

PT Selecta Bestama v Sin Huat Huat Marine Transportation Pte Ltd
[2015] SGHC 295

Case Number : Admiralty in Personam No 135 of 2014 (Registrar's Appeal No 236 of 2015)
Decision Date : 18 November 2015
Tribunal/Court : High Court
Coram : Steven Chong J
Counsel Name(s) : Jason Tan Hin Wa (Asia Ascent Law Corporation) for the plaintiff; Michael Chia Peng Chuang and Darius Lee Zhen Ying (Legal Solutions LLC) for the defendant.
Parties : PT Selecta Bestama — Sin Huat Huat Marine Transportation Pte Ltd

Civil procedure – Judgment in default of appearance – Setting aside

Conflict of laws – Choice of jurisdiction – Exclusive

18 November 2015

Steven Chong J:

Introduction

1 This case arose from the defendant's application before the assistant registrar ("the AR") in Summons No 1088 of 2015 to set aside a judgment in default of appearance and to stay the proceedings in favour of the courts in Batam as stipulated in the exclusive jurisdiction clause of two signed contracts between the defendant and the plaintiff. Although the AR set aside the default judgment, the order was conditional upon the defendant paying the sum of \$173,500 into court, being the sum of liquidated damages awarded to the plaintiff under the default judgment. He refused the stay on the premise that "the obligation to negotiate was a precondition to the exclusive jurisdiction agreement ... and given that negotiations have not been attempted, it follows that the parties' promise to submit to the exclusive jurisdiction of the Batam court is not yet enforceable" (*PT Selecta Bestama v Sin Huat Huat Marine Transportation Pte Ltd* [2015] SGHCR 16 ("the AR's decision") at [54]–[55]).

2 The defendant appealed against both decisions by the AR and the appeal came before me. After two rounds of hearing, I allowed the defendant's appeal against both decisions. First, I set aside the condition requiring the defendant to pay the sum of \$173,500 into court and second, I ordered the stay of proceedings in accordance with the exclusive jurisdiction clause. I had issued brief oral grounds when delivering my decision, but as the appeal had raised points of law and procedure which were of interest, I believe it may be useful to provide my full written grounds.

3 Typically, the party resisting the stay application is the same party who challenges the validity of the contract which contains the exclusive jurisdiction clause. In such cases, the conventional approach taken by the court is to order that the validity of the contract be determined by the forum stipulated in the exclusive jurisdiction clause, and as a consequence, that the proceedings be stayed. Here, the situation was the converse. Can the defendant, who is challenging the validity of the contracts on the ground of misrepresentation, rely on the exclusive jurisdiction clause contained therein to stay the Singapore proceedings? I found that there was no reason in law or principle why the outcome should be any different in such a situation particularly since, by the plaintiff's own case,

the contracts are valid and therefore the commencement of the Singapore proceedings is *ex facie* in breach of the exclusive jurisdiction clause. Furthermore, contrary to the AR's holding, I was of the view that the plaintiff could not rely on its own breach in failing to attempt negotiations to argue that the exclusive jurisdiction clause had not been engaged. Put another way, if the plaintiff had commenced the action in Batam without first attempting settlement negotiations, the action would probably be stayed (in the absence of evidence that Indonesian law on this issue is different from Singapore law) until the parties' attempt to settle the dispute amicably had failed. If so, why should the plaintiff be in a better position to resist the stay application in circumstances where it had breached not one, but both steps in the exclusive jurisdiction clause?

4 The heart of the dispute pertained to two contracts to build two barges in Batam. The plaintiff produced two contracts which the defendant admitted to signing. The defendant's case was that although it did sign the two contracts, it had ordered only one barge and it believed that subsequently, the contract for the one barge was agreed to be cancelled.

5 I had my initial doubts about this defence. But several odd and suspicious features of the case led me to decide that the defendant should be entitled to defend the claim unconditionally. For one, although the two initial instalments payable upon the signing of the contracts (20 percent) and the laying of the keels (a further 20 percent) amounting to a total of \$1,064,000 were not paid by the defendant after invoices were issued, the plaintiff nevertheless claimed to have build the barges to 90 percent completion. Moreover, it did so despite the fact that the defendant had not stationed a representative at the plaintiff's shipyard as required under the terms of the contracts. This representative was meant to provide instructions to the plaintiff in relation to, *inter alia*, the plans, drawings, modifications of the specifications, attendance to tests and inspection of the barges. Curiously, throughout the shipbuilding process, there was no communication whatsoever with the defendant about the construction progress of the two barges following the receipt of the initial invoices – a period of complete silence for six months. No progress report was ever sent to the defendant. Instead, the progress reports (without any photographs attached) purportedly showing that the barges were 72 percent completed were enclosed in the letter of demand sent by the plaintiff's solicitors. Significantly, when the defendant was informed about the default judgment, it sought permission to inspect the two barges in Batam but its request was inexplicably denied. Why would the plaintiff deny the defendant the right to inspect the barges if they were being built for the defendant?

6 The unusual features of this case will be examined in greater detail below.

Facts

7 The plaintiff commenced the present suit to recover sums it claimed were due to it from the defendant under two signed contracts dated 25 September 2013 for the building of two barges ("the Contracts"). The Contracts were identical. Under each of the Contracts, the plaintiff was to build a single barge for the defendant at a price of \$1.33m. The only thing that distinguished the Contracts was its cover page – one was marked "DATE:", whilst the other was marked "Contract No: 001/SV/IX/2013". [\[note: 1\]](#)

8 As mentioned at [4] above, the defendant did not dispute that it had signed the Contracts. However, it claimed that prior to the signing of the Contracts, the parties had entered into an in-principle oral agreement for the construction of only *one* barge at the same price of \$1.33 million. [\[note: 2\]](#) The payment terms according to the defendant were also quite different – 20 percent payable upon signing and the balance 80 percent payable upon delivery. The defendant also claimed that the parties orally agreed that if the defendant failed to pay the initial 20 percent deposit, the

contract would be cancelled and the plaintiff would not proceed with the building of the barge. [\[note: 3\]](#)

9 The defendant's director, Mr Low Swe Teen ("Low"), claimed that on or about 25 September 2013, the plaintiff had presented him with a large number of documents to sign. [\[note: 4\]](#) He did not understand the documents, which were in English, but the plaintiff's director, Mr Andy Lynn ("Lynn"), had allegedly represented to him that his signature was needed on the documents simply to formalise the oral agreement (described at [8] above). [\[note: 5\]](#) Low claimed that he did not know that the documents he signed were multiple contracts for more than one vessel. Nor did he know that under the terms of the Contracts, he had to pay 20 percent of the purchase price upon signing the Contracts, and another 20 percent upon the laying of the keel, with the balance 60 percent payable within seven days upon completion. [\[note: 6\]](#) He was instead under the impression that the Contracts would be cancelled if the defendant did not pay the initial 20 percent deposit (as per the in principle oral agreement). The defendant thus claimed that the agreement was voidable on the ground of misrepresentation. [\[note: 7\]](#) For the avoidance of doubt, the defendant did not rely on the defence of *non est factum*.

10 I should mention that apart from the Contracts which the plaintiff relied on, Low exhibited in his affidavit another 14 contracts (each with a different reference on the cover page). Apart from the fact that four of the contracts stipulated a price of \$1.6m instead of \$1.33m, these contracts, which were all signed by Lynn, were identical to the two signed by Low. Low claimed that these contracts were handed to him by Lynn on 25 September 2013 and that he only retrieved them from the defendant's files and realised they were identical contracts when he consulted the defendant's lawyers for the present suit. Of the 14 contracts retrieved from the defendant's files, there was one additional contract which was also signed by Low on behalf of the defendant. In other words, including the two contracts which the plaintiff was suing on (*ie*, the Contracts), there were a total of three contracts signed by *both parties*, each for the construction of a barge at a price of \$1.33m.

11 The plaintiff did not deny that it provided the defendant with a number of identical, signed contracts. However, it claimed that it did so because Low had requested for "*blank*" contracts so that the defendant could consider whether to order more barges. [\[note: 8\]](#) The plaintiff maintained that the in-principle oral agreement between the parties always concerned the construction of *two* barges and that in any event, any prior oral agreement would have been superseded by the Contracts executed by the parties. [\[note: 9\]](#)

12 According to the plaintiff, the barges were 90 percent completed at the time of the commencement of the action herein. [\[note: 10\]](#) However, the defendant had not paid a cent for the barges. Following the defendant's failure to enter an appearance, on 3 November 2014, the plaintiff obtained judgment in default of appearance against the defendant in the sum of \$173,500 with interest and damages to be assessed. The application to set aside the default judgment and to stay the present proceedings was filed by the defendant on 10 March 2015.

Setting aside the default judgment

13 It is necessary to first consider the defendant's application to set aside the default judgment before considering its stay application. This is because there would be nothing to stay without first setting aside the default judgment (*Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR(R) 168 at [24]).

14 The principles governing the setting aside of a default judgment are well-established and have been set out at [19] and [20] of the AR's judgment. In short, the defendant had to establish "a *prima facie* defence in the sense of showing that there are triable or arguable issues" (*Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 at [60]). As mentioned at [5] above, I found that the defendant had raised several triable issues and as such, should be entitled to defend the claim unconditionally. There were several troubling aspects of the plaintiff's factual narrative which had to be probed further at a full trial.

15 First, it was far from clear whether the parties had agreed to the construction of one or two barges. The plaintiff's case theory was that the defendant had contracted for the construction of *two barges* because it had signed *two contracts*. Notwithstanding the fact that the Contracts were identical (apart from its label on the cover page, one of which oddly bore the reference "DATE"), *prima facie*, these two separately signed contracts appeared to create distinct, though identical, contractual obligations in law. However, having reviewed the surrounding circumstances which culminated in the signing of the Contracts, I found that it was triable whether these two *identical* contracts necessarily indicated that the parties had agreed to the construction of two barges.

16 As mentioned earlier, the defendant had been given another 14 contracts which were identical to the Contracts which the plaintiff was suing on (apart from the different price of \$1.6m in four of the 14 contracts), and which were *all* signed by Lynn. The AR observed that the multiple contracts related to "different types of barges" (the AR's judgment at [23]). From my examination of these multiple contracts, they appeared to be for the same type of barges. At the appeal hearing, both parties accepted that the AR's observation in this respect was incorrect. While the plaintiff admitted that it did provide these 14 contracts to the defendant, it could not offer any reasonable explanation as to why the multiple contracts were prepared and presented to the defendant. Lynn stated that "*blank*" contracts were prepared at the defendant's request to enable it to consider whether it wanted to order more barges. [\[note: 11\]](#) However, the explanation did not make sense. First, the contracts were not blank – they were all dated and signed by the plaintiff. Second, there was no explanation for the higher price of \$1.6m on four of the 14 contracts, all of which were for *identical barges*. This unexplained multiplicity of contracts provided, in my view, the necessary context for the defendant's complaint that Low was asked to sign many contracts and did not know that in signing them, he would be ordering more than one barge.

17 Significantly, a *third* signed contract was found among the 14 contracts. According to the plaintiff's case theory, this would mean that the parties had contracted for the construction of *three* barges, rather than *two* barges. Lynn explained in his affidavit that the third contract must have been a duplicate which the defendant had retained, and that only two signed contracts (*ie*, the Contracts) had been returned to the plaintiff. [\[note: 12\]](#) It was not readily apparent that the third signed contract was merely a duplicate of the Contracts given that each of the three signed contracts bore *different* reference numbers. Furthermore, the plaintiff's counsel accepted that he was unable to explain how the duplicates and the originals were to be distinguished. The plaintiff's own explanation that these contracts, though bearing different reference numbers, could be duplicates of each other casted doubt on its case theory that two barges were ordered simply because the Contracts had been signed. It bears emphasis that one of the Contracts which the plaintiff was relying on did not even bear a proper reference number, but was merely marked "DATE:".

18 To my mind, the unusual events which surrounded the signing of the Contracts gave rise to questions about the legal effect of the defendant having signed *multiple, identical* contracts. At its core, a contract is formed when there is a meeting of the minds. While a signed contract is often taken as near conclusive proof that there was a meeting of minds on the terms found therein, in the

present case, I found that there was considerable uncertainty about the exact agreement between the parties and how the Contracts ought to be construed.

19 I also found it arguable whether the Contracts had been terminated pursuant to the oral agreement that the Contracts would be cancelled should the defendant fail to pay the initial 20 percent deposit. I had noted that the plaintiff had sent, and the defendant had admitted to having received, four invoices from the plaintiff. [\[note: 13\]](#) Two invoices dated 7 October 2013 were each for 20 percent of the purchase price due upon the signing of the Contracts, and two invoices dated 23 November 2013 were each for another 20 percent due upon the plaintiff laying the keels for the two barges. [\[note: 14\]](#) According to Low, upon receiving the invoices, he had called and told Lynn on a few occasions that the defendant was not proceeding with the purchase of the barge due to lack of funds. [\[note: 15\]](#) Although there was no evidence of such calls apart from Low's seemingly bald assertion, the conduct of the parties following the receipt of the invoices had raised sufficient doubts as to whether the Contracts were treated to have been cancelled.

20 It was common ground that after the second batch of invoices were issued in November 2013, Low did not hear any further from the plaintiff about the barges until the defendant received the letter of demand dated 19 May 2014 from the plaintiff's solicitors. In other words, there was complete silence for six months. Crucially, while the Contracts required the defendant to "send and maintain" a representative at the plaintiff's shipyard, as mentioned above at [5], no such representative was ever sent. This was consistent with the defendant's case that it believed the Contracts had been cancelled.

21 In my view, it was highly unusual for the plaintiff to proceed with the building of the barges despite the fact that (a) no payment had been received at all; and (b) the defendant had failed to station any representative at the shipyard. These facts suggested that the defendant was not proceeding with the order for the barge(s). This must have been apparent to the plaintiff. In addition, I also found it unusual that there was no communication whatsoever between the parties on the construction progress of the barges for six months while the barges were being built purportedly for the defendant. No progress reports were sent to the defendant. No further demand for payment on the allegedly overdue invoices was sent either. It is highly unusual for a vessel to be built without *any* input, financial or technical, from the party who purportedly ordered it and without eliciting any negative reaction from the purported builder.

22 It should be recalled that it was the defendant's case that the parties had agreed for the balance 80 percent to be payable only upon completion of the barge. In this connection, the AR observed at [25] of his judgment that "there seemed hardly any logical, much less strong commercial reason, for the Plaintiff to take on such disproportionate financial risk for a client that had yet to chalk up any goodwill". While he intended this to be a point against the defendant, in truth, it actually undermined the plaintiff's case because that was precisely what the plaintiff claimed to have done in proceeding with the building of the barges despite having received no payment or instruction *at all* from the defendant. The plaintiff explained that it had proceeded with the building of the barges to mitigate its losses because it had already undertaken contractual commitments to sub-contractors. This assertion by Lynn was not supported by any objective evidence before the court. The alleged sub-contracts were not exhibited in the supporting affidavits. In any event, it was also an odd explanation because it seemed that the continued building of the barges aggravated rather than mitigated the plaintiff's losses.

23 This highly unusual state of affairs was, at least *prima facie*, consistent with the defendant's case that the Contracts had been cancelled upon its non-payment of the initial deposit. At the very

least, it demonstrated that the plaintiff's contractual claim was far from straightforward.

24 I also noted that the plaintiff appeared to have denied the defendant's request to inspect the barges. [\[note: 16\]](#) This was extremely odd if the barges were being built for the defendant, and if the defendant was not only entitled to, but had a duty to, send a representative to the shipyard under the terms of the Contracts.

25 In short, I found that many features of the present case called for further examination. I add that I agreed with the AR that the defendant had a *prima facie* defence in respect of the claim for liquidated damages, especially given the unchallenged evidence of the defendant's Indonesian law expert that the liquidated damages clause was not enforceable under Indonesian law, which was the governing law of the contract (the AR's Judgment at [40]–[43]). The AR, however, concluded that because the defendant's factual assertions were "inherently incredible", it was fair and just to require the defendant to put up security in the amount of \$173,500 (the AR's Judgment at [43]). Given my view that the defendant had raised triable issues of fact, I was unable to agree with the AR that the defendant should be required to put up this sum of money to defend the claim.

The stay application

26 The Contracts contained the following exclusive jurisdiction clause:

Article IX: Governing Law and Jurisdiction

...

b) Save for the matters set out in [the following] paragraph [concerning disputes over the quality of materials or workmanship], all disputes arising in connection with this contract including but not limited to the validity, the interpretation or the execution of this contract *shall be settled amicably by negotiation. In case no settlement can be reached the parties hereto agree to submit all such disputes to the Governing Jurisdiction of the Courts Batam [sic] in Batam.*

[emphasis added]

27 As a preliminary point, I found that the exclusive jurisdiction clause was wide enough to cover the disputes raised by the parties. The clause covered "all disputes arising in connection with this contract including but not limited to the *validity*... of this contract" [emphasis added]. The plaintiff submitted that the defendant was disputing the *existence* of the Contracts rather than their *validity*. [\[note: 17\]](#) I was unable to agree with this submission. It appeared to me that the dispute raised by the defendant in essence related to the *validity* of the Contracts and not merely their existence. The defendant did not deny that he had agreed to enter into the Contracts but claimed that one of them had been cancelled pursuant an oral agreement and the other was voidable owing to misrepresentation. The dispute on their validity therefore fell within the scope of the exclusive jurisdiction clause.

28 The courts would ordinarily give effect to valid exclusive jurisdiction clauses because, *prima facie*, contracting parties should be held to their contractual commitment: *Golden Shore Transportation Pte Ltd v UCO Bank and another appeal* [2004] 1 SLR(R) 6 ("*Golden Shore*") at [33]. However, if a party can show "exceptional circumstances amounting to "strong cause" why the court should exercise its discretion in his favour and assist him in breaching his promise to bring the action in the contractual forum", the court may refrain from ordering a stay in favour of the contractual forum: *Golden Shore* at [33].

29 Logically, subject to the question of separability, the existence of a valid exclusive jurisdiction clause is dependent on the validity of the underlying contract between the parties. But it is well-established that a dispute relating to the validity of the underlying agreement is nonetheless a dispute *arising under* the governing exclusive jurisdiction clause: *Mackender and others v Feldia AG and others* [1967] 2 QB 590 at 598.

30 In the present case, the validity of the Contracts was plainly in dispute. Following the principles discussed above, the exclusive jurisdiction clause would be applicable to decide the dispute as regards its validity. Several arguments, however, were raised in support of the plaintiff's position that the court should refuse the stay application:

(a) First, the AR found that the stay should be refused on the ground that the exclusive jurisdiction clause had yet to be engaged given that the prior requirement to negotiate had not been met.

(b) Second, the plaintiff argued that the defendant could not on the one hand, deny the validity of the Contracts, and on the other hand, rely on the exclusive jurisdiction clause therein.

(c) Third, the plaintiff submitted that by filing a Notice to Produce Documents Referred to in Pleadings or Affidavits ("Notice to Produce") on 23 February 2015, the defendant had taken a step in the proceedings and had thereby waived its right to rely on the exclusive jurisdiction clause.

(d) Fourth, the plaintiff argued that in any event, there was strong cause to disregard the exclusive jurisdiction clause because the defendant lacked a proper defence.

Non-compliance with the requirement to negotiate

31 In the AR's view, the promise to submit to the exclusive jurisdiction of the Batam courts was subject to the existence of an agreed state of affairs, *ie*, a failed attempt at negotiations. In this regard, citing *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 ("*International Research*"), the AR likened the requirement to first attempt negotiations to a precondition which had to be satisfied *before* the exclusive jurisdiction clause could be engaged. He acknowledged that by commencing the Singapore proceedings, the plaintiff was the party in breach of the supposed precondition, *ie*, the obligation to negotiate. However, in his view, this did not entitle the defendant to enforce the exclusive jurisdiction clause. I did not agree with the AR's reasoning.

32 In *International Research*, the issue before the Court of Appeal was whether the arbitral tribunal constituted pursuant to an arbitration agreement had jurisdiction over the dispute. The dispute resolution clause made it mandatory for the parties to engage in several rounds of mediation and specified the persons who should participate at each stage of the mediation. The arbitration clause stated that all "[a]ll disputes ... which cannot be settled by mediation pursuant to Clause 37.2, shall be finally settled by arbitration" (*International Research* at [7]).

33 Whilst the Court of Appeal found on the facts that the appellant was not bound by the dispute resolution clauses (*International Research* at [53]), it nevertheless commented on the necessity of complying with the preconditions in order to invoke the right to refer the dispute to arbitration.

(a) First, the court held that the clause containing the obligation to mediate was sufficiently clear and certain. It set out "in mandatory fashion and with specificity the personnel ... who were

required to meet ... [and] it further specified the purpose of each such meeting" (*International Research* at [54]). The court also found that the specific steps laid down were "conditions precedent to any reference to arbitration" ((*International Research* at [54])).

(b) Second, the court held that where parties have "clearly contracted for a specific set of dispute resolution procedures as preconditions for arbitration, those preconditions must be fulfilled" (*International Research* at [62]). This observation extended to condition precedents to *litigation* as well (*International Research* at [62]).

(c) Third, the court found that on the facts, the conditions precedent had not been complied with (*International Research* at [58] and [63]).

(d) As a consequence of the non-compliance, the arbitral tribunal did not have jurisdiction over the parties (*International Research* at [63]).

34 In the present case, I found that the direction in the exclusive jurisdiction clause to settle the matter "amicably by negotiation" was set out in mandatory fashion, and though general in nature, was sufficiently clear and certain. I also agreed with the AR that it was a precondition to be satisfied before the parties could commence court proceedings in Batam given that the parties were to commence court proceedings in Batam only "[i]n case no settlement can be reached". It was not in dispute that no negotiations were ever attempted before the plaintiff commenced the Singapore proceedings.

35 What then is the legal effect of the plaintiff's non-compliance with the requirement to negotiate? The AR was of the view that this meant the exclusive jurisdiction clause could not be relied on even by the defendant, and as a consequence, the Singapore proceedings should not be stayed. With respect, I disagreed. As the defendant submitted, the plaintiff's failure to comply with the precondition to negotiate was itself a ground for the Singapore courts to decline jurisdiction. [\[note: 18\]](#) It must be borne in mind that the consequence of the non-compliance with the conditions precedent in *International Research* was that the second stage of the dispute resolution contemplated in the exclusive jurisdiction clause, *ie*, arbitration, could not be invoked. In my judgment, it was implicit in that holding that *no other* dispute resolution mechanism could be invoked either. It would defy logic and common sense if the parties who were in breach of the conditions precedent in a two-tiered dispute resolution clause could not have recourse to the secondary dispute resolution mechanism *mandated* by the contract, but could instead proceed with a mode of dispute resolution which was not contractually provided for.

36 Thus, in my view, the *plaintiff's* failure to first attempt negotiation did not disentitle the *defendant* from relying on Article IX of the Contracts to stay the present proceedings. As a matter of principle, it would be wholly unsatisfactory if the plaintiff could circumvent the exclusive jurisdiction clause by relying on its own breach of the contractual requirement to negotiate. If anything, the plaintiff's failure to satisfy the precondition to negotiate provided a *further reason* to stay the present proceedings.

Can the party denying the contract rely on the exclusive jurisdiction clause therein?

37 Ordinarily, the party denying the contract is also the party who is resisting the stay application (*ie*, seeking to depart from the contractual forum). However, as noted at [3] above, the situation in this case was the converse. The defendant sought to rely on the exclusive jurisdiction clause to stay the application and at the same time, disputed the validity of the Contracts. This troubled me initially, and I directed further submissions on this issue. After considering the parties' further submissions, I

was satisfied that the defendant was nonetheless entitled to rely on the exclusive jurisdiction clause.

38 The defendant relied on *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 ("*CIMB Bank*") for the proposition that it could rely on the exclusive jurisdiction clause to apply for the stay notwithstanding that it was disputing the validity of the contracts. As *CIMB Bank* was strictly concerned with a choice of law clause instead of an exclusive jurisdiction clause, it was necessary to examine the facts and the court's holding in order to understand its relevance to the present case. In *CIMB Bank*, it was not in dispute that the appellant, CIMB, was not bound by the contract pursuant to which the respondent, Dresdner, had paid US\$8.2m for the purchase of eight promissory notes. The contract had been procured by the fraud of one of CIMB's employees and Dresdner accepted that the agreement was not binding on CIMB. Issues of restitution remained to be determined between the parties and the question before the court was whether the choice of law clause (which provided for English Law) was applicable in spite of the parties' agreement that there was in fact no concluded contract. CIMB applied for a permanent stay of the Singapore proceedings on the ground of *forum non conveniens* (ie, that England was the more appropriate forum) and sought to rely on the choice of law clause in aid of its stay application.

39 At [54] and [55] of its judgment, the Court of Appeal held that CIMB could not rely on the choice of law clause:

54 ... Both Dresdner and CIMB agreed that there was no contract between them because George Chau went on a fraudulent frolic of his own. Even taking the "infection" approach advocated by Prof Harris (see [45] above), this fraud must infect the entire "agreement". The "agreement", including the choice of law clause, could not have bound CIMB (if CIMB, contrary to its stand here, was minded to take that position). **If the choice of law clause in the void contract could not apply to CIMB, the same should be the position vis-à-vis Dresdner. It would be contrary to all principles to suggest that the clause could be effective only against one party and not the other.** Accordingly, we found the following argument of Dresdner (at paras 85 and 86 of the respondent's case) both germane and persuasive and here we quote:

CIMB cannot have its cake and eat it too. Here, it is CIMB who has alleged fraud on the part of its own employee. **It is CIMB who is disavowing the Agreement. It cannot at the same time also insist on relying on the express choice of law therein.**

The position can be simply tested in a different way. Assuming the choice of law clause is unfavourable to CIMB, would it be fair that it can be used against CIMB? Obviously not, as CIMB had never agreed to, or even seen, the terms of the Agreement, and both parties accept that the Agreement is invalid. If that is the case, CIMB cannot likewise take advantage of the choice of law clause in the Agreement.

55 **We would reiterate that this was not a case where fraud was alleged by one party but disputed by the other party. In such an event, as stated at [30] above, the mere allegation of fraud is not in itself sufficient to impugn the choice of law clause in the contract** (see *Industrial & Commercial Bank Ltd v Banco Ambrosiano Veneto SPA* [2000] SGHC 188, and *Ash* ([30] supra)). **Neither was it a case where the parties intended to enter into the contract and the fraud related only to the subject matter of the contract** (see [46] above).

[emphasis added in bold]

40 In determining whether a choice of law clause could survive a challenge to the validity of a

contract, the Court of Appeal in *CIMB Bank* stressed the distinction between “a case where the parties are agreed that there is no agreement at all, and a case where the parties are in dispute as to the existence or validity of the agreement (eg, due to fraud or misrepresentation)” – in the latter situation the dispute would be determined in accordance with the choice of law clause *as if* the contract was valid (*CIMB Bank* at [30]). Therefore, the mere fact that the validity of the contract was challenged by a party would not *ipso facto* infect the choice of law clause. Additionally, even if it was undisputed that the contract was invalid, it remained critical to examine the substance of the challenge as to whether the factor which led to the invalidity of the contract itself also infected and invalidated the choice of law clause. It would only be in situations where there was clearly no concluded contract at all such as where the parties were *ad idem* that there was no contract (as was the case in *CIMB Bank*), or where the other party was defrauded into thinking that the contract was of a wholly different nature giving rise to the plea of *non est factum*, would the choice of law clause be infected to preclude its applicability altogether. Indeed as aptly observed by Assistant Professor Adeline Chong in Adeline Chong, “Void Contracts and the Applicability of Choice of Law Clauses to Consequential Restitutionary Claims: *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR 543” (2009) 21 SAcLJ 545 at para 8, “[c]entral to the court’s reasoning was the assessment of whether there had been a “meeting of the minds” between the parties”.

41 Although *CIMB Bank* concerned a choice of law clause, in my view, there was no reason why the same principle should not apply in the context of an exclusive jurisdiction clause. The pertinent question was whether the defendant’s challenge vitiates the exclusive jurisdiction clause. Indeed, the following instructive passage from *Ash v Corporation of Lloyd’s* (1992) 9 OR (3d) 755 at 758 which concerned an exclusive jurisdiction clause was cited with approval by the Court of Appeal in *CIMB Bank* at [30]:

The plaintiffs argue that the exclusive jurisdiction clauses should be ignored because if there has been fraud in the circumstances surrounding the procurement of the contracts then the contracts are void *ab initio* and the clauses relating to forum are of no effect. I agree with McKeown J., and with the authorities he cites, to the effect that an allegation that a contract is void *ab initio* does not make it so until a final judgment of the court. If the plaintiffs can commence an action with an allegation of fraud which would void the contract and thus vitiate a choice of jurisdiction clause from the outset, then they may succeed on the merits while enjoying their own choice of jurisdiction or fail on the merits while depriving the defendant of the contracted choice. These clauses are too important in international commerce to permit that anomalous result to flow.

42 The Court of Appeal in *CIMB Bank* at [30] and [55] clarified that *if the allegation of fraud was disputed* (ie, the validity of the contract was disputed), then it would not have mattered that CIMB was trying to “have its cake and eat it too”; CIMB would have been entitled to rely on the choice of law clause in the contract in support of its stay application.

43 Based on its affidavits, the defendant’s plea of misrepresentation pertained only to the payment terms and whether the parties had contracted for one or two barges. [\[note: 19\]](#) In other words, there was strictly no dispute that the parties intended to enter into a contract and in particular, there was no challenge to the validity of the exclusive jurisdiction clause. In fact, the defendant specifically confirmed it was not relying on the defence of *non est factum*. In such a scenario, the parties would have agreed to the choice of law or jurisdiction clause, and it would be “reasonable and logical” that those clauses should continue to apply to the parties to govern the dispute between the parties (*CIMB Bank* at [46]). Otherwise, as observed in *CIMB Bank* at [30], albeit in the context of a choice of law clause, a mere allegation that the contract is invalid at the interlocutory stage would be sufficient “to neutralise the effect of the *jurisdiction* or choice of law clause in the agreement”

[emphasis added].

44 As a matter of principle and fairness, as was held in *CIMB Bank* at [54], if the choice of law clause could not be asserted against CIMB, it likewise could not be asserted against Dresdner. Holding otherwise would be “contrary to all principles”. In the present case, as the defendant helpfully submitted, the plaintiff would have been able to enforce the exclusive jurisdiction clause against the defendant if the defendant had been the party to have commenced the Singapore proceedings for a declaration that the Contracts were voidable on the grounds of misrepresentation. [\[note: 20\]](#) If so, I found that it would be contrary to principle not to permit the defendant to enforce the exclusive jurisdiction clause against the plaintiff, notwithstanding that it was disputing the validity of the Contracts.

45 It bears mention that the plaintiff’s case was itself premised on the validity of the Contracts. On the plaintiff’s own case, the exclusive jurisdiction clause was both *operative and binding*. It would thus have been wrong in principle for the court not to take cognisance of the exclusive jurisdiction clause in considering the stay application when the plaintiff was, *ex facie*, in breach of a clause which, by its own case, was operative and binding.

46 Keeping these points in mind, the plaintiff’s submission based on the doctrine of approbation and reprobation was no longer relevant – the positions taken by the defendant were not necessarily inconsistent. The plaintiff’s reliance on *Hyundai Merchant Marine Company Limited v Americas Bulk Transport Limited* [2013] EWHC 470 (Comm) was also misguided. In that case, the dispute was whether the parties had entered into any binding legal agreement based on a series of email exchanges. The defendant asserted that the email exchanges merely evidenced pre-contractual negotiations. Mr Justice Eder found that the lack of consensus prevented not just the main contract, but the arbitration agreement from coming into existence (at [35]). The case before me was quite different. The defendant was not asserting that there was no consensus or contract; it admitted that a contract was entered into, but claimed that the plaintiff had misrepresented to it the payment terms and the number of barges contracted for. Unlike a defence that no contract was ever concluded, the defence of misrepresentation did not “infect” the exclusive jurisdiction clause.

47 I therefore found that the defendant was able to avail itself of the exclusive jurisdiction clause notwithstanding its challenge to the validity of the Contracts. The positions taken by the defendant were not necessarily inconsistent, and even if they were, the overarching principle established in *CIMB Bank* was that the jurisdiction clause applied even where the validity of the underlying contract was *disputed*.

Did the defendant waive its right to rely on the exclusive jurisdiction clause?

48 On 23 February 2015, the defendant filed a Notice to Produce, *inter alia*, the Contracts which the plaintiff had relied on. I noted that this step was necessitated by the plaintiff’s refusal to provide copies of the said documents at the defendant’s solicitor’s request. [\[note: 21\]](#)

49 I agreed with the AR’s decision that the filing of the Notice to Produce did not constitute a step in the proceedings, nor did it amount to a waiver of the defendant’s right to rely on the exclusive jurisdiction clause in the contract. The AR cited *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724, in which Lee Seiu Kin J held (at [20]) that the issuance of a Notice to Produce did not constitute a submission to jurisdiction, and did not amount to a waiver of the right to stay the proceedings in favour of arbitration. In my view, Lee J’s observations applied equally in the context of an exclusive jurisdiction clause.

50 I should add that I found the plaintiff's refusal to provide the defendant with copies of the Contracts inexplicable (see [48] above). Nothing could be gained from such unhelpful conduct. It was outrageous for the plaintiff to rely on the defendant's Notice to Produce, which was necessitated by its own obstructive attitude, to deny the defendant's right to apply for a stay of proceedings.

Absence of strong cause

51 Given my decision on the above issues, I found that the defendant was entitled to rely on the exclusive jurisdiction clause to stay the Singapore proceedings. The only remaining question was whether the plaintiff had demonstrated exceptional circumstances amounting to strong cause to refuse the stay application.

52 The plaintiff advanced several reasons to argue that the Singapore proceedings should not be stayed: [\[note: 22\]](#)

- (a) the defendant had no defence;
- (b) the plaintiff would lose its security in Singapore;
- (c) the relative ease of enforcing a Singapore judgment because the defendant is a Singapore company whose assets are in Singapore; and
- (d) Low, a principal witness, is resident in Singapore and given his alleged medical conditions, it would be expensive to arrange transport for him to testify in Batam.

53 In *Golden Shore* at [38], the Court of Appeal held that limited weight should be given to factors which were known to the parties at the time of the contract. This was affirmed by the Court of Appeal in *The "Hyundai Fortune"* [2004] 4 SLR(R) 548 at [30]. Accordingly, as the issues relating to the relative ease of enforcement and the place of witnesses were known to the parties at the time the contracts were entered into, these factors did not assist the plaintiff in demonstrating *exceptional circumstances* amounting to "strong cause". The plaintiff must have known all along that the defendant was a Singapore company.

54 A lack of a defence may constitute "strong cause" on the ground that it indicates that the defendant does not genuinely desire a trial in the contractual forum: see *The "Jian He"* [1999] 3 SLR(R) 432 at [62]–[63] and *The "Hung Vuong-2"* [2000] 2 SLR(R) 11 at [11]. However, given my finding that the defendant had raised triable issues and did have a *prima facie* defence, this argument was no longer sustainable.

55 There was therefore no reason not to enforce the exclusive jurisdiction clause. Additionally, I also found that there were several persuasive reasons for the suit to be heard in Indonesia:

- (a) First, Indonesian law is the governing law of the Contracts. Significantly, the defendant's Indonesian law expert's evidence that the liquidated damages clause in the Contracts was unenforceable under Indonesian law was not challenged by the plaintiff. It would certainly be desirable for the Indonesian courts in Batam to decide on the validity of the liquidated damages clause.
- (b) Second, there appeared to be an issue regarding the defendant's right to inspect the barges at the plaintiff's shipyard in Batam. The defendant's earlier request was denied. As the barges are located in Batam, any order for inspection could only be made by the Indonesian court

in Batam. Such inspection is essential for the defendant to conduct its defence.

(c) Third, the barges are being built in Batam. Evidence of the costs of building the barges, the progress of the construction of the barges and the alleged involvement of the sub-contractors would be more easily obtainable in Indonesia. These facts would be extremely relevant in determining whether the barges have been built as alleged and/or whether they were being built for the defendant pursuant to the contracts given the unusual features of this case. It also has a material bearing on the assessment of damages should the defendant be found liable under the Contracts.

Conclusion

56 For the above reasons, I allowed the defendant's entire appeal and ordered that the present proceedings be stayed in order for the dispute to be determined in accordance with the exclusive jurisdiction clause. I also awarded the defendant costs fixed at \$16,000 here and below, plus reasonable disbursements including the Indonesian law expert's fees to be agreed, if not taxed.

[\[note: 1\]](#) Low Swe Teen's affidavit (16 Mar 2015) at para 14

[\[note: 2\]](#) Low Swe Teen's affidavit (16 Mar 2015) at para 9

[\[note: 3\]](#) Low Swe Teen's affidavit (16 Mar 2015) at para 12

[\[note: 4\]](#) Low Swe Teen's affidavit (16 Mar 2015) at para 13

[\[note: 5\]](#) Low Swe Teen's affidavit (16 Mar 2015) at para 16

[\[note: 6\]](#) Low Swe Teen's affidavit (16 Mar 2015) at para 16

[\[note: 7\]](#) Low Swe Teen's affidavit (16 Mar 2015) at para 42 – 43

[\[note: 8\]](#) Andy Lynn's affidavit (26 March 2015) at para 23

[\[note: 9\]](#) Andy Lynn's affidavit (26 March 2015) at para 12–14

[\[note: 10\]](#) Statement of claim at para 9

[\[note: 11\]](#) Andy Lynn's affidavit (26 March 2015) at para 23

[\[note: 12\]](#) Andy Lynn's affidavit (26 March 2015) at paras 27 and 28

[\[note: 13\]](#) Low Swe Teen's affidavit (16 Mar 2015) at para 19

[\[note: 14\]](#) Statement of claim para 10

[\[note: 15\]](#) Low Swe Teen's affidavit (16 Mar 2015) at para 19

[\[note: 16\]](#) Low Swe Teen's affidavit (16 Mar 2015) at para 47

[\[note: 17\]](#) Plaintiff's further submissions dated 25 September 2015 at para 16

[\[note: 18\]](#) Defendant's submissions at para 41

[\[note: 19\]](#) Defendant's further submissions dated 25 September 2015 at para 12

[\[note: 20\]](#) Defendant's further submissions dated 25 September 2015 at para 19

[\[note: 21\]](#) Low Swe Teen's affidavit (16 Mar 2015) at paras 29 – 31

[\[note: 22\]](#) Plaintiff's submissions dated at paras 139 – 151

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