IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2026] SGHCR 11

Originating Claim No 984 of 2025 (Summons No 438 of 2026 and Summons No. 441 of 2026)

Between

(1) Low Jun Hong
(2) Sean Joseph McKendrick
(3) Lum Marn Chi
(4) Chim Tat Hong
(5) Peter McCorkindale
(6) Chen Yuanjing

…C*laimants*

And

(1) Hong Qi Yu
(2) Erin Koo Kee Hoon

…D*efendants*

GROUNDS OF DECISION

[Contract – Privity of contract – Whether third parties can rely on arbitration clause by virtue of Contracts (Rights of Third Parties) Act 2001]

Version No 1: 10 Apr 2026 (09:28 hrs)

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Low Jun Hong and others
v
Hong Qi Yu and another

[2026] SGHCR 11

General Division of the High Court — Originating Claim No 984 of 2025
(Summons No 438 of 2026 and Summons No 441 of 2026)
DR Teo Guan Siew
13 March, 20 March 2026

10 April 2026

DR Teo Guan Siew:

Introduction

1 The claimants in this case were customers holding accounts with a digital asset trading exchange. Following the winding up of the company which operated the trading exchange, the claimants commenced the present representative proceedings seeking damages for fraudulent misrepresentation against the defendants, who were the former management of the company. The defendants applied for a stay of the proceedings in favour of arbitration, based on an arbitration clause in the customer service agreement. However, the defendants were not parties to this customer service agreement, which was between the company and each customer. The defendants' stay applications therefore raised the question of when a third party to a contract could rely on an arbitration clause in the contract.

2 I dismissed the defendants' applications. I now set out the grounds of my decision.

Background

The parties

3 HC/OC 984/2025 is a representative action brought by the first to six claimants on behalf of 272 individuals ("the Claimants") who had accounts with a digital asset trading exchange, Tokenize Xchange ("Tokenize").[1] Tokenize was operated by a company incorporated in Singapore, AmazingTech Pte Ltd ("ATPL"). The Claimants are grouped into six categories in these proceedings (each with a representative claimant), depending on *inter alia* the nature of the assets they held in their accounts (whether fiat currency, cryptocurrency or both) and whether they had effected withdrawals of their assets.[2]

4 The first defendant, Hong Qi Yu ("Hong") was the founder and director of ATPL. The second defendant, Erin Koo Kee Hoon ("Koo") was the Chief Operating Officer of ATPL, and the wife of Hong.

The Customer Service Agreement

5 When registering for a trading account on Tokenize, each of the Claimants had to enter into a Customer Service Agreement ("CSA") with ATPL.[3]

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1 Affidavit of Hong Qi Yu filed on 4 February 2026 in support of SUM 438/2026 ("Hong's Affidavit") at para 5.

2 Statement of Claim at [3] to [8].

3 Statement of Claim at [14].

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6 The CSA contains an arbitration clause ("Clause 26.2"):[4]

> Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination ("the Dispute"), shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre…

7 The CSA also contains clauses that sought to exclude the liability of ATPL and its directors, employees and agents ("Exclusion Clause") and confer a right of indemnity on them against losses due to the customers' breaches of the CSA ("Indemnity Clause"):[5]

> Clause 24.2 (Exclusion Clause)
>
> (a) …
>
> (b) ***In no event shall*** Tokenize,[6] all other entities within the Tokenize Group, … and ***the directors***, members, ***employees*** and/or agents of the aforementioned entities ***(each, a "Relevant Party", and collectively, the "Relevant Parties") be liable to you*** for any of the ***following types of loss*** or damage arising under or in connection with this Agreement or your use of the Tokenize Services:
>
> > (i) any loss of profits or loss of expected revenue or gains, including but not limited to any loss of anticipated trading profits …;
> >
> > (ii) any loss of, or damage to reputation or goodwill;
> >
> > (iii) any loss of sales or business or opportunity, customers or contracts;
> >
> > (iv) any loss or waste of overheads, management or other staff time;
> >
> > (v) any other loss of revenue or actual or anticipated savings …;

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4 Affidavit of 6th Claimant Chen Yuanjing filed on 20 February 2026 ("Chen's Affidavit") at page 39.

5 Chen's Affidavit at pages 37 to 38.

6 In the CSA, ATPL is referred to as Tokenize – see the Preamble of the CSA in Chen's Affidavit at page 12.

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(vi) any loss of use of hardware, software or data and/or any corruption of software, data or information …;

(vii) any loss, damage, cost and/or expense that we have expressly excluded or disclaimed or otherwise absolved ourselves of liability or responsibility for that are contained in other Sections of this Agreement; and

(viii) any indirect or consequential loss arising or in connection with our breach of this Agreement, except where we are prohibited under law from excluding any such liability.

(c) The provisions of Section 2(b)[7] shall be for the benefit of each Relevant Party, and shall be enforceable by each Relevant Party.

Clause 25 (Indemnity Clause)

25.1 You shall be liable to us for your breach of the terms of this Agreement.

25.2 To the maximum extent permitted by law, ***you agree to indemnify*** Tokenize, all other entities within the Tokenize Group, and ***the directors***, members, ***employees*** and/or agents of Tokenize and all other entities within the Tokenize Group ***(each, an "Indemnified Party" and collectively the "Indemnified Parties")*** against any action, liability, cost, claim, loss, damage, proceeding or expense … suffered or incurred by an Indemnified Party directly or indirectly arising from or in connection with:

(a) Any breach of a warranty or representation contained in Section 4.1;

(b) Your use of or conduct in relation to the Site and/or the Tokenize Exchange and/or your Account and/or any other Tokenize Services that is not in compliance with the terms of this Agreement; and/or

(c) ***Your breach of the terms of this Agreement***.

25.3 The provisions of Section 25.2 shall be for the benefit of each Indemnified Party, and shall be enforceable by each Indemnified Party.

[emphasis added]

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[7] The contractual clauses are referred to in the CSA as "sections".

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8 In respect of rights of third parties, Clause 34.6 of the CSA provides as follows:

> Rights of third parties
>
> ***Except for the Relevant Parties*** defined under Section 24.2(b) ***and the Indemnified Parties*** defined under Section [25.2] that are not parties to this Agreement, any person who is not a party to this Agreement ***shall have no right*** (whether under the Contracts (Rights of Third Parties) Act 2001 or otherwise) ***to enforce or enjoy the benefit of any term*** of this Agreement.
>
> [emphasis added]

9 While the Claimants' pleaded case accepts that each of them had entered into the CSA with ATPL, the affidavit affirmed by the 6th claimant, which was filed to resist the defendants' stay applications, alluded to how there was no requirement to sign or otherwise specifically agree to the CSA at the time of signing up for an account with Tokenize. According to the 6th claimant, there were no obvious signs drawing his attention to the CSA before or during the account creation process. He did not recall being provided with a link to review the CSA, nor was there any checkbox which he had to tick to acknowledge that he had read and agreed to the CSA.[8]

The Defendants' Stay applications

Facts leading up to the applications

10 Hong, the first defendant, was charged in the court on 31 July 2025 for fraudulent trading under s 238(4) of the Insolvency, Restructuring and Dissolution Act 2018 in connection with ATPL's operation of Tokenize, and the criminal proceedings are pending.[9]

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8 Chen's Affidavit at [8].

9 Hong's Affidavit at [9] to [10].

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11 On 1 August 2025, the Monetary Authority of Singapore ("MAS") and the Singapore Police Force issued a joint media release on investigations into ATPL for potential offences including fraudulent trading.[10] The media release also stated that ATPL did not have sufficient assets to meet its customers' claims and that it might not have segregated its customers' assets from ATPL's assets.

12 On 15 August 2025, ATPL was placed under interim judicial management.[11] The interim judicial managers filed for the liquidation of ATPL on 9 September 2025, and the company was wound up on 30 September 2026.

13 Following the winding up of ATPL, the Claimants commenced HC/OC 984/2025 against Hong and Koo for fraudulent misrepresentation and in the alternative unlawful conspiracy. The claims were based on false misrepresentations that had allegedly been made by Hong and Koo to the Claimants in connection with their accounts on Tokenize. These alleged misrepresentations pertained to *inter alia* whether ATPL operated Tokenize through a central order book[12] and whether it kept its own assets segregated from its customers,[13] as well as licencing issues including the status of ATPL's licence application to the MAS.[14] The Claimants sought damages for the losses suffered in depositing their fiat currency and cryptocurrency assets on Tokenize and being unable to subsequently withdraw the same from Tokenize.

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10 Statement of Claim at [85].

11 Hong's Affidavit at [7].

12 Statement of Claim at [19].

13 Statement of Claim at [26].

14 Statement of Claim at [43].

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14 Hong and Koo then filed the present two summons applications, SUM 439/2026 and SUM 441/2026, to seek a stay of the proceedings in favour of arbitration. Both defendants sought to rely on the arbitration agreement in Clause 26.2 of the CSA, even though they were non-parties to the contract.

The parties' submissions

15 In seeking to rely on Clause 26.2 of the CSA as a third party, Hong had two main arguments. The first relied on s 9(1) of the Contract (Rights of Third Parties) Act 2001 ("CRTPA"):

> **Arbitration provisions**
>
> 9.—(1) Where —
>
> (a) ***a right under section 2 to enforce a term*** (called in this section the substantive term) ***is subject to a term providing for the submission of disputes to arbitration*** (called in this section the arbitration agreement); and
>
> (b) the arbitration agreement is an agreement in writing for the purposes of the Arbitration Act 2001 or Part 2 of the International Arbitration Act 1994,
>
> ***the third party is treated*** for the purposes of the Arbitration Act 2001 or the International Arbitration Act 1994 (as the case may be) ***as a party to the arbitration agreement*** as regards disputes between the third party and the promisor relating to the enforcement of the substantive term by the third party.
>
> [emphasis added]

16 Hong's first argument can be summarised as follows:[15]

(a) It appears that the Claimants had committed a breach of the CSA by commencing this court action, because under Clause 4.2 of

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15 Written submissions filed by Hong on 11 March 2026 ("Hong's written submissions") at [17] to [23].

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the CSA, each of the Claimants had agreed to "bear all risk of loss in the value of the Digital Assets".

(b) Hong, being a director of ATPL, is an "Indemnified Party" under Clause 25.2. This means that, at least on a *prima facie* level, Hong is entitled to enforce his right to an indemnity under Clause 25.2 from the Claimants for their breach of the CSA. This would be pursuant to s 2 of the CRTPA, under which a third party may enforce a term of the contract if the contract expressly provides that the third party may do so (s 2(1)(a)) or if the term purports to confer a benefit on the third party (s 2(1)(b)).

(c) Under s 9(1) of the CRTPA, where the right under s 2 to enforce a term is subject to a term providing for arbitration (in this case Clause 26.2), the third party (*ie* Hong) is treated as a party to the arbitration agreement if he wishes to enforce his substantive right to an indemnity.

17 Hong's second argument was premised on an objective interpretation of the parties' intention to the CSA.[16] Hong, as the director of ATPL, is a "Relevant Party" under the Exclusion Clause (*ie* Clause 24.2). According to Hong, the contracting parties had to have intended a Relevant Party like himself to have the right to refer the dispute to arbitration when seeking to rely on the exclusion of liability provided under Clause 24.2. This could be gleaned from Clause 34.6, which carves out specifically Relevant Parties and Indemnified Parties from other third parties who are not entitled to enforce any term or benefit under the CSA. Were it otherwise, Hong argued that there would be a risk of fragmentation of disputes, a particularly real risk in the context of the

[16] Hong's written submissions at [25] to [35].

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present dispute concerning a cryptocurrency exchange which would likely involve multiple parties. As an example, it could lead to a scenario of two parallel sets of proceedings, where ATPL relies on the Exclusion Clause in arbitration whilst a Relevant Party like Hong relies on the same Exclusion Clause in litigation. Such an outcome makes no commercial sense and contractual interpretations that make no commercial sense should be avoided: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029.

18 Although framed as a matter of contractual interpretation applying common law principles, the statutory basis of Hong's second argument would similarly be s 9(1) of the CRTPA, insofar as the point is that Hong's intended reliance on the Exclusion Clause constitutes a third party's enforcement of a contractual term which is subject to a term providing for the submission of disputes to arbitration.

19 The second defendant, Koo, aligned herself with Hong's arguments, but in addition relied on s 9(2) of the CRTPA:

> (2) Where —
>
> (a) ***a third party has a right under section 2 to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration*** (called in this section the arbitration agreement);
>
> (b) the arbitration agreement is an agreement in writing for the purposes of the Arbitration Act 2001 or Part 2 of the International Arbitration Act 1994; and
>
> (c) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement,
>
> ***the third party is, if the third party exercises the right, treated*** for the purposes of the Arbitration Act 2001 or the International Arbitration Act 1994 (as the case may be) ***as a party to the arbitration agreement*** in relation to the matter

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> with respect to which the right is exercised, and treated as having been so immediately before the exercise of the right.
>
> [emphasis added]

20 In Koo's submission,[17] Clause 34.6 is effectively a clause which expressly provides a right to a third party (specifically a Relevant Party under the CSA) to enforce an arbitration agreement, which falls under s 9(2) of the CRTPA. Given that she was an employee of ATPL and hence a Relevant Party, Koo contended that she could therefore enforce the arbitration agreement in Clause 26.2 such that she is entitled to a stay of these court proceedings in favour of arbitration.

21 In resisting the stay applications, counsel for the Claimants did not engage with the above submissions by the defendants. Instead, the focus of their contention was that the stay applications should fail because their claims for fraudulent misrepresentation and conspiracy are tortious claims for damages falling outside the scope of the loss or damage contemplated under the Exclusion Clause.[18] It presumably followed that the defendants could therefore not be Relevant Parties under the CSA and hence were not entitled to the benefit of the arbitration agreement in Clause 26.2. As against the second defendant Koo specifically, the Claimant's counsel argued that she was not entitled to rely on the Exclusion Clause in any event because she was an employee of ATPL (and hence a Relevant Party) only until April 2021.

22 Further, so the Claimants' argument went, even if Clause 24.2 purports to exclude such losses, it would be void and unenforceable as exclusion of

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17 Written submissions filed by Koo on 10 March 2026 at [22] to [27].

18 Written submissions filed by the Claimants on 10 March 2026 at [12] to [15].

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liability for fraud is against public policy: *Goldring, Timothy Nicholas v Public Prosecutor and other appeals* [2015] 4 SLR 742.

Issues

23 In deciding the two stay applications, the main issue for determination was whether the defendants, as third parties to the CSA, were entitled to rely on the arbitration agreement in Clause 26.2 of the CSA. This raised two sub-issues.

24 The first sub-issue was whether the defendants could, on the basis of s 9(1) of the CRTPA, be treated as a party to the arbitration agreement to the extent that they were seeking to enforce a term in the CSA that was subject to a term providing for the submission of disputes to arbitration. On the facts underpinning the applications, the term sought to be enforced by the defendants could potentially be either the Exclusion Clause or the Indemnity Clause.

25 The second sub-issue was whether the defendants could be treated as party to the arbitration agreement in Clause 26.2 because the CSA contained "a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration" within the meaning of s 9(2) of the CRTPA.

Analysis and Decision

26 Before addressing the above issues, I deal briefly, as a preliminary point, with the argument raised by the Claimants' counsel in resisting the stay applications. In my view, the argument – that their claims are tortious in nature and hence falling outside the scope of the loss contemplated under the Exclusion Clause – missed the point. It failed to engage the core issue, which was whether the defendants were entitled to rely on the arbitration agreement in Clause 26.2.

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The Claimants' argument went into the merits of the underlying claim and likely defence (based on the Exclusion Clause), instead of the anterior question of where the forum for the resolution of that substantive dispute should be.

Scope of application of s 9(1) and s 9(2) CRTPA

27 In considering how s 9(1) and s 9(2) of the CRTPA apply, it is instructive to examine the facts and holding in the English Court of Appeal decision of *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] 1 WLR 3466 ("*Fortress*"). There, the managers of an investment scheme, much like the defendants in our present case, were third parties to a Partnership Deed who sought to stay court proceedings on the basis that their right to rely on an exclusion clause in the deed is subject to an arbitration clause in the deed. The English court accepted that reliance on an exclusion clause as a defence can constitute the enforcement of a contractual term within the meaning of s 8(1) of the UK CRTPA (which is in *pari material* with our s 9(1)). Indeed, s 1(6) of the UK Act (and s 2(6) of ours) makes that point clear. However, the court nevertheless rejected the managers' attempt to rely on s 8(1).

28 In doing so, Tomlinson LJ drew a distinction between a situation where the third party was bringing a claim against a contracting party, and when the third party is defending a claim from the contracting party (as was the case in *Fortress*).

29 In the former situation, the parties to the contract "intended to confer a benefit such as an indemnity on terms that if the third party chooses to avail himself of it, he must do so by resort to arbitration" (*Fortress* at [29]). As his fellow judge Toulson LJ explained, s 8(1) thus contemplates the conferment of an enforceable substantive right which is subject to a procedural condition,

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namely that the third party can only enforce the right by recourse to arbitration (*Fortress* at [42]). In other words, the third party can choose to exercise the substantive right given to him under the contract but only if he agrees to do so by way of arbitration.

30 By contrast, in the latter scenario, if s 8(1) is to have the intended effect as contended by the managers and if arbitration proceedings are to be initiated against the third party, then the third party would be bound to submit to arbitration. In Tomlinson LJ's view, this result is contrary to the principle that arbitration is a consensual process – it effectively imposes a burden on the third party to which he did not agree (*Fortress* at [29]). Conversely, in a situation like the case in *Fortress* where the third parties (*ie* the managers) were sued in court, Toulson LJ rejected the managers' argument, which was that they were entitled to a stay of proceedings because they could only advance the contractual defence in arbitration proceedings, as that would convert what is a procedural qualification of a substantive right given to them by the contract into a positive procedural right (*Fortress* at[53]).

31 By comparison, s 8(2) (in *pari material* to s 9(2) of our CRTPA) caters to a different scenario. As explained by Toulson LJ (*Fortress* at [44]):

> Section 8(2) is aimed at the different situation in which a term of the contract gives a unilateral right to T [the third party] to require that a dispute with P [the promisor and contracting party] of an identified description should be submitted to arbitration. In that situation T is to be treated as a party to an arbitration agreement with P if and when T exercises the right.

32 For s 8(2) to be successfully invoked, the contract must on its true construction give the third party such a right to arbitrate. The English Court of Appeal in *Fortress* was of the view that the Partnership Deed simply did not

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provide as such, and such a provision could not be read into the language of the deed.

33 *Fortress* was considered by our Court of Appeal in the case of *VKC v VJZ and another* [2021] 2 SLR 753 ("*VKC*"). Although in a slightly different context involving exclusive jurisdiction clauses, the Court of Appeal agreed with the reasoning of the English court in *Fortress.*

34 From the above discussion, it can be discerned that there are broadly two scenarios when a third party would be able to rely on an arbitration agreement in a contract to which it is not a party. First, where the contract clearly provides that a third party may require that certain descriptions of disputes between the third party and the promisor be referred to arbitration, if a dispute falling within such descriptions arises, the third party is treated as a party to the arbitration agreement pursuant to s 9(2) of the CRTPA and can insist that any claim in respect of such dispute be determined by arbitration. There can be no conceptual objection to this conclusion – while a contract cannot purport to impose a burden on third parties without their consent, it can confer a right or benefit on a third party to require that any claim against it be pursued only way of arbitration. It is in every case a matter of construction of the contract as to whether the contracting parties intended to confer such a unilateral procedural right to arbitrate on the third party.

35 Second, even when there is no such express provision giving the third party the procedural right to arbitrate, it may still be possible for the third party to rely on an arbitration agreement in the contract – this is when the contract expressly provides that the third party may enforce a contractual term or if the contractual term purports to confer a benefit on the third party, and the enforcement of that substantive term is subject to the submission of the dispute

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to arbitration. In this second scenario, s 9(1) of the CRTPA operates such that the third party is treated as a party to the arbitration agreement as regards disputes between third party and the promisor in relation to that substantive term.

36 This second scenario can in turn present itself in two different situations. The first is where the third party seeks to enforce the substantive term by bringing proceedings against the promisor, for instance, to enforce an indemnity provided in the contract in the third party's favour. The third party is bound to do so by way of arbitration. This is uncontroversial, as it is clearly open to contracting parties to confer a substantive right on a third party which is subject to a procedural condition. The second situation, where the third party seeks to enforce the substantive term by relying on it as a defence (for example, by invoking an exclusion of liability clause) is less straightforward. If arbitration proceedings are brought against the third party, the difficult question is whether the third party would be bound by the arbitration agreement such that it no longer remains open to the third party to resist the jurisdiction of the arbitral tribunal. The difficulty arises because a conclusion that the third party is bound to participate in the arbitration runs counter to the principle that arbitration is a consensual process, such that the third party should not be subject to a burden to which it did not consent. It is equally problematic if the third party is being sued in court instead. If the third party is entitled to stay the court process by insisting on arbitration, this arguably elevates a procedural qualification (which is what the contracting parties intended) into a positive procedural right.

37 The proper application of s 9(1), in this second situation where the substantive term is being relied on by the third party as a defence, is therefore not without difficulties. In particular, it is unclear if the third party can be bound by or entitled to arbitration as the mode of dispute resolution, given the

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consensual nature of arbitration. In any event, as the Court of Appeal in *VKC* stated (at [61]), such a conclusion cannot be reached without very clear language in the contract to that effect.

Application to the present case

Whether defendants could be treated as party to arbitration agreement pursuant to s 9(1) CRTPA

38 I address first Hong's argument that was predicated on the Indemnity Clause. As mentioned above, Hong postulated the possible bringing of a claim, or more accurately a counterclaim in these proceedings, for an indemnity because of the alleged breach by the Claimants of Clause 4.2 by initiating the present action. To the extent that Hong as a director is an Indemnified Party under the Indemnity Clause which is in turn subject to the arbitration agreement in Clause 26.2, Hong contended that he was bound to pursue such a counterclaim only by arbitration and hence entitled to a stay of the present court proceedings.

39 Whilst conceptually unobjectionable, the problem with Hong's submission in this regard is that it was raised only for the first time in the written submissions; in particular, nothing was said of this in the affidavit filed in support of the stay application. While I appreciate that we were at the stage of a jurisdictional challenge and Hong certainly could not be filing a counterclaim since that would amount to taking a step in the proceedings and hence submission to jurisdiction, there had to at least be some clear evincing of an intention to mount such a claim for indemnity. Yet, there was no evidence before this court of an intention to do so – even in the submissions, the point was tentatively framed, with Hong's counsel stating that "it appears" that the Claimants have committed a breach, and even then only "at a prima facie level".

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40 The use of such tentative language perhaps revealed some degree of hesitation even on the part of Hong as to the viability of such a cause of action in the first place. Indeed, it seemed to me that not only was this supposed action for indemnity putative in nature, it was also inchoate. In order to bring a claim for damages for breach of contract, losses must have already been sustained, even if the exact quantum cannot yet be ascertained, the question of assessment or quantification of loss being necessarily distinct from the inquiry of whether loss has been sustained in the first place. In the present case, the alleged breach is the Claimants' initiating of this lawsuit and yet obviously, it is unclear whether and what losses or damage the first defendant Hong might suffer at this juncture. For one, it would surely depend on which party ultimately prevails on the merits of the case. Any loss or damage has therefore not crystalised, and the cause of action is incomplete at this stage. In any case, to my mind, what Hong would effectively be seeking is just an award of indemnity costs in the event he succeeds in his defence, and not a separate counterclaim.

41 For these reasons, Hong's intimation, in submissions through his counsel, of a potential counterclaim based on the Indemnity Clause did not, in my view, provide sufficient basis for the application of s 9(1) of the CRTPA.

42 I next turn to Hong's other argument based on his intended reliance on the Exclusion Clause. To the extent that Hong was asserting that he should be entitled to a stay of proceedings because he would be able to raise the Exclusion Clause as a defence only in arbitration, this was the same submission that was made by the managers in *Fortress* and which was rejected by the court, as it would convert a procedural qualification of a substantive right into a positive procedural right to arbitration. Indeed, there should in fact be no legal impediment to Hong or Koo raising the Exclusion Clause as a defence in these court proceedings. As Toulson LJ in *Fortress* explained (at [54]), "T [the third

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party] must be entitled to advance that substantive contractual right in his defence", and "[i]t would not make sense or accord with the purpose of section 8(1) [s 9(1)] to interpret it as preventing T from doing so in circumstances where P had chosen to sue him".

43 As the Court of Appeal in *VJZ* made clear (at [62]), "very clear language would be required to find that the right of a third party to avail himself of the defence of an exclusion clause is subject to the dispute being brought in arbitration". I did not find that there was such clear language to that effect in the CSA. In particular, I disagreed with Hong's counsel that such an intention on the part of the contracting parties could be gleaned from Clause 34.6, the interpretation of which I would come to below when considering the arguments of Koo's counsel.

44 For the above reasons, my view was that the defendants could not be treated as a party to the arbitration agreement in Clause 26.2 under s 9(1) of the CRTPA. In reaching this conclusion, I recognised that a risk of possible fragmentation of dispute could be an unintended consequence, given that any dispute with ATPL itself would have to be resolved in arbitration. However, the risk was one which would not appear to arise on the circumstances of the present case, given the Claimants' clear indication that they did not intend to commence arbitration proceedings against the company ATPL.

Whether defendants could be treated as party to arbitration agreement pursuant to s 9(2) CRTPA

45 In addition to adopting Hong's arguments, Koo also sought to rely on s 9(2) of the CRTPA. As explained above, s 9(2) applies to the scenario where the contract confers on a third party a unilateral procedural right to refer disputes of certain descriptions to arbitration. Koo's argument in this regard hinged on

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Clause 34.6. This clause states that non-parties to the CSA, other than Relevant Parties and Indemnified Parties, shall have no right to enforce or enjoy the benefit of any term of the agreement. In Koo's submission, the effect of Clause 34.6 is that Relevant Parties and Indemnified Parties are therefore entitled to rely on the arbitration agreement at Clause 26.2.

46 I was unable to accept this submission. Firstly, on a literal reading, Clause 34.6 simply does not say so. Second, what Koo was effectively contending was that since Relevant Parties and Indemnified Parties are carved out from Clause 34.6 and distinguished from other non-parties who are not entitled to enforce or enjoy the benefit of any term of the contract, this must mean that the Relevant Parties and Indemnified Parties would therefore be able to enforce and enjoy the benefit of *all* the terms of the contract. With respect, this does not necessarily follow. The mere fact that Relevant Parties and Indemnified Parties are treated differently from other non-parties does not necessarily translate to them being then able to enforce *any* term of the contract. This is too expansive a reading of Clause 34.6. Rather, it is sensible to single out Relevant Parties and Indemnified Parties in Clause 34.6 simply because the clause is for the purpose of making clear that third parties have no rights under the contract, whereas Relevant Parties and Indemnified Parties, notwithstanding they are third parties, do have some rights under the contract, namely that they are entitled to the benefit of Clause 24.2 and Clause 25.2 respectively.

47 In my view, Clause 34.6 of the CSA cannot be construed as equivalent to saying that a Relevant Party or Indemnified Party is entitled to the benefits of all the terms of this CSA including the arbitration agreement in Clause 26.2. If a third party is to be entitled to enforce a term of the contract, this must be expressly provided for in the contract (s 2(1)(a) of the CRTPA) or the term must purport to confer a benefit on the third party (s 2(1)(b) of the CRTPA). Indeed,

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Clause 24.2(c) expressly states that the provisions of Clause 24.2(b) is for the benefit of and shall be enforceable by each Relevant Party. Equally, Clause 25.3 expressly provides for the same in respect of an Indemnified Party. In contrast, there is nothing said anywhere else in the CSA about any other provision being for the benefit of or being enforceable by Relevant Parties or Indemnified Parties. In particular, there is no provision which states that a Relevant Party or Indemnified Party has a right to enforce the arbitration clause. Accordingly, my view was that Koo's argument relying on s 9(2) to seek a stay for arbitration had to also fail.

48 Before I conclude, for completeness, even though this was not canvassed by parties during the hearing, I deal with the Hong's additional prayer for the proceedings to be stayed under the inherent jurisdiction of the court, presumably due to the ongoing criminal case against him. The law is clear: the mere fact of parallel criminal proceedings does not give rise to an automatic right to a stay of the civil proceedings; instead it is a matter of judicial discretion whether to stay proceedings (*Debenho Pte Ltd and anor v Envy Global Trading Pte Lyd and anor* [2022] SGHC 7 ("*Debenho*") at [34]). The burden is on the defendant to show that there is a real danger that the continuance of the civil action against him will result in injustice in the criminal proceedings (*Debenho* at [35]). Hong did not discharge this burden. There was nothing other than a bare assertion in one sentence in his affidavit that this action is likely to prejudice his position in the criminal investigations. No arguments were made by counsel on this, whether in written submissions or orally.

Conclusion

49 For the reasons set out above, my decision was that Hong and Koo, as non-parties to the CSA, could not rely on the arbitration agreement in the CSA.

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In particular, neither s 9(1) nor s 9(2) of the CRTPA operated to allow them to enforce the arbitration agreement. Accordingly, I dismissed both stay applications with costs.

Teo Guan Siew
Deputy Registrar

Mr Aaron Leong and Ms Sarah Khan (Dauntless Law Chambers LLC) for the claimant;
Mr Nichol Yeo (Nine Yard Chambers LLC) for the first defendant;
Mr Senthil Dayalan and Mr Aric Amaraganthan (Forte Law LLC) for the second defendant.

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