. In consideration of your agreement to the full and final settlement arrangement stated hereinabove, and pending your compliance with the same, our client shall withhold any further action to demand your repayment of the said Outstanding Sum until 5.30 p.m. on 30 September 2020. In the event of default of your full payment of the Outstanding Sum by the said deadline, our client shall be entitled to take immediate action against you for recovery of the Outstanding Sum (or any unpaid balance thereof) together with interest accrued from 30 May 2018 at judgement rate and all costs incurred, and you hereby irrevocably waive and forgo any defence, contention, reduction or set-off in respect of the Outstanding Sum.

3. This settlement shall be governed by and construed in accordance with the laws of Hong Kong Special Administrative Region and the parties to this settlement hereby irrevocably undertake to submit themselves to the non-exclusive jurisdiction of the courts of Hong Kong Special Administrative Region to resolve any dispute arising out of or in connection with this settlement.

We shall be grateful if you could countersign and return to us with the confirmation hereinbelow and let us have a certified true copy of the relevant board resolutions authorising the signing of the same.

For the avoidance of doubt, nothing herein shall constitute any waiver of our client’s rights in claiming against your client for the Outstanding Sum nor shall be binding on our client unless and until you accept the agreement contained herein by countersigning the confirmation below by your authorised representatives together with a certified true copy of the relevant board resolutions.

Meanwhile, all rights and remedies of our client are expressly reserved.”

5. At the end of the April Letter appear the name and signature of Grant Craft, date 11 May 2020 and the defendant’s chop, below the following:-

“We hereby confirm our agreement to the contents of this letter and the settlement terms with Gurkhas Construction Limited as set out hereinabove.

For and on behalf
Craft Façade Tech (Hong Kong) Co Ltd”

The Purchase Orders

6. The defendant says each PO incorporates the defendant’s standard “General Terms and Conditions” (“General T&C”) which terms and conditions form part of the contractual relationship between the plaintiff and the defendant.

The arbitration clause

7. The General T&C include an arbitration clause. Clause 14 of the General T&C (“arbitration clause”) reads as follows:-

“14 DISPUTE RESOLUTION

- a) If any dispute, difference or claim (“Dispute”) arises out of or in connection with this agreement, the party which requires the Dispute to be resolved must notify the other party in writing giving details of the nature of the Dispute.
- b) Both parties shall endeavour to settle the dispute amicably and the managing directors of each of the

parties (or such other person(s) who may be notified to the other party) shall meet in an attempt to resolve the matter(s) in dispute.

c) If attempts of amicable settlement fail or no attempt at amicable settlement is made within 28 (twenty eight) days of a notice of Dispute having been served, and unless otherwise agreed between the parties, the dispute shall be referred to arbitration in accordance with the Arbitration Rules of the Hong Kong International Arbitration Centre.

d) The place of arbitration shall be Hong Kong.

e) The arbitration shall be conducted in English.

f) The parties shall agree on the appointment of a single arbitrator. If the parties are unable to agree on the appointment of an arbitrator, the arbitrator shall be appointed by the Chairman of the Hong Kong International Arbitration Centre.

g) Notwithstanding the submission of any issue to dispute or arbitration, the parties will continue to perform their obligations under the Purchase Order in accordance with its terms.

h) Notwithstanding the above provision, any arbitration proceedings initiated by the Supplier or the Purchaser may at the request of the Purchaser be held jointly or consolidated with other proceedings connected with the Purchase Order.”

The pleadings and evidence

8. The nature and substance of the claim by the plaintiff is important in the determination of the application. The affidavit evidence of each party verifies the facts in their respective pleadings and is in the same terms on all material matters. The substance of the matters in dispute can be seen from the pleadings.

The Statement of Claim

9. The Statement of Claim (“SOC”) pleads, *inter alia*, that:-

(1) The defendant placed orders (“Orders”) with the plaintiff for the provision of workers and scaffolders for the Project. The plaintiff provided the labour as per the Orders and issued invoices in the total amount of HK\$1,492,753.80. Despite repeated reminders the defendant failed to settle the invoiced amount within one month from their dates of issue as required under the Orders.

(2) After rounds of negotiations between the plaintiff and the defendant the parties reached a settlement details of which were set out in the April Letter. The defendant countersigned agreeing the terms, including:-

(a) The total indebtedness of HK\$1,492,753.80, being due and owed by the defendant to the plaintiff, namely the Outstanding Sum;

(b) In any event the defendant shall pay the Outstanding Sum to the plaintiff by 5.30 pm on 30 September 2020 (“Deadline”);

(c) If the Outstanding Sum is not paid by the Deadline, the plaintiff shall be entitled to take

immediate action for recovery of the Outstanding Sum, and the defendant irrevocably waives and forgoes any defence, contention, reduction or set-off in respect of the Outstanding Sum;

(d) The settlement shall be governed by and construed in accordance with the laws of Hong Kong and the plaintiff and the defendant irrevocably submit themselves to the non-exclusive jurisdiction of the courts of Hong Kong to resolve any dispute arising out of or in connection with the settlement (“April Letter jurisdiction clause”).

(3) The defendant failed to pay the plaintiff the Outstanding Sum or any part thereof on or before the Deadline and to date.

(4) The plaintiff claims against the defendant for the Outstanding Sum agreed in the April Letter together with interest thereon. The Prayer claims (1) the Outstanding Sum; (2) Interest; (3) Further and/or other relief; (4) Costs.

The Defence

10. The Defence pleads, *inter alia*:-

(1) Each of the POs incorporates the defendant's standard General T&C, which terms and conditions form part of the contractual relationship between them; particulars of the four POs and the agreed number of personnel during the relevant periods. Each of the POs contained express terms, including that the plaintiff shall:-

(a) reimburse the defendant the costs of making good any defects and the defendant may deduct such costs from any monies due to the plaintiff.

(b) strictly comply with all site rules and HKSAR regulations and laws including site safety.

(c) provide all his site operatives with PPE (personal protection equipment) suitable, adequate and in compliance with statutory regulations.

(2) Each of the four POs also contain in the General T&C:-

(a) Clause 14 Dispute Resolution, namely the arbitration clause;

(b) Clause 18 Right to Set-off. The defendant may deduct, set off or contra charge any debt due or monies payable from the plaintiff to the defendant from any (a) monies due or to become

due to the plaintiff; and (b) retention monies; or (c) monies due to the plaintiff under any other agreement between them. The defendant may, if the plaintiff is in breach of the agreement, employ and pay others to remedy that breach and recover or set-off the loss or cost as a debt due from the plaintiff (“set-off clause”).

(3) Defences relating to:-

(a) the quality of the L/3 Propping works by the plaintiff at the Project. Particulars of the separate arbitral proceedings in which the main contractor [Hien Lee Engineering Co Ltd (“Hien Lee”)] is the claimant and the defendant is the respondent.

(b) Over-claiming by the plaintiff;

(c) Failure to give credit for PPE provided by the defendant to the plaintiff.

(4) The defendant will seek to set-off its entitlements against any sums otherwise due to the plaintiff under the set-off clause.

(5) The amount certified by the defendant in respect of the plaintiff’s works in Interim Payment Certificates total is HK\$165,957.20. Of which certified amount the

defendant has paid HK\$100,081. However, the certified amount did not take into account the issues with the quality of the L3/Propping works. The defendant will seek to set-off its entitlements against any sums otherwise due to the plaintiff.

(6) The Defence admits that the defendant received and its Mr Grant Craft signed the April Letter. It is denied that the defendant has confirmed or acknowledged that an amount of HK\$1,492,753.80 is due and owing by the defendant to the plaintiff, or that the alleged “settlement” or any agreement was reached between the parties. The defendant avers that;

(a) The plaintiff was aware and acknowledged that the defendant was engaged in arbitration with the main contractor in respect of a dispute on the Project.

(b) The purpose of the April Letter was to seek to avoid the plaintiff commencing legal proceedings against the defendant, and the defendant defending them raising counter-claims, pending the outcome of the arbitration proceedings. The parties also recorded their understanding that the damages that the defendant would receive from the arbitration

would be used to settle monies owing from the defendant to the plaintiff (if any).

(c) No separate agreement was agreed between the parties, and no admission of any monies due was made by the defendant.

(7) Further, and in any event, the alleged “settlement”, even if the parties reached some sort of understanding which is denied, is not effective or binding on the parties because the defendant did not provide to the plaintiff a certified true copy of the relevant board resolutions authorising the signing of the April Letter when it was returned to the plaintiff, as required by the April Letter.

(8) The defendant’s case is that:-

(a) No binding settlement was reached between the plaintiff and the defendant.

(b) Alternatively, at least there are disputes or differences between the plaintiff and the defendant as to whether a settlement was reached.

(c) There are disputes and differences between them as to the proper amount due to the plaintiff and

as to the counter-claims that the defendant has against the plaintiff.

(d) All of the disputes or differences fall within the scope of the dispute resolution clauses in the POs.

(e) The court proceedings must be stayed in favour of arbitration.

(9) The parties contractual relationship was and is governed by the POs. The POs contain the arbitration clause. The plaintiff's claims in this action, are the subject of an arbitration clause. Therefore, the plaintiff has wrongly commenced these court proceedings, and should have commenced arbitration proceedings instead. The defendant has issued a summons dated 26 November 2020, requesting the court to stay the proceedings and refer the parties to arbitration ("Summons").

(10) The Defence is repeated and to the extent that the defendant is liable for any claims from the main contractor as regards the L3/Propping works, the defendant asserts the same claims against the plaintiff. The defendant seeks an indemnity from the plaintiff in respect of such claims and will set-off its entitlements against any sums otherwise due to the plaintiff.

Reply and Defence to Counterclaim

11. In the Reply and Defence to Counterclaim (“R&DCC”) the plaintiff maintains its claim on the settlement and the April Letter. The R&DCC:-

(1) Admits that the defendant issued 4 POs for the provision of labour at the Project and that the defendant’s Special Terms for Labour (“the PO Terms”) governed the contractual relationship between the plaintiff and defendant. The plaintiff denies that the defendant’s General T&C governed the contractual relationship between them as those General T&C only apply to the purchase of materials and/or equipment, as stated on the General T&C, and have no relevance to the POs which concern labour force.

(2) Pleads that the PO Terms in relation to set-off and dispute resolution process have no application to the plaintiff’s claims for outstanding invoiced amounts as the parties have agreed the Outstanding Sum and the parties are bound by the terms in the April Letter, which have superseded any and all terms governing the parties contractual relationship regarding payment of the POs. All replies made in relation to the POs are made without prejudice to the plaintiff’s case that the Outstanding Sum was claimed pursuant to the settlement reached

between the plaintiff and the defendant as reflected in the April Letter.

(3) In answer to the Defence and Counterclaim the plaintiff repeats its denial that the POs Terms have any application in light of the settlement reflected in the April Letter. The plaintiff denies the General T&C were applicable. The plaintiff complied with the dispute resolution process under Clause 14 of the General T&C insofar as endeavouring to settle the dispute amicably, and the parties reached a settlement on the amount and payment terms of the outstanding sum arising for the POs and the settlement was put in writing in the April Letter countersigned by the defendant.

(4) Particulars of the main contractor's claim against the defendant in the arbitration proceedings are not admitted. The plaintiff's services did not include the matters that formed the basis of the complaints of the main contractor. The plaintiff denies:-

(a) it carried out works unsatisfactorily.

(b) it provided more personnel/labour than what was agreed.

(c) it failed to provide PPE.

(d) the defendant's alleged right of set-off. The defendant never indicated that there was any problem with workmanship of any labour supplied at the time and it is denied that the defendant made any payment to the plaintiff for work done at the Project.

(5) Relies on the April Letter that Mr Grant Craft countersigned on 11 May 2020 with the defendant's company chop accepting the terms, acknowledging the indebtedness for the Outstanding Sum plus interest being due and that the defendant shall pay it by the Deadline which the defendant failed to do.

(6) Admits it was aware that the defendant was engaged in arbitration with the main contractor in respect of a dispute at the Project. This has no relevance or bearing on the plaintiff's claim which arose from the defendant's failure to pay the Outstanding Sum by the Deadline. Although Mr Grant Craft failed to provide a certified true copy of the relevant board resolution, he was a director of the defendant and the sole shareholder and the ultimate decision maker of business decisions of the defendant. By the terms of the April Letter the defendant irrevocably waived any defence or set-off in respect of the Outstanding Sum.

(7) Further, by the April Letter jurisdiction clause the parties are bound to submit themselves to the non-exclusive jurisdiction of the Hong Kong courts to resolve any disputes arising from the settlement terms, such as the defendant's failure to pay the Outstanding Sum by the Deadline. The plaintiff opposes the defendant's application to stay proceedings in favour of arbitration.

(8) The Defence to Counterclaim denies the Counterclaim repeating the Reply.

Whether the action should be stayed for arbitration

12. Stay of proceedings in favour of arbitration is governed by section 20(1) of the Arbitration Ordinance, Cap. 609 ("Ordinance"), which gives effect to Article 8 of UNCITRAL Model Law ("Article 8"), which in turn provides as follows:-

"Article 8. Arbitration agreement and substantive claim before court

- (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
- (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

13. It is not in dispute that in approaching an application for stay under section 20(1), the court asks itself four questions, namely:-

(1) Is the clause in question an arbitration agreement?

(2) Is the arbitration agreement null and void, inoperative or incapable of being performed?

(3) Is there in reality a dispute or difference between the parties?

(4) Is the dispute or difference within the ambit of the agreement between the parties?

See *Tommy CP Sze & Co v Li & Fung (Trading) Ltd & Others* [2003] 1 HKC 418, *per* Ma J (as he then was) at §§19-22; *Suzhou Quam-SND Venture Capital Enterprises & Anor v Great East Packing International & Ors* [2013] 6 HKC 53 at 60 §27.

Plaintiff's opposition to a stay

14. The plaintiff opposes the Summons on the basis that this action is an action on the settlement, which does not contain any arbitration agreement. Instead the settlement expressly provides that disputes arising from the agreement would be resolved by Hong Kong courts. Therefore there is no ground to stay the action in favour of arbitration.

15. The plaintiff refers to the express words of section 20(1) of the Ordinance, Article 8 submitting that this action is not “an action brought in

any matter which is the subject of an arbitration agreement”. The settlement is not a matter subject to an arbitration agreement. According to the plain language of section 20(1) there is no basis to grant a stay for arbitration.

16. Alternatively, applying the 4 tests, any disputes or difference between the plaintiff and the defendant concerning the validity of the settlement is not within the ambit of the arbitration clause (if any) under the POs. Therefor there is no ground to stay the action.

Whether disputes over the settlement and April Letter should be referred to arbitration

The four questions

17. In the present case *Tommy CP Sze* Question 4 is in issue, whether the dispute falls within the ambit of the arbitration agreement. The plaintiff also relied upon matters material to Questions 1 and 3 in opposing the Summons.

(1) *Is the clause in question an arbitration agreement?*

18. Here the issue was whether the General T&C were incorporated into the POs so that the arbitration clause formed part of the contractual relationship between the parties. If the answer is No, a stay will not be granted.

Whether the General Terms and Conditions governed the contractual relationship

19. The plaintiff's affidavit first ground of opposition to the stay application is that the General T&C did not govern the contractual relationship between plaintiff and the defendant as they only apply to purchase of material/ equipment. Only the "Special Terms for Labour" as stated within the PO itself governed the contractual relationship between them. The plaintiff pleads the point in both the SOC and the R&DCC.

20. However, Mr Cheung for the plaintiff informed the court that for the purpose of this hearing of the Summons, the plaintiff does not think it requires to rely on the ground that the General T&C do not form part of the POs. If they do not a stay will not be granted.

21. Therefor the defendant submitted first, the General T&C were expressly incorporated into the POs and were attached to each of the POs. The following appears immediately above the signature block of each PO:-

"Notes: Enclosed Term & Condition (2 pages) form part of this Purchase Order. Please sign and return all pages of this Purchase Order and return to EFT-CRAFT. Once returned EFT-CRAFT will sign and return the Purchase Order to you within two working days as confirmation that this Purchase Order has been effected."

22. Where parties expressly incorporate terms into a contract, the incorporated terms must be interpreted as if they had been written out in full in the contract, and accordingly, must be interpreted in the context of the contract into which they have been incorporated. Clear words of

reference suffice to incorporate the terms referred to: *The Interpretation of Contracts, Lewison, 7th ed. (2020)*, §§ 3.66, 3.105.

23. Secondly, the plaintiff has acknowledged, accepted and agreed to the General T&C by: (1) signing and stamping the plaintiff's company chop on each PO; and (2) sending the executed POs back to the defendant by email with the General T&C attached.

24. Third, on a proper construction, the purpose of the Special Terms for Labour was to supplement the General T&C, and to vary the General T&C insofar as there are inconsistent or conflicting terms. Although the General T&C were stipulated to "govern purchase of materials/ equipment", they consisted of both terms of general application, such as "Language and Law" under Clause 13 and "Dispute Resolution" under Clause 14, as well as terms governing purchase of materials/ equipment.

25. In cases of conflict between general conditions in standard forms and special terms which parties have agreed on, greater weight should be attached to special terms and special terms will usually prevail: *The Interpretation of Contracts, Lewison, 7th ed. (2020)*, §7.37.

26. For clauses of general application contained in the General T&C which do not conflict with the Special Terms for Labour, they continue to be valid and binding on the parties. The arbitration clause is within this category. The Special Terms for Labour are silent on governing law and jurisdiction. Their purpose was to supplement with terms

pertaining to provision of labour, not override and replace the General T&C.

27. Given the clear wording of the PO and the facts that the General T&C were attached to each PO, each PO was duly signed returned, counter-signed by the defendant and returned to the plaintiff, there is at least a *prima facie* plainly arguable case that the General T&C were incorporated into each PO and the arbitration clause formed part of the contractual relationship between the plaintiff and the defendant. The answer to Question 1 is Yes.

(2) *Is the arbitration agreement null void, inoperative or incapable of being performed?*

28. The answer is No.

(3) *Is there in reality a dispute or difference between the parties?*

29. A dispute will exist unless there is a clear unequivocal admission not only of liability but also of quantum: *Tommy CP Sze* at §51 and §59(2), (3).

30. The plaintiff made submissions to the effect that the defendant really has no defence to the action. However, the plaintiff also submitted “In any event, in determination of this Summons, this court need not finally resolve the issue of the validity of the settlement, which is the subject matter of this Action”. It is not for the court on a stay application to go into how the dispute may be resolved. At this stage, the court is only to

consider the existence and nature of the dispute and not to evaluate or determine the merits of the defence, or issues raised by the defendant to the plaintiff's claim. Here there is no clear and unequivocal admission by the defendant, both of liability and quantum. A dispute or difference exists. Question 3 must be answered Yes.

(4) *Is the dispute or difference between the parties within the ambit of the arbitration agreement?*

31. The real question in issue is whether the dispute falls within the ambit of the arbitration clause. If the answer is No, a stay will not be ordered.

32. In deciding whether or not a dispute comes within the ambit of an arbitration agreement, and therefor whether it should be referred to arbitration, the court adopts the following approach:-

- (1) It must first construe the arbitration agreement itself.
- (2) Next, it must analyse the nature of the dispute or difference by reference to the claim which is made.
- (3) The nature of the claim will enable the court to decide the question whether or not the dispute or difference is one that is covered by the arbitration agreement.

Construction of the arbitration clause

33. The principle of construction is the ascertainment of the meaning which the document would convey to a reasonable person that has all the knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract. The objective of construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean – having regard, not merely to the individual words used, but to the agreement as a whole. A court must balance between the indications from the factual background, rival constructions and a close examination of the language in the agreement. This requires a textual analysis in the factual matrix but the surrounding circumstances should not be used to undervalue the language: *Jumbo King Ltd v Faithful Properties Ltd & Ors* (1999) 2 HKCFAR 279, [1999] 3 HKLRD 757; *Law Ting Pong Secondary School v Chen Wai Wah* [2021] 1 HKCA 873 Lam VP, Yeun, Chu JJA, 11 June 2021.

One-stop adjudication

34. The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction: *Fiona Trust & Holding Corp v Privalov* [2007] Bus LR 1719 at §13 *per* Lord Hoffmann; *Giorgio Armani SpA v*

Elan Clothes Co Ltd (N0 2) [2020] 1 HKLRD 354 at §18 *per* Mimmi Chan J.

35. The presumption in favour of one-stop adjudication means that one would be very slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings: *Harbour Assurance co (UK) Ltd v Kansa General International Assurance co Ltd* [1993] QB 701 *per* Hoffmann LJ at 724D-G, 726A-C.

36. The modern trend of the courts is to uphold arbitration agreements, to facilitate arbitrations (save in necessary circumstances) not to intervene in an arbitration, which is the parties free choice as to the method of dispute resolution: *Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Limited* [2016] 1 HKLRD 582 at §§10-11.

Clause 14

37. Clause 14(a) of the arbitration clause provides if “any dispute difference or claim (“Dispute”) arises out of or in connection with” the agreement.

38. The language contained in the Clause 14(a) has been held by the court to be wide in scope. While every arbitration agreement must be construed in accordance with its ordinary and natural meaning, the words in Clause 14(a) are wide in scope. They would in general cover all disputes other than one entirely unrelated to the transaction covered by the POs.

39. The expression “in connection with” has been held to be wide enough to include a cause of action other than a contractual claim, such as a tortious claim. While the words “arising out of” have been held to include disputes on a subsequent settlement agreement, as further considered below.

40. The arbitration clause prescribes a process and steps to be followed if a dispute or difference arises.

41. Clause 14(b) requires both parties to endeavour to settle the dispute amicably and for their managing directors to meet in an attempt to resolve the dispute.

42. Clause 14(c) provides for what is to be done if “attempts of amicable settlement fail” or, alternatively, no attempt is made. Clause 14(c) does not expressly address the situation where one party considers the attempts at settlement succeeded and the other party considers they failed. Under Clause 14(c), if the attempts at settlement fail, the dispute shall be referred to arbitration, “unless otherwise agreed”. A narrow construction may be that only “the dispute” first notified is to be referred. The rival construction is that “any dispute” between the parties, including arising out of the attempts at amicable settlement, shall be referred to arbitration.

43. The defendant submits that if a stay were not granted, it would result in two sets of proceedings, one involving disputes over the defendant’s liabilities under the POs in an arbitration, and one involving disputes over the settlement agreement in court. This is undesirable and inconsistent with the presumption in favour of one-stop adjudication. The

plaintiff maintains there would not be two sets of proceedings, *inter alia*, because the defendant has waived all claims under the settlement and April Letter. That must depend on the validity, binding effect and/or construction of the terms of the settlement and April Letter.

44. The presumption fortifies my view of the proper construction of the arbitration clause. Starting from the assumption that the parties are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal the language does not make it clear that certain questions, such as the effect of any attempted settlement, were intended to be excluded from the arbitrator's jurisdiction.

45. The court should be slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings. The possibility of attempts to reach settlement is obviously foreseeable. Such attempts are required by Clause 14(b). That disputes may arise out of or in connection with a purported settlement is a clearly foreseeable eventuality. Construed in accordance with the presumption, I would not attribute to the parties an intention that in those foreseeable circumstances there should be two sets of proceedings.

46. The parties intention objectively construed would, at least *prima facie*, be that the same prescribed process should be followed and same forum should determine their disputes when only one party says the attempt at amicable settlement resulted in a binding settlement and the other party says it failed. That is, unless they agreed otherwise.

The nature of the dispute or difference by reference to the claim which is made.

47. The claim is brought in respect of alleged breach of the terms of the settlement and April Letter. It is a separate cause of action to a claim in respect of any breach of the terms of the POs.

48. The defendant says there are disputes over both:-

(1) The defendant's liability under the POs (defective quality of works, over charging); and

(2) The alleged settlement under the April Letter (whether it is binding and enforceable against the defendant).

49. In response to the defendant's submissions that there was no settlement reached Mr Cheung replied, *inter alia*, that:-

(1) The plaintiff was aware and acknowledged that the defendant was engaged in arbitration with Hien Lee, but this has no relevance or bearing on the plaintiff's claim which arose upon the defendant's failure to pay the Outstanding Sum by the Deadline;

(2) Even if the purpose of the April Letter was to seek to avoid the plaintiff commencing legal proceedings pending the outcome of the arbitration with Hien Lee, the pending provision has a Deadline, the April Letter

provides “in any event no later than 5.30 pm on 30 September 2020”.

(3) The contention that no separate agreement was agreed between the parties, and no admission of any monies due was made by the defendant, contradicts the content of the April Letter which itself formed a conclusive settlement agreement signed by both parties. There was no need for a separate agreement.

(4) The contention that the settlement is not binding given that no certified true copy of the board resolutions were provided by the defendant, which was a condition expressly provided in the April Letter, fails to have regard to the facts that Mr Grant Craft who signed the April Letter was a director and the sole shareholder of the defendant and the plaintiff had all along been doing business with the defendant knowing that he is the ultimate decision maker of all business decisions of the defendant.

50. The plaintiff’s submissions go to the merits of the defences. Having found there is a dispute the task is to consider the nature of the dispute by reference to the claim. The subject matter of the action is the validity and enforceability of the settlement. The nature of the dispute is as to the construction, binding effect and breach of the settlement and April Letter and the relevance of defences or claims under the POs.

51. Mr Cheung submits that the counterclaim concerning set-off due to the alleged quality of the propping works, credit for PPE, or over-claiming by the plaintiff are red herrings. As they, even if legitimate, had all been waived by the defendant in the April Letter. That the defendant may, in the action, raise an issue relating to the POs is insufficient to bring the plaintiff's claim within the scope of Article 8. In my view whether the counterclaim and set-off may be relevant would turn on the determination of the dispute on the settlement and April Letter.

52. The plaintiff pleads in the Reply that the plaintiff complied with the dispute resolution process under Clause 14 of the General T&C insofar as endeavouring to settle the dispute amicably, and the parties reached a settlement on the amount and payment terms of the outstanding sum and the settlement was put in writing in the April Letter countersigned by the defendant. Events subsequent to entering an agreement are not admissible to construe the terms of the agreement. However, relevant to the nature of the dispute and whether it is within the ambit of the arbitration clause is that the settlement and April Letter are the product of the parties following the agreed dispute resolution procedure under Clause 14(b) of the arbitration clause. On the defendant's case, having followed Clause 14(b), the parties are now squarely within Clause 14(c).

53. Alternatively, the defendant maintains that at the least there are disputes between the parties as to whether a settlement was reached and the April Letter was binding and enforceable against the defendant. Together with the disputes as to the proper amounts assessed to be payable under the POs. The defendant maintains that all these disputes fall within the scope of the widely worded arbitration clause.

Whether the dispute or difference is one that is covered by the arbitration agreement

54. In the terminology of Article 8(1), the questions are: what is the “matter” for determination in the action, and is that “matter” the subject of the arbitration agreement? When these “matters” have been identified, the court can then decide whether the claim in these proceedings is “in the matter” which is the subject of an arbitration agreement, Clause 14.

55. The matter in the action is the validity and enforceability of the settlement and April Letter, including disputes as to the construction, binding effect and breach thereof. It is necessary for the defendant to demonstrate that those disputes or differences are matters which are intended by the arbitration clause to be referred to arbitration.

New cause of action

56. The plaintiff submits that a settlement supersedes the original cause of action: *Green v Rozen* [1955] 1 WLR 741, at 746; *McCallum v Country Residences Ltd* [1965] 1 WLR 657, *per* Lord Denning MR at 660F.

57. The plaintiff relies on *Pilecon (Hong Kong) Limited v Mightyhon Limited*, [1993] 2 HKLR 435, paragraph 31 where the Court held:-

“31. Prior to November 1986, it was true that the parties did have some disputes with regard to the plaintiff’s performance in the works and delay in completion. These disputes had been

resolved by the parties entering into the Settlement Agreement signed on 23 November 1989. In other words, instead of referring these disputes to arbitration, the parties had settled them. According to Clauses 5 and 6 of the Settlement Agreement, each party had unconditionally abandoned, withdrawn and/or waived all its claims, rights and remedies, if any, against the other. In these circumstances, I think that the parties can no longer refer whatever disputes they had prior to the Settlement Agreement to arbitration now.”

58. The *Pilecon* case was decided on 23 July 1992 under the Arbitration Ordinance, Cap. 341, before the commencement of the Arbitration Ordinance, Cap. 609 on 1 June 2011. The decision also predates the *Tommy CP Sze* decision of 28 October 2002 setting out the approach of the court to stay applications, which approach is still followed under the Arbitration Ordinance, Cap. 609.

59. In *Pelicon* the approach of the court at a hearing of an Order 14 application and a stay application was to ask 3 questions. First, does the plaintiff’s claim fall within the arbitration agreement. If it does not, the claim must be pursued in litigation. Second, if it does should the court stay proceedings pending arbitration. Or third, should the court give summary judgment against the defendant. The first question is similar to *Tommy CP Sze* question 4. However, *Pilecon* may be distinguished on its facts. The holding at paragraph 31 was that the parties could no longer refer whatever “disputes they had prior to the Settlement Agreement” to arbitration now, as distinct from disputes in respect of the Settlement Agreement. The court then considered whether any disputes other than those which had been settled had arisen at the time of issue of the Writ. Here the plaintiff brings its claim on the alleged settlement and April Letter. The defendant disputes, *inter alia*, the validity and enforceability of the settlement. The defendant seeks to stay proceedings for those disputes in respect of the settlement and

April Letter to be referred to arbitration. By way of Defence and Counterclaim the defendant also seeks to raise other PO disputes.

60. *Sonact Group Limited v Premuda SPA* [2018] EWHC 3820 (Comm) was a challenge pursuant to section 67 of the Arbitration Act 1996 to an arbitration award wherein the arbitrators held that they had jurisdiction to determine the claim and ordered the respondent charterer to pay the owner US\$600,000 with interest and costs. The charterer said that the arbitrators had no jurisdiction to do so. The court held that an arbitration agreement contained in a charterparty could apply in relation to disputes arising out of a subsequent settlement agreement contained in correspondence between the parties relating to the sum allegedly due under the charterparty.

61. The arbitration clause in the charterparty commenced “Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or the City of London whichever place is specified...”. The owner had a claim for demurrage and heating costs which was the subject of correspondence. Eventually the claim was settled by an exchange of emails, in which the charterer agreed to pay US\$600,000 by the extended date 24 April 2015. This sum covered all the owner’s outstanding claims under the charterparty. The charterers did not pay. The Notice of Arbitration did not refer to the agreed sum but rather claims for demurrage, heating and other claims. Males J accepted that strictly speaking once a claim is compromised there is a new cause of action for the agreed sum and that the old cause of action no longer exists. Nevertheless, the claim for the agreed sum, being that agreed due in respect of demurrage and heating costs could properly be

regarded by commercial parties as a claim for demurage and heating costs. Males J held therefor that the Notice of Arbitration was effective to refer the claim for the agreed sum to arbitration: §§22 and 23.

62. The charterers contended that the settlement agreement did not provide for London arbitration and therefor the arbitrators appointment did not extend to dealing with a claim for the agreed settlement sum. Males J held;

“15. ... Although the exchange of emails can be described as a “settlement agreement”, that was a somewhat grandiose expression for what was, in reality, no more than an informal and routine arrangement to finalise the sums due under the charterparty, notwithstanding that Italian lawyers became involved. I agree with the arbitrators that it is obvious that the parties intended that the arbitration clause in the charterparty would continue to apply in the event that the agreed sum was not paid. The wide wording of that clause is sufficient to encompass such a claim, albeit that the agreement to pay US\$600,000 represents a new cause of action under a new and binding agreement.

16. It is inconceivable that the parties intended that, if the agreed sum was not paid, the owner would be unable to pursue its claim in arbitration, the parties chosen neutral forum, and to obtain an award which would be readily enforceable under the New York Convention, but instead would have to commence court proceedings out of the jurisdiction.

20. Mr Brier submitted that the critical point in the present case is that the settlement agreement gave rise to a new legal relationship between the parties, replacing the relationship under the charterparty. However, there is in my judgment, no bright line rule that once the parties enter into a new legal relationship, here a settlement agreement, an arbitration clause in the underlying contract necessarily can no longer apply”.

63. Here, the plaintiff’s primary point is that the claim is brought on a new and different cause of action. Males J held that there is “no bright line rule that once the parties enter into a new legal relationship, here a

settlement agreement, an arbitration clause in the underlying contract necessarily can no longer apply”. The authorities are clear that a new cause of action is not of itself a bar to arbitration under an arbitration clause in a separate agreement. The question remains whether the claim comes within the ambit of the arbitration clause.

64. The plaintiff seeks to distinguish *Sonact Group* on the basis that there were peculiar factual circumstances, the case concerned a claim for demurage in a charterparty and the parties were from different jurisdictions. Further, the so called “settlement agreement” was not entirely formal in nature.

65. There is no international element in this case. The difficulties that would be faced by the owner were factors contributing to the determination that it would be inconceivable that they intended that the owner would not be able to pursue a claim under the settlement agreement in arbitration. While the present plaintiff would not face the same difficulties, it is not clear that the intention of the parties was to exclude disputes on a settlement agreement from arbitration, their chosen forum.

66. The parties here could be taken to have intended that an arbitral tribunal under the POs would also have jurisdiction over disputes arising out of an alleged settlement between them despite the claim being brought on a new cause of action and the absence of an express arbitration clause in the April Letter. There is at least a *prima facie* case that the parties intended that the arbitration clause would continue to apply in the event that the Outstanding Sum was not paid by the Deadline.

67. In *PCCW Global Ltd v Interactive Communications Service Ltd*. [2007] 1 HKLRD 309 the material issue was whether or not an arbitration clause covered a billing dispute. The judge had held there was no agreement to arbitrate at all. The Court of Appeal held the proper test to be applied in determining the question of whether it was for the court on a stay application or the arbitrator to decide whether an arbitration agreement existed was is there a *prima facie* or plainly arguable case that the parties were bound by an arbitration clause. The Court of Appeal held that the arbitration clause, Clause 11.3 provided for enforceable though permissive arbitration.

68. The remaining question was whether a billing dispute fell within the ambit or scope of Clause 11.3. The Court of Appeal held the proper approach to interpretation is to consider the agreement as a whole, then decide whether billing disputes are covered by Clause 11.3. The Court considered whether it was clear that there was no agreement to arbitrate billing disputes. It is important for the court not to usurp the function of the arbitrators or attempt to resolve the issue. Only if it is clear that Clause 11.3 does not cover billing disputes, should the court refuse a stay: *per* Tang VP (as he then was) at 321-322 §§60-61. It was held that Clause 4.3 was a self-contained provision on how any dispute or contest over billing should be determined. As a whole it was clear that the parties had agreed that billing disputes should be dealt with differently and separately from Clause 11.3.

69. The court must not usurp the function of the arbitrator by attempting to resolve the issue. In my view it cannot be said that it is clear that the arbitration clause does not cover disputes over the settlement and

April Letter. It is not clear that such disputes do not fall within the ambit or scope of the arbitration clause.

70. In *Giorgio Armani SpA v Elan Clothes Co Ltd (N0 2)* [2020] 1 HKLRD 354 at §18 Mimmi Chan J referring to the presumption of one-stop adjudication and that if any business men did want to exclude disputes of a particular type it would be easy for them to do so expressly, continued:-

“Otherwise, having gone to the trouble of agreeing that their disputes would be heard in the courts of a particular country or by a tribunal of their choice, they could not rationally have expected that time and expense would be taken in lengthy argument about the nature of particular causes of action, and whether any particular cause of action comes within the meaning of a particular phrase they have chosen in their arbitration clause.”

71. It is not clear that the plaintiff’s cause of action falls outside the phases chosen by the parties in the arbitration clause.

April Letter Jurisdiction Clause

72. The plaintiff submits the April Letter expressly stipulated the non-exclusive jurisdiction of the Hong Kong courts to resolve any dispute arising out of or in connection with the settlement and there was no other feature indicating the parties had the intention to engage the arbitration clause under the POs to resolve any dispute arising from the April Letter.

73. Whereas the defendant maintains that no binding settlement was ever entered into so the April Letter jurisdiction clause is not valid or binding on the parties. Further, even if the April Letter jurisdiction clause

could be enforceable, the arbitration clause should take precedence over the April Letter jurisdiction clause as would be the case where there is a parallel arbitration clause and a non-exclusive jurisdiction clause.

74. In cases where there is an arbitration clause and a non-exclusive jurisdiction clause in interrelated agreements, it has been consistently held by the courts that the arbitration clause would be favoured over the non-exclusive jurisdiction clause and would be upheld.

75. In *Paul Smith Ltd v H & S international Holdings Inc* [1991] 2 Lloyds LR 127, Steyn J held that an English law clause whereby the parties submitted to the exclusive jurisdiction of the English courts, is not inconsistent with the arbitration clause in the same agreement, in that the English law clause specified the law governing the arbitration.

76. In *AXA Re v Ace Global Markets Ltd* [2006] EWHC 216 (Comm), the claimant sought a declaration that the contract does not, on its true construction, include an arbitration agreement, which was refused. Gloster J held that a clause providing for English law to be the governing law and for any dispute thereunder to be referred to the jurisdiction of the English courts operated in parallel with the arbitration provisions of the agreement by fixing the supervisory court of the arbitration.

77. In *Lee Cheong Construction & Building Materials Limited* [2012] 2 HKLRD 975, DHCJ Burrell ordered a stay in favour of arbitration, holding that a non-exclusive jurisdiction clause and an arbitration clause are reconcilable and should be reconciled in favour of the latter. The non-exclusive jurisdiction clause was no more than a submission of the parties

to the Hong Kong jurisdiction, not their disputes, and it does not impose a positive obligation to resolve all disputes only in Hong Kong Courts: §13.

78. In *Bluegold Investments Holdings Limited v Giant Crown Industries Limited & Ors* (unrep., HCA 1127/2017, 27 November 2017), Mimmie Chan J ordered a stay finding that the arbitration clause in a Subscription Agreement also applied to the defendant who was a guarantor under a Guarantee which contained a non-exclusive jurisdiction clause of the Hong Kong courts.

79. In *Neo Intelligence Holdings Limited v Giant Crown Industries Limited & Ors* (unrep., HCA 1127/2017, 27 November 2017), DHCJ Sherrington, there was an arbitration clause in the original June Agreement, clause 8.1. The parties entered into a November Agreement which amended and supplemented the June Agreement which contained a non-exclusive jurisdiction clause of the Hong Kong courts, clause 4.1. The court upheld the arbitration clause and reconciled the arbitration and jurisdiction clauses on the basis that the arbitration clause was a detailed dispute resolution clause specifying procedures including a stepped process of consultation and negotiation first and only if that fails arbitration. Clause 4.1 was a simple jurisdiction clause by which the drafters were merely making it clear beyond peradventure that the November Agreement was also governed by Hong Kong law. Citing *AXA Re*, there is no presumption against surplusage in commercial agreements and no conclusions can be drawn from the presence of two express choices of English law. The non-exclusive submission to Hong Kong courts could be as the *lex arbitri* or for the purposes of post arbitral enforcement and did not amount to a sufficiently clear and unequivocal indication of waiver of

the arbitration clause in the June Agreement. Absent overwhelming evidence of an unequivocal waiver, a stay in favour of arbitration should be ordered. The wording of the November Agreement did not make it plain that there was an abandonment or waiver of the arbitration agreement.

80. The defendant submits the present case is analogous to the above cases, in particular *Lee Cheong Construction*, *Bluegold Investments* and *Neo Intelligence*.

81. The plaintiff replies that the onus is on the applicant to show a *prima facie* or plainly arguable case that the parties are bound by an arbitration clause. Once the April Letter is accepted by the court as valid, which is the only issue in this action, there is simply no room to argue that there is a *prima facie* case that the parties are bound by an arbitration clause as the April Letter contains none.

82. I hold that the arbitration clause, Clause 14 is a detailed dispute resolution clause specifying the procedures which shall be followed in the event of a dispute arising, requiring the prescribed notice and attempt at amicable settlement first, and if that fails, submission to arbitration. On the other hand, the non-exclusive jurisdiction clause in the April Letter is a jurisdiction clause, albeit it might be said to be otiose to the extent that Clause 13(b) of the General T&C validly provides for Hong Kong law to be the governing law. There is no presumption against surplusage in commercial agreements.

83. As in *Neo Intelligence* the drafters may have added a provision for submission to the non-exclusive jurisdiction of the Hong

Kong courts to make it clear beyond peradventure that the settlement was also governed by Hong Kong law and for this purpose.

84. Secondly, the inclusion of a non-exclusive submission to the Hong Kong courts may be construed as fixing the supervisory court of the arbitration or for the purposes of post arbitral enforcement, which is not inconsistent with the arbitration clause.

85. Thirdly, the April Letter jurisdiction clause does not amount to a sufficiently clear and unequivocal indication of waiver of the arbitration clause.

86. Fourthly, in a similar manner to *Lee Cheong Construction*, the April Letter jurisdiction clause may be a submission of the parties to the Hong Kong jurisdiction, not their disputes. In my view it does not impose a positive obligation to resolve all disputes only in Hong Kong courts.

87. Clause 14(b) does include the words “unless otherwise agreed”. I do not consider that the inclusion of the April Letter jurisdiction clause is an agreement otherwise. First, it is not an express agreement that the arbitration clause does not apply. Secondly, it is not a sufficient basis from which to infer that must be the intention of the parties. It is a non-exclusive jurisdiction clause. It does not show a clear intention of the parties that they agree that all disputes must only be submitted to the Hong Kong courts.

88. On a proper construction, the April Letter jurisdiction clause can sit in parallel with the arbitration clause. The two clauses are not

inconsistent and are reconcilable. On those bases I hold that in context the April Letter jurisdiction clause does not amount to an agreement “otherwise” in terms of the Clause 14(c) or override the arbitration clause.

Election

89. Alternatively, the plaintiff relies on election, submitting that if upon a proper construction of the terms of the settlement the plaintiff were to have a choice to either pursue the original cause of action under the POs or to sue on the settlement, the commencement of this action would constitute a clear election by the plaintiff to sue on the settlement: *Lam Fung Ying v Ho Tung Sing & Anor* [1993] 2 HKC 436 at 447E-F, 447I-448B, 450 A-C, affirmed on appeal to the Court of Appeal in [1993] 2 HKC 21. The arbitrator could consider any issue of election. Even if the plaintiff has elected to pursue a claim on the basis of the settlement and April Letter rather than under the POs, where the parties are not bound to resolve any disputes only in the Hong Kong courts and the plaintiff’s claim is within the ambit of the arbitration clause it should be referred to arbitration.

90.

Question 4 conclusion

91. The parties agreed by the arbitration clause that any dispute that arises out of or in connection with the PO agreement shall be referred to arbitration. The Clause 14(a) words are wide in scope. Ultimately, whether a dispute arises out of or is in connection with a contract is a question of fact, to be determined by examining all the circumstances of the case.

92. The claim against the defendant arises out of the settlement and April Letter. They arise out of or are in connection with the agreement containing the arbitration clause. The Clause 14 language is sufficiently wide to cover another cause of action where it arises out of the relationship created under the POs or is connected to it in the present circumstances. Clause 14(c) does provide that the dispute shall be referred to arbitration “unless otherwise agreed between the parties”. I do not construe the April Letter jurisdiction clause or terms of the April Letter read as a whole to be a clear agreement that disputes shall be dealt with otherwise than by arbitration.

93. In my view the plaintiff’s claim dispute comes within the ambit of the arbitration clause. It is a matter that is, at least *prima facie*, the subject of the arbitration clause. Accordingly, the answer to Question 4 is Yes.

Orders

94. I hold that the arbitration clause is effective to cover the claim in this action and a stay in favour of arbitration should be granted.

95. For the above reasons I grant an order in terms of paragraph 1 of the defendant’s Summons dated 26 November 2020 that the action be stayed and the plaintiff’s claim be referred to arbitration.

96. I shall make an order *nisi* as to costs that the plaintiff do pay the defendant's costs of and occasioned by the Summons on an indemnity basis with certificate for counsel, such costs to be taxed if not agreed.

(Liza Jane Cruden)
Deputy District Judge

Mr Harrison Cheung, instructed by Deacons, for the plaintiff

Mr Joseph Wong, instructed by Bryan Cave Leighton Paisner LLP, for the defendant