

International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another
[2013] SGCA 55

Case Number : Civil Appeal No 12 of 2013
Decision Date : 18 October 2013
Tribunal/Court : Court of Appeal
Coram : Sundaresh Menon CJ; V K Rajah JA; Quentin Loh J
Counsel Name(s) : Subramanian A Pillai, Yek Jia Min Jasmin, Tan Wei Ser Venetia and Tien Chih Hsien Melanie (Colin Ng & Partners LLP) for the appellant; Dinesh Singh Dhillon, Margaret Joan Lin Wei Wei and Teh Shi Ying (Allen & Gledhill LLP) for the first respondent.
Parties : International Research Corp PLC — Lufthansa Systems Asia Pacific Pte Ltd and another

Arbitration – Agreement – Incorporation

Arbitration – Arbitral tribunal – Jurisdiction

[LawNet Editorial Note: The decision from which this appeal arose is reported at [\[2013\] 1 SLR 973.](#)]

18 October 2013

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 This appeal arose from the decision of the High Court judge (“the Judge”) in Originating Summons No 636 of 2012 (“OS 636/2012”). That was an application by the appellant, International Research Corporation PLC (“the Appellant”), pursuant to Art 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law 1985”) read with s 10 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (“the International Arbitration Act”) challenging the ruling by the arbitral tribunal in SIAC Arbitration No 061 of 2010 (“the Tribunal”) that it had jurisdiction over the dispute referred to it by the first respondent, Lufthansa Systems Asia Pacific Pte Ltd (“the Respondent”). As the Respondent filed its notice of arbitration on 13 May 2010, the applicable version of the International Arbitration Act is that Act as it stood before the amendments enacted by the International Arbitration (Amendment) Act 2012 (Act 12 of 2012) (“the 2012 Amendment Act”). We will refer to that version of the International Arbitration Act as “the IAA” so as to distinguish it from the International Arbitration Act as it currently stands (“the current IAA”).

2 The Judge found that the Tribunal did have jurisdiction and accordingly dismissed the Appellant’s application. The Judge’s written judgment (“the Judgment”) is reported in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] 1 SLR 973. On 16 August 2013, having considered the written submissions filed by the parties as well as the oral submissions of counsel, we allowed the appeal and ruled that the Tribunal did not have jurisdiction over the Appellant and its dispute with the Respondent. We now give the grounds of our decision.

The facts

The parties to the dispute

The parties to the dispute

3 The Appellant is a company incorporated under the laws of Thailand. It is engaged primarily in the business of providing information and communication technology products and services. The Respondent, a Singapore-registered company, is in the business of providing information technology services to companies in the aviation industry. The second respondent, Datamat Public Company Ltd ("Datamat"), is a company incorporated under the laws of Thailand. It provides information and computer technology services, including the distribution of hardware and software maintenance services. Datamat was a nominal respondent in this appeal and played no real part either in the application below or in the appeal.

Background to the dispute

4 On or around 11 March 2005, the Respondent and Datamat entered into an agreement which they referred to as the Cooperation Agreement for Applications and Services Implementation SAP R/3 IS A&D Contract No LSY ASPAC 1ZW-B ("the Cooperation Agreement"). Under the Cooperation Agreement, the Respondent was to supply, deliver and commission a new maintenance, repair and overhaul system ("the MRO System"). The MRO System was a component of the electronic data protection system ("the EDP System") that Datamat had agreed to provide Thai Airways under an agreement which Datamat and Thai Airways entered into on 12 January 2005 ("the EDP System Agreement").

5 On or around 14 March 2005, Datamat entered into a sale and purchase agreement with the Appellant ("the Sale and Purchase Agreement"). The Appellant agreed to: (a) supply and deliver various hardware and software products for the EDP System; and (b) provide a bankers' guarantee on behalf of Datamat in order for Datamat to comply with its obligations to Thai Airways under the EDP System Agreement. In effect, the Appellant and the Respondent were both Datamat's sub-contractors, albeit pursuant to separate sub-contracts, for the services which Datamat was obliged to provide Thai Airways under the EDP System Agreement. Datamat also agreed to assign its right to receive payments from Thai Airways under the EDP System Agreement to Siam Commercial Bank ("SCB"). These payments were to be deposited into an account which Datamat had opened with SCB. In turn, payments due to the Appellant under the Sale and Purchase Agreement were to be deducted from that account. The Appellant was then also to pay the Respondent for goods and services provided by the latter under the Cooperation Agreement upon the payments from Thai Airways being deposited into Datamat's SCB account.

6 In April 2005, very shortly after the Cooperation Agreement and the Sale and Purchase Agreement were entered into, Datamat ran into financial difficulties. The Respondent then informed Datamat that it would cease work under the Cooperation Agreement unless Datamat was able to secure another party that would settle the outstanding payments due to the Respondent as well as undertake to pay all future invoices issued by it. On 8 August 2005, a compromise arrangement was worked out between the Appellant, the Respondent and Datamat, which together entered into a supplemental agreement ("Supplemental Agreement No 1"). This agreement was expressly stated to be "annexed to and made a part of" the Cooperation Agreement. Pursuant to Supplemental Agreement No 1, Datamat undertook to transfer to the Appellant the monies received from Thai Airways, whereupon the Appellant would use those monies to pay the Respondent for the works and services which the latter had rendered to Datamat under the Cooperation Agreement. The Appellant also had to provide an irrevocable letter of credit in favour of the Respondent, on which the latter could draw in the event of non-payment. In effect, the Respondent agreed to an arrangement under which the payments received by Datamat from Thai Airways would be managed by the Appellant and used to pay the Respondent for the works and services which it rendered. Supplemental Agreement No 1 was backdated to 2 May 2005. A further supplemental agreement ("Supplemental Agreement No 2") was

entered into some time later on 3 May 2006. Under Supplemental Agreement No 2, the Appellant, the Respondent and Datamat agreed that the sums due to the Respondent from Datamat under the Cooperation Agreement would be settled by deducting those sums directly from the Appellant's account with SCB. This was effected by way of a payment instruction from the Appellant to SCB executed on the same day as Supplemental Agreement No 2. However, it remained the case that the payments to the Respondent from the Appellant's SCB account were conditional on payments having been made by Thai Airways for the services provided by Datamat under the EDP System Agreement.

7 The Cooperation Agreement contained a multi-tiered dispute resolution mechanism ("the Dispute Resolution Mechanism"), which was set out in cl 37.2 read with cl 37.3. Clause 37.2 states:

37.2 Any dispute between the Parties [*ie*, the Respondent and Datamat] relating to or in connection with this Cooperation Agreement or a Statement of Works shall be referred:

37.2.1 first, to a committee consisting of the Parties' Contact Persons or their appointed designates for their review and opinion; and (if the matter remains unresolved);

37.2.2 second, to a committee consisting of Datamat's designee and Lufthansa Systems' [*ie*, the Respondent's] Director Customer Relations; and (if the matter remains unresolved);

37.2.3 third, to a committee consisting of Datamat's designee and Lufthansa Systems' Managing Director for resolution by them, and (if the matter remains unresolved);

37.2.4 fourth, the dispute may be referred to arbitration as specified in Clause 36.3 [*sic*] hereto.

Clause 37.2.4 refers incorrectly to cl 36.3. The correct clause to refer to is cl 37.3, which reads:

All disputes arising out of this Cooperation Agreement, which cannot be settled by mediation pursuant to Clause 37.2, shall be finally settled by arbitration to be held in Singapore in the English language under the Singapore International Arbitration Centre Rules ("SIAC Rules"). The arbitration panel shall consist of three (3) arbitrators, each of the Parties has the right to appoint one (1) arbitrator. The two (2) arbitrators will in turn appoint the third arbitrator. Should either Party fail to appoint its respective arbitrator within thirty (30) days as from the date requested by the other Party, or should the two (2) arbitrators so appointed fail to appoint the third arbitrator within thirty (30) days from the date of the last appointment of the two arbitrators, the arbitrators not so appointed shall be appointed by the chairman of the SIAC Rules within thirty (30) days from a request by either Party.

8 Between 2 January 2008 and 17 April 2008, the Respondent sent several letters to the Appellant requesting payment of certain invoices that it had issued for works and services rendered to Datamat, which invoices, the Respondent said, the Appellant was liable to pay. Reference was made in these proceedings to numerous meetings that were held between March 2006 and July 2009. It was alleged that those meetings, some of which had been held even before the issuance of formal letters from the Respondent requesting payment, were directed at addressing the payment dispute between the Appellant and the Respondent, among other matters. On 24 February 2010, the Respondent informed Datamat and the Appellant that it was terminating the Cooperation Agreement as well as Supplemental Agreement No 1 and Supplemental Agreement No 2 (collectively, "the Supplemental Agreements"). On 13 May 2010, the Respondent filed a notice of arbitration with the Singapore International Arbitration Centre ("the SIAC") pursuant to cl 37.3 of the Cooperation Agreement, naming Datamat and the Appellant as respondents. The Appellant objected to the jurisdiction of any

arbitral tribunal to hear the matter on the grounds that:

- (a) it was not a party to the arbitration agreement contained in the Cooperation Agreement; and
- (b) even if it was a party to that arbitration agreement, the Respondent had not fulfilled the preconditions for the commencement of arbitration.

The arbitration proceedings

9 While reserving its position as to its objection to the jurisdiction of any arbitral tribunal, the Appellant proposed the constitution of a single-member tribunal. It contended that this was warranted because cl 37.3 of the Cooperation Agreement did not contemplate its participation in the constitution of the arbitral tribunal since it was not a party to the agreement and had no express right to nominate an arbitrator of its choice. The SIAC rejected this proposal. The Appellant subsequently acquiesced in the appointment of a three-member tribunal and nominated its own arbitrator, but without prejudice to its jurisdictional objections. The two party-appointed arbitrators in due course appointed the last member, who also presided over the Tribunal. Datamat informed the SIAC that it was undergoing business rehabilitation in Thailand, which we understand to be a form of insolvency process there, and it therefore did not participate in the arbitration.

10 After hearing submissions, the Tribunal dismissed the Appellant's objection to jurisdiction by way of a preliminary ruling on jurisdiction. It held that the Cooperation Agreement and the Supplemental Agreements were "one composite agreement" between the Respondent, the Appellant and Datamat, such that cll 37.2 and 37.3 of the Cooperation Agreement applied to the Supplemental Agreements, which the Appellant was undoubtedly party to. The Tribunal further held that the preconditions for arbitration set out in cl 37.2 were too uncertain to be enforceable. There were thus no obstacles to the commencement of arbitration. The Tribunal also expressed its view that in the event that the preconditions set out in cl 37.2 were found to be sufficiently certain to be enforceable, they had not been complied with. It is not evident to us how the latter view was compatible with the Tribunal's primary holding that those preconditions were so uncertain as to be unenforceable.

The Appellant's application to the High Court

11 Dissatisfied with the preliminary ruling of the Tribunal, the Appellant commenced OS 636/2012 pursuant to Art 16(3) of the Model Law 1985 read with s 10 of the IAA seeking, among other reliefs:

- (a) a declaration that the Tribunal did not have jurisdiction to determine the dispute between the Respondent and the Appellant; and
- (b) an order that the Tribunal's ruling on jurisdiction be "set aside".

The decision below

12 The Appellant's application in OS 636/2012 was dismissed by the Judge. The Judge held, with reference to what he regarded were the parties' objective intentions, that the Appellant, the Respondent and Datamat in fact intended that the terms of the Cooperation Agreement, and in particular, the Dispute Resolution Mechanism, were to be binding on all three parties (see the Judgment at [33]–[43], [48]–[51], [69]–[73] and [78]). In so deciding, the Judge sought to apply the approach to contractual interpretation endorsed by this court in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*"). In this

regard, the Judge avoided the Appellant's argument that there was a strict rule under Singapore law that clear and express words were required to incorporate an arbitration clause found in one agreement into a separate agreement, holding that that rule did not apply to the case at hand. The Judge thought that any question over the existence or application of the said rule was "of little help in addressing the one true issue", which he thought was "what were [the Respondent's], Datamat[s] and [the Appellant]'s common intentions, if any, when objectively ascertained, as to the applicability of the Dispute Resolution Mechanism to resolve their disputes" (see the Judgment at [48]).

13 The Judge's analysis applying *Zurich Insurance* can be summarised as follows:

(a) The object and purpose of the Supplemental Agreements was to enforce the Respondent's right to payment under the Cooperation Agreement. The Supplemental Agreements transferred Datamat's payment obligations under the Cooperation Agreement to the Appellant. Accordingly, the Appellant's obligations to the Respondent under the Supplemental Agreements were inextricably tied to Datamat's obligations under the Cooperation Agreement (see the Judgment at [60] and [62]).

(b) The following bore on the Judge's mind in the contextual interpretation of the Cooperation Agreement and the Supplemental Agreements:

(i) The Supplemental Agreements were entered into in consequence of Datamat's non-performance of its payment obligations to the Respondent under the Cooperation Agreement, and they were intended to address those shortcomings (see the Judgment at [70]).

(ii) There was a substantial degree of interdependence between the obligations in the Supplemental Agreements and those in the Cooperation Agreement (see the Judgment at [71]).

(iii) Given the circumstances, the Appellant was aware of the terms of the Cooperation Agreement, including the Dispute Resolution Mechanism contained therein, when it entered into the Supplemental Agreements (see the Judgment at [72]).

(iv) It must have been within the contemplation of the Appellant, the Respondent and Datamat that "a dispute over payment between either [the Respondent] or [the Appellant], Datamat or [the Appellant], or all three parties" would be resolved via the Dispute Resolution Mechanism because it would be impractical to require recourse to different dispute resolution methods to resolve essentially the same or substantially overlapping disputes, depending only on which of the parties were involved (see the Judgment at [73]).

14 On the strength of this court's decision in *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738, the Judge ruled that the preconditions for arbitration contained in cl 37.2 of the Cooperation Agreement were enforceable (see the Judgment at [93]–[94] and [97]). The Judge then held that the parties had, by their various meetings and attempts at negotiations (referred to at [8] above), in fact met the object of cl 37.2 and accordingly, the conditions precedent to the commencement of arbitration were satisfied, thereby conferring jurisdiction on the Tribunal (see the Judgment at [110]).

15 Finally, the Judge also expressed, in *obiter dicta*, his view that there was a lacuna in s 10 of the IAA because a Singapore court could not "set aside" an arbitral tribunal's preliminary ruling on jurisdiction as such a ruling was not a decision on the substance of the dispute referred to the arbitral

tribunal and thus, could not be characterised as an “award” (see the Judgment at [111]–[113]).

The issues before this court

16 The issues which we decided in this appeal were the following:

- (a) Was the Appellant bound by the Dispute Resolution Mechanism (and in particular, the arbitration agreement) contained in cl 37.2 and 37.3 of the Cooperation Agreement?
- (b) Assuming the Appellant was bound by the Dispute Resolution Mechanism, were the preconditions for arbitration contained in cl 37.2 enforceable, and if so, had they been met?
- (c) Is there a lacuna in s 10 of the IAA (and, correspondingly, Art 16(3) of the Model Law 1985) in that a Singapore court cannot “set aside” an arbitral tribunal’s preliminary ruling on jurisdiction?

Was the Appellant bound by the Dispute Resolution Mechanism in the Cooperation Agreement?

The relevant legislative provisions

17 The Appellant was not a signatory to the Cooperation Agreement, in which the Dispute Resolution Mechanism was contained. However, it did sign the Supplemental Agreements, which made reference to the Cooperation Agreement. The question, therefore, is whether the Appellant was bound by the Dispute Resolution Mechanism, and in particular, the arbitration agreement, contained in the Cooperation Agreement. The relevant provisions on what constitutes a valid “arbitration agreement” are found in s 2 of the IAA (as defined at [1] above) read with Art 7 of the Model Law 1985, which is in the First Schedule to the IAA. Section 2 of the IAA reads as follows:

2.—(1) In this Part, unless the context otherwise requires —

...

“arbitration agreement” means an agreement in writing referred to in Article 7 of the Model Law [1985] and includes —

- (a) an agreement made by electronic communications if the information contained therein is accessible so as to be useable for subsequent reference; and
- (b) an agreement deemed or constituted under subsection (3) or (4) ...

...

...

As for Art 7 of the Model Law 1985, it states:

ARTICLE 7

DEFINITION AND FORM OF ARBITRATION AGREEMENT

- (1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain

disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. ***The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract .***

[emphasis added in bold italics]

An "arbitration agreement" is now defined in s 2A of the current IAA, a new section inserted by the 2012 Amendment Act. This section (specifically, s 2A(7)) in effect retains the provision that a valid arbitration agreement can be constituted by way of incorporation by reference where a document containing an arbitration clause is referred to in a contract and the reference is such as to make the arbitration clause part of the contract. This is the same as the previous position under s 2 of the IAA read with Art 7(2) of the Model Law 1985 (see the passage in bold italics in the quotation above).

The Appellant's argument

18 The Appellant contended that the Judge ought to have asked whether the arbitration clause in cl 37.3 of the Cooperation Agreement had been "incorporated by reference" into the Supplemental Agreements. Had he done so, the Appellant contended, it would have emerged that the Appellant had not agreed to be bound by the arbitration clause in cl 37.3 of the Cooperation Agreement. It was the Appellant's argument, on the authority of this court's decision in *Star-Trans Far East Pte Ltd v Norske-Tech Ltd and others* [1996] 2 SLR(R) 196 ("*Star-Trans*"), that clear and express reference to an arbitration clause contained in one contract was required before a court would find that the clause had been incorporated into a separate contract in "two-contract" cases ("the strict rule"). In response, the Respondent argued, first, that this was not a "two-contract" case and, second, that even if it was, the arbitration clause in cl 37.3 had been properly and adequately incorporated into the Supplemental Agreements.

Incorporation of arbitration clauses by reference

"Single contract" or "two-contract"

19 The classification of cases into "single contract" and "two-contract" cases for the purposes of determining whether an arbitration clause has been incorporated into a contract is a feature of English arbitration law. In *Habaş Sinai Ve Tibbi Gazlar Isthisal Endüstri AŞ v Sometal SAL* [2010] Bus LR 880 ("*Habaş Sinai*"), Christopher Clarke J held that the material distinction between the two classes of cases depended on whether the contracts in question were made between the same or different parties. He posited four broad categories of cases (at [13]), concluding (at [52]) that the first and second were "single contract" cases and the third and fourth, "two-contract" cases:

13 ... [M]ost attempts at incorporation of an arbitration (or jurisdiction) clause are likely to fall within one of the following broad categories (in which the terms referred to include an arbitration clause).

- (1) *A and B make a contract in which they incorporate standard terms. ...*
- (2) *A and B make a contract incorporating terms previously agreed between A and B in another contract or contracts to which they were both parties.*
- (3) *A and B make a contract incorporating terms agreed between A (or B) and C.* Common examples are a bill of lading incorporating the terms of a charter to which A is a party; reinsurance contracts incorporating the terms of an underlying insurance; excess insurance contracts incorporating the terms of the primary layer of insurance; and building or engineering sub-contracts incorporating the terms of a main contract or sub-sub-contracts incorporating the terms of a sub-contract.
- (4) *A and B make a contract incorporating terms agreed between C and D.* Bills of lading, reinsurance and insurance contracts and building contracts may fall into this category.

[emphasis added]

A more restrictive approach is said to be necessary in cases which fall into the latter two categories on the basis that where the arbitration clause in question is contained in another contract involving different parties, it might not be evident that the parties to the contract which is alleged to have incorporated the arbitration clause intended to incorporate not only the substantive provisions of the first-mentioned contract, but also the provisions on dispute resolution that the parties to the first-mentioned contract had agreed would govern their disputes (see *Habaş Sinai* at [49]).

The strict rule in "two-contract" cases

20 The strict rule was imported into our jurisprudence in *Star-Trans*. That was founded on the decision of Sir John Megaw sitting in the English Court of Appeal in *Aughton Ltd (formerly Aughton Group Ltd) v MF Kent Services Ltd* (1991) 31 Con LR 60 ("*Aughton*"), which was itself based on the earlier House of Lords decision of *T W Thomas & Co, Limited v Portsea Steamship Company, Limited* [1912] AC 1 ("*Thomas v Portsea*").

21 More recently, in *Sea Trade Maritime Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd (The "Athena")* (No 2) [2007] 1 Lloyd's Rep 280 ("*The Athena No 2*"), a question arose as to whether an arbitration agreement contained in the rules of the defendant association ("the Association") had been incorporated into an agreement for war risks insurance. The plaintiff, Sea Trade Maritime Corporation ("Sea Trade"), had applied to enter its vessel, the *Athena*, with the Association to obtain war risks insurance. It accepted an offer of insurance made by the Association's agents "in accordance with the rules and bye-laws of the Association", and the *Athena* was entered into the Association on 10 December 1992. On the same day, Sea Trade completed an application for membership of the Association "in accordance with the Bye-Laws and the Rules for such Association with which I/we agree to conform". A dispute subsequently arose as to whether the arbitration clause in the Association's rules had been incorporated into Sea Trade's insurance contract, with the Association asserting that the arbitration clause had been incorporated and Sea Trade arguing that it had not. In that context, Langley J held that the case before him was what he called a "single contract" case, such that the ordinary rules of incorporation, which the parties agreed operated to incorporate the rest of the terms of the Association's rules into Sea Trade's insurance contract, were also sufficient to incorporate the arbitration clause. Langley J rejected the submission by Sea Trade's counsel that the strict rule, as enunciated in *Thomas v Portsea*, applied such that specific reference had be made to the arbitration clause in the Association's rules in order to incorporate it into Sea Trade's insurance contract, going so far as to call this submission "hopeless" (at [68]). Langley J also

noted (at [69]) that there were several English authorities neither citing nor applying the approach taken by the House of Lords in *Thomas v Portsea*.

22 Subsequently, in *Habaş Sinai*, Christopher Clarke J elaborated on the categories of contracts which we have noted above (at [19]), and rejected the submission that the strict rule, as stated in *Aughton*, applied to a case falling within his second category, which he regarded as a “single contract” case.

23 Christopher Clarke J in *Habaş Sinai* also expressed his reservations about the strict rule, suggesting (at [52]) that “its retention is partly attributable to the desirability of not changing an approach established ‘for better or for worse’”, and that “the rule is not easily congruent with ordinary principles of construction”. In our judgment, it is clear that the rationale behind the strict rule, as enunciated in *Thomas v Portsea*, needs to be re-examined with a view to considering whether it should continue to form part of our law. In our judgment, the strict rule is one that has been overextended from its roots, which are to be found in a particular and specific context, and it is appropriate to identify those roots clearly so that the rule can be situated in its proper place.

The rationale for the strict rule

24 The reasons underlying the House of Lords’ decision in *Thomas v Portsea* to adopt the strict rule were succinctly summarised by Langley J in *The Athena No 2* (at [72]–[73]), and we gratefully reproduce that summary here. In essence, they include the following:

(a) In *Thomas v Portsea*, which concerned a bill of lading, the question before the House of Lords was whether an arbitration agreement in the charterparty referred to in the margin of the bill of lading had been incorporated into the bill of lading. The House of Lords held that the arbitration agreement had not been thus incorporated. Lords Atkinson and Robson relied on the fact that bills of lading were negotiable. Lord Robson explained (at 11):

It is to be remembered that the bill of lading is a negotiable instrument, and if the obligations of those who are parties to such a contract are to be enlarged beyond the matters which ordinarily concern them, or if it is sought to deprive either party of his ordinary legal remedies, the contract cannot be too explicit and precise. It is difficult to hold that words which require modification to read as part of the bill of lading and then purport to deal only with disputes arising under a document made between different persons are quite sufficiently explicit ...

(a) Lord Loreburn LC relied on the need for certainty in the law (given that the English Court of Appeal had previously decided the issue similarly just some years earlier in *Hamilton & Co v Mackie & Sons* (1889) 5 Times LR 677). It may be noted that these reasons were subsequently endorsed by Bingham LJ in *Federal Bulk Carriers Inc v C Itoh & Co Ltd and Others (The “Federal Bulker”)* [1989] 1 Lloyd’s Rep 103 (“*The Federal Bulker*”), although that also was a case involving bills of lading.

(b) Lords Loreburn, Gorrell and Robson relied on the fact that the language of the arbitration clause was inapposite to claims under the bill of lading or would require manipulation to apply.

(c) Lord Gorrell also relied on the notion that the arbitration clause, if incorporated, would oust the jurisdiction of the court, and so thought that “very clear language” (see *Thomas v Portsea* at 9) would be required to have that effect.

25 The reasons given by Sir John Megaw in *Aughton* when he applied the strict rule to a building sub-sub-contract appear to mirror the reasons of the House in *Thomas v Portsea*, to which he referred. As we have noted, it was on the strength of *Aughton*, or to be more accurate, the judgment of Sir John Megaw in that case, that this court applied the strict rule in *Star-Trans* (at [30]). Sir John Megaw's three reasons for applying the strict rule in *Aughton* were (at 87):

- (a) an arbitration agreement could preclude the parties from bringing a dispute before a court of law;
- (b) the statutory requirement (under s 32 of the Arbitration Act 1950 (c 27) (UK) as re-enacted in s 7(1)(e) of the Arbitration Act 1979 (c 42) (UK)) that an arbitration agreement had to be "a written agreement" emphasised and was designed to ensure that a party would not be deprived of his right to have a dispute decided by a court of law unless he had consciously and deliberately agreed that it should be so; and
- (c) an arbitration clause was an independent and "self-contained contract collateral or ancillary to' the substantive contract" (citing Lord Diplock in *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909), and was not to be regarded as merely another term in the substantive contract which could be incorporated by reference to the substantive contract.

26 In *Star-Trans*, no mention or comment was made of the judgment of Ralph Gibson LJ in *Aughton*. That judgment is significant because while Ralph Gibson LJ reached the same result as Sir John Megaw in that case (*viz*, refusing to stay the court proceedings in favour of arbitration), it is evident (at 83–85) that he did so on different grounds altogether, focusing instead on the question of whether the arbitration agreement there fulfilled the formal requirement of writing. He held that it did not, and that there was thus no valid arbitration agreement, as statutorily required, in the sub-sub-contract. On the issue of whether the arbitration agreement in the sub-contract had been validly incorporated into the sub-sub-contract, however, Ralph Gibson LJ reached the *opposite* conclusion from Sir John Megaw, finding that it *had* been validly incorporated. Ralph Gibson LJ (at 81–82) distinguished the bill of lading and charterparty cases, explaining that in those cases, given the negotiability of a bill of lading, the holder of such a bill might not have had the opportunity to examine the terms of the charterparty to determine whether it contained an arbitration clause. It was for this reason that he thought that general references were not sufficient to evince an intention to incorporate an arbitration clause contained in a charterparty into bills of lading. Ralph Gibson LJ (at 82–83) undertook a contextual analysis, taking into account the practices of the industry and the amenability of the arbitration clause in question to the modifications needed to make it applicable to the sub-sub-contract, and held that the words used by the parties were sufficient to connote their intention to incorporate *all* the terms and conditions of the sub-contract, including the arbitration clause, into the sub-sub-contract. In our judgment, Ralph Gibson LJ's approach is in fact similar to the contextual approach to contractual interpretation that we laid down in *Zurich Insurance*.

27 Returning to the House of Lords' rationale for laying down the strict rule in *Thomas v Portsea* and, in particular, to the judgment of Sir John Megaw in *Aughton*, two comments are apposite here. First, the notion that to oust the jurisdiction of the court is something odious and, therefore, has to be established by proof of the requisite intention to a higher degree is an outdated one. *Thomas v Portsea* was decided in 1911 and is now more than a century old. As we noted in *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28], arbitration is today no longer "viewed disdainfully as an inferior process of justice" and there is now "[a]n unequivocal judicial policy of facilitating and promoting arbitration". Second, while, as a matter of legal technicality, it is correct to state that an arbitration clause is an independent and self-contained contract and so, of a

different nature from the normal clauses of a contract, to place such significant weight on this distinction seems unfounded. As noted by Christopher Clarke J in *Habash Sinai* (at [51]), businessmen (who must be distinguished from commercial lawyers) would not discriminate between the terms of a contract and an arbitration clause, and “would have no difficulty in regarding [an] arbitration clause ... as part of a contract and as capable of incorporation, by appropriate wording, as any other term of ... a contract”. Christopher Clarke J considered (likewise at [51]) that to a businessman, “all” the terms of a contract would include an arbitration clause in the contract, and he would be surprised to be told that “‘all’ should be interpreted so as to mean ‘all but the arbitration clause’”.

28 Given the division in opinion that is evident in the judgments of the two-member English Court of Appeal in *Aughton* on the key issue of whether the strict rule should be applied outside the bill of lading cases, it is not clear to us that the decision stands as binding authority, even on the lower courts in England (see *Habash Sinai* at [53]), for the applicability of this rule in all “two-contract” cases. The Appellant commended to us Bingham LJ’s suggestion in *The Federal Bulker* (at 105) that the strict rule ought to persist because “it is perhaps preferable that the law should be clear, certain and well understood than that it should be perfect”, and that “it would ... be a source of mischief if we were to do anything other than try to give effect to settled authority as best [as] we can”. But, even these observations are references taken out of context. *The Federal Bulker* and many of the cases cited by the Appellant were cases involving bills of lading and other specific species of contracts such as reinsurance or certain building sub-contracts, and in those specific contexts, there may well be merit, for the sake of certainty, in applying the strict rule. But, in our judgment, this cannot be the inflexible position. A leading commentator, Mr David Joseph QC, who describes the strict rule as one founded on “100 years of authority” (see David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2nd Ed, 2010) at para 5.19), is himself quick to stress (at para 5.18) the sensibility of recognising that there can be a departure from the rule in appropriate cases:

It does, however, need to be stressed that the requirement of express words of reference is only a general rule. There might be particular background circumstances, such as a course of dealing or a usage in a particular trade, which make it appropriate to depart from the general rule. It is also possible to conclude in a particular case that the parties have made their intentions sufficiently clear to contract back to back with another contract so as to result in the incorporation of the dispute resolution provision in that other agreement, or that a contract was concluded by an agent who knew of the existence and application of the dispute resolution provision in question. [emphasis added]

Is there place for the strict rule in Singapore jurisprudence?

29 The commentaries on the law of arbitration in Singapore appear to accept as a general proposition the persistence of the strict rule in relation to the incorporation of an arbitration clause by reference. For example, *Halsbury’s Laws of Singapore* vol 1(2) (LexisNexis, 2011 Reissue) at para 20.021 suggests:

... As an arbitration clause in a contract is considered a separate and independent agreement, ***words of its incorporation must be specific***. While general words of inclusion may be sufficient to incorporate terms referred to in another document and which are germane to the underlying contract as part of the contract, an arbitration clause being a collateral agreement cannot be so incorporated. Courts have therefore tended to construe words of incorporation restrictively. ... [emphasis added in bold italics]

The footnote to the last sentence of this passage refers to *Star-Trans*, among others, and also to

the decision of the High Court in *Concordia Agritrading Pte Ltd v Cornelder Hoogewerff (Singapore) Pte Ltd* [1999] 3 SLR(R) 618. On the other hand, there are also cases to the contrary in our jurisprudence. The learned editor in the next part of the passage extracted above refers to *Mancon (BVI) Investment Holding Co Ltd v Heng Holdings SEA (Pte) Ltd and others* [1999] 3 SLR(R) 1146, where the High Court held that an arbitration clause in a joint venture agreement had been validly incorporated into a subsequent supplemental agreement even though the latter agreement did not make any express reference to the arbitration clause. At the hearing before us, counsel for the Respondent, Mr Dinesh Dhillon ("Mr Dhillon"), submitted that it might be time for us to depart from the notion that there is a continuing place for the strict rule in our law.

30 In *Trygg Hansa Insurance Co Ltd v Equitas Ltd and Others* [1998] 2 Lloyd's Rep 439 ("Trygg Hansa"), HHJ Raymond Jack QC, sitting in the Queen's Bench Division (Commercial Court) of the English High Court, had to grapple with the conflicting authorities in England and, in particular, the difficulty brought about by the application of the strict rule in some cases. HHJ Jack QC referred to Art 7(2) of the Model Law 1985 with what might perhaps be described as a measure of wistfulness, observing that under the Model Law 1985, there did not exist as restrictive a rule *vis-à-vis* the incorporation of arbitration clauses by reference as that purportedly laid down by the English authorities. However, given that it was s 6 of the Arbitration Act 1996 (c 23) (UK) ("the AA 1996") which applied in England and not Art 7(2) of the Model Law 1985, HHJ Jack QC found (at 447) that he could not simply "put the English authorities on one side".

31 The applicable legislation in Singapore today is not in the form of the AA 1996. On the contrary, ours is a jurisdiction based on the Model Law 1985. When this court applied and laid down in *Star-Trans* in 1996 the strict rule that clear and express words were required to incorporate an arbitration agreement by reference, the governing legislation was the Arbitration Act (Cap 10, 1985 Rev Ed) ("the old Arbitration Act"), which was first enacted in 1953 (as the Arbitration Ordinance 1953 (Ordinance 14 of 1953)) based on the older English arbitration legislation. The old Arbitration Act was repealed in 2001 and replaced with the Arbitration Act 2001 (Act 37 of 2001), which has in turn been superseded by the Arbitration Act (Cap 10, 2002 Rev Ed) ("the new Arbitration Act"), the present legislation which governs arbitrations taking place in Singapore. The new Arbitration Act follows the IAA (as well as the current IAA) to a significant degree. The IAA (and, likewise, the current IAA) implements and gives legal effect to the Model Law 1985 in Singapore in relation to international arbitrations. The IAA itself was first enacted in 1994 (as the International Arbitration Act 1994 (Act 23 of 1994)) and has undergone a number of changes to keep it consistent with best international practices. Given our legislative scheme today, in our judgment, we are entitled, indeed obliged, to do what HHJ Jack QC could not, namely, "put the English authorities on one side", and this we hereby do.

32 Reference to the *travaux préparatoires* for the purposes of interpreting the Model Law 1985 is permitted by s 4(1) of the IAA. In respect of the third sentence of Art 7(2) of the Model Law 1985, Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd Ed, 2010) at para 2-032 (referring to *Report of the Working Group on International Contract Practices on the work of its seventh session* Doc A/CN.9/246 at para 19) observes that "[t]he *travaux* explain that it is sufficient if the reference [in a contract to a document containing an arbitration agreement] only refers to the document; specific mention of the arbitration clause therein is not necessary". Similarly, as noted by HHJ Jack QC in *Trygg Hansa* (at 447), Howard M Holtzmann & Joseph E Neuhaus, *A Guide to The UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers, 1994) explains (at p 264) that the last 14 words of the third sentence of Art 7(2) of the Model Law 1985 only has the effect of excluding the incorporation of an arbitration clause where the reference to the clause is merely by way of *mention*. It is apparent that Art 7(2) of the Model Law 1985 does not place the

same restrictive constraints as do the English authorities in respect of the circumstances in which the court may legitimately find that an arbitration clause in one agreement has been incorporated, by reference, into another agreement.

33 In *Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd* [1994] 3 HKC 328, Kaplan J, sitting in the Hong Kong High Court, had the occasion to consider the law on the incorporation of arbitration clauses by reference under the Arbitration Ordinance (Cap 341) (HK), which implemented the Model Law 1985 in Hong Kong. Kaplan J considered the following (at 339) in arriving at his decision that an arbitration clause in a sub-contract had been incorporated by reference into a sub-sub-contract:

(a) *Thomas v Portsea* was a case dealing with a negotiable instrument (namely, a bill of lading) and so, different considerations applied in that context.

(b) The expressions of reservations in *Thomas v Portsea* about ousting the court's jurisdiction:

... fall on infertile ground in Hong Kong at the end of the twentieth century, ... when the legislature has enacted the Model Law [1985] which relegates the role of the court to basically one of support for the arbitral process and gives full effect to the principle of full party autonomy.

Kaplan J thus concluded that the strict rule, as enunciated in *Thomas v Portsea* – viz, that an arbitration clause contained in a contract must be specifically referred to before it can be satisfactorily incorporated into another contract – had no application in Hong Kong. He held (at 339):

... *The task before the court in determining whether or not there has been incorporation by reference is **one of construction, namely, to ascertain the parties' intentions** when they entered into the contract by reference to the words that they used.* [emphasis added in italics and bold italics]

Kaplan J reaffirmed this conclusion in *Gay Constructions Pty Ltd and Another v Caledonian Techmore (Building) Ltd and Hanison Construction Co Ltd* [1995] 2 HKLR 35 at 39, explaining that he was "quite satisfied that it is possible to comply with the last sentence of Article 7(2) without an explicit reference to the arbitration clause".

34 We agree. The strict rule has been overextended impermissibly from its original application in the context of bills of lading and charterparties. It clearly should not be taken as a rule of general application. The question in general is one of construction: did the parties intend to incorporate the arbitration agreement in question by referring, in their contract, to it or to a document containing it? In our judgment, the analysis of whether a particular case is a "one contract" or a "two-contract" case as that notion has developed in English law, while possibly useful in some aspects, is not helpful for our purposes. It is ultimately a matter of contractual interpretation; and in undertaking this exercise, as we held in *Zurich Insurance*, the task is one which must be done having regard to the context and the objective circumstances attending the entry into the contract. As the Judge rightly noted, "[b]e it incorporation or construction, the court is always seeking to ascertain the parties' objective intentions" (see the Judgment at [48]).

Was the Dispute Resolution Mechanism in the Cooperation Agreement validly incorporated by reference into the Supplemental Agreements?

35 In the present case, we are concerned with interpreting the Supplemental Agreements. The

question whether, by entering into those agreements, the Appellant agreed to be bound by the Dispute Resolution Mechanism – in particular, the arbitration clause – contained in a separate agreement to which it was not a party (namely, the Cooperation Agreement) is something which falls to be considered, first, by reference to the terms of the Supplemental Agreements. In particular, the Respondent relied on the words in the preamble to and cl 6 of Supplemental Agreement No 1:

This Supplemental Agreement No. 1 (the "Supplemental Agreement") is hereby annexed to and made a part of the [Cooperation] Agreement specified above. ...

...

6. All other provisions of the [Cooperation] Agreement shall remain effective and enforceable.

...

In relation to Supplemental Agreement No 2, the Respondent relied on cll 1 and 8:

...

1. This Supplemental Agreement No. 2 is hereby annexed to and made a part of the [Cooperation] Agreement specified above. ...

...

8. All other provisions of the [Cooperation] Agreement and the Supplemental [Agreement] No. 1 shall remain effective and enforceable.

...

36 Mr Dhillon accepted that at the time the Appellant, the Respondent and Datamat entered into the Supplemental Agreements, no thought was given specifically to what dispute resolution mechanism should apply, but this is inconclusive either way since the key question is whether, by the preamble to Supplemental Agreement No 1 or cl 1 of Supplemental Agreement No 2, the Appellant, the Respondent and Datamat intended to incorporate *all* the terms of the Cooperation Agreement into the Supplemental Agreements.

The purpose of the Supplemental Agreements

37 In our view, a vitally important consideration when examining the context and the relevant factual matrix is the purpose of the Supplemental Agreements.

38 The Supplemental Agreements were entered into not with a view to the Appellant guaranteeing or undertaking *any* obligation under the Cooperation Agreement. Instead, the Appellant's only substantive obligation was in effect to act as a payment agent. The primary contractual arrangement between Datamat and the Respondent as reflected in the Cooperation Agreement remained intact. Significantly, the Supplemental Agreements were to be annexed to and made part of the Cooperation Agreement, to which only Datamat and the Respondent were party. The point, shortly put, is that the Cooperation Agreement, which was between the Respondent and Datamat only, remained the only contract dealing with the rights and obligations between them, save that in relation to payment, the Appellant agreed to act as a payment agent in accordance with the terms of the Supplemental Agreements.

39 Supplemental Agreement No 1 was entered into by the parties after the Respondent raised concerns over Datamat's ability to pay for the works and services that the Respondent had rendered or was required to render under the Cooperation Agreement. The Respondent had threatened to cease all work under the Cooperation Agreement unless a payment mechanism was formally put in place to ensure that it would be paid for the works which it had already carried out and would in due course carry out (see above at [6]).

40 Under the terms of Supplemental Agreement No 1, Datamat was to transfer and remit the payments which it received from Thai Airways under the EDP System Agreement to the Appellant upon receipt. The Appellant's sole responsibility in this regard was to act as a payment agent, using the monies which it received from the Thai Airways payments in turn to pay the Respondent for works and services rendered by the latter to Datamat under the Cooperation Agreement. This was coupled with an irrevocable letter of credit provided by the Appellant in favour of the Respondent, on which the latter could draw in the event of non-payment. The effect of Supplemental Agreement No 1 was that the monies due to Datamat from Thai Airways (the ultimate customer) under the EDP System Agreement would be managed by the Appellant (a sub-contractor of Datamat), which undertook to use those monies, once they had been received from Thai Airways, to pay the Respondent (another sub-contractor of Datamat) for the sums due to the Respondent under the Cooperation Agreement. Seen in this light, it is evident why the Supplemental Agreements had to be "annexed to and made a part of" the Cooperation Agreement. As we have noted above, the contractual arrangement between the Respondent and Datamat under the Cooperation Agreement remained unaffected by the Supplemental Agreements, save to the limited extent that the Appellant was to act as the payment agent.

41 If at all there was any room for doubt as to whether this was the intended effect of Supplemental Agreement No 1, Supplemental Agreement No 2, which was subsequently entered into, put it beyond peradventure. Clause 3 of Supplemental Agreement No 2 expressly states that all sums payable to the Respondent shall be paid to it directly from the Appellant's SCB bank account pursuant to the "Payment Instruction and Authorization" annexed to that agreement. The relevant portions of the said payment instruction and authorisation are highly relevant, and read as follows:

Whereas, [Datamat], [the Appellant] and [SCB] agreed that the *proceeds derived from the Thai [Airways] [c]ontracts that [are] deposited into the [Datamat] Account shall be distributed to [the Appellant] by depositing into the [Appellant's] account.*

...

[The Appellant] hereby irrevocably instructs and authorizes [SCB] as follows:

1. *Within 3 banking days **after receipt by [SCB] of the payments from Thai [Airways] under the Thai [Airways] [c]ontracts** in respect of the following service description, [SCB] shall pay to [the Respondent] the amount set out in column (C) of the following table.*

(A) Service Description	(B) Payment due to [the Respondent]	(C) Net Payment after 5% Withholding Tax
[Descriptions]	[Amounts]	[Amounts]
...	...	...

...

[emphasis added in italics and bold italics]

In essence, the Appellant's obligation was expressly and only to act as a payment conduit. Its *only* obligation was to make payment to the Respondent upon receiving the monies paid by Thai Airways under the EDP System Agreement.

42 All this was further buttressed by cl 5 of Supplemental Agreement No 1:

5. [The Respondent] and Datamat agree that [the Appellant] shall have no other obligations than those provided in this Supplemental Agreement.

It was thus evident that while the Cooperation Agreement had to be read with the Supplemental Agreements to *understand* the Appellant's obligation as a payment agent, the Appellant *undertook* no obligation under the Cooperation Agreement; its obligations were limited to those stated in the Supplemental Agreements. Mr Dhillon was candid enough to accept that the Appellant's obligations were indeed limited in this way, although he submitted that this did not preclude the incorporation of the arbitration clause in cl 37.3 of the Cooperation Agreement into the Supplemental Agreements. When he was confronted with cl 5 of Supplemental Agreement No 1, he submitted that an arbitration clause was not a commercial obligation since it concerned a chosen method of dispute resolution and did not touch on the commercial agreement of the parties. He submitted that cl 5 should be construed as applying only to the commercial obligations in the Cooperation Agreement. This seemed to us to revive one of the arguments from *Thomas v Portsea*, but in an inverse way. There, the special status of an arbitration agreement was relied on to justify a strict requirement of express reference to warrant a finding that an arbitration agreement contained in one contract had been *incorporated* into another contract. Here, its status as a "non-commercial" obligation was being relied on to found an argument that a special reference was required before it could be found that a clause *excluding* obligations from another contract extended to excluding an arbitration agreement. In our judgment, the latter argument was just as misconceived as the former. While it might well be that an arbitration agreement is a different *type* of obligation, it is an obligation nonetheless, and on the face of it, the obligation to arbitrate in cl 37.3 of the Cooperation Agreement had been excluded by cl 5 of Supplemental Agreement No 1, were there any doubt over this to begin with.

43 Finally, we note that consistent with all this, cl 4 of Supplemental Agreement No 1 provided that Datamat was to remain primarily liable to pay for the works and services rendered to it by the Respondent under the Cooperation Agreement. This underscored the fact that the Appellant's obligations under the Supplemental Agreements were intended to be quite different from those owed by Datamat under the Cooperation Agreement.

Presumptions relating to the construction of dispute resolution clauses

44 Reference was made to the rules of construction found in *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2008] 1 Lloyd's Rep 254 ("*Fiona Trust*") and *Econ Piling Pte Ltd v NCC International AB* [2007] SGHC 17 ("*Econ Piling*"), two cases cited by the Judge (at [36] and [41], and [75]–[77] of the Judgment, respectively,) in relation to the interpretation of dispute resolution clauses. We did not find either to have any useful application to the present case. In *Fiona Trust*, Lord Hoffmann stated in his speech in the House of Lords (at [13]) that:

... [T]he 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. ...

Similarly, in *Econ Piling* (at [16]–[17]), I expressed the view in a High Court decision that unless there was clear and express indication to the contrary, it could usually be assumed that the parties to two closely-related agreements involving the same parties and concerning the same subject matter would not have intended to resolve disputes arising under one agreement through one dispute resolution mechanism and those arising under the other agreement through a different dispute resolution mechanism. Neither case is of any assistance to us here for the following reasons.

45 First, in both *Fiona Trust* and *Econ Piling*, all the parties to the dispute in question were also parties to the agreement which contained the dispute resolution mechanism that was being called in aid to found the arbitral tribunal's jurisdiction.

46 Second, those were both cases where it was entirely plausible that the same sort of issue or a closely-related issue could arise in disputes arising under the various agreements. In *Fiona Trust*, the question before the House of Lords was whether a dispute resolution clause in certain charterparties in the "Shelltime 4" form (specifically, to have disputes determined in accordance with the laws of England and by the English courts, with either party permitted to elect arbitration), which clause purported to cover "[a]ny dispute arising under this charter" (see *Fiona Trust* at [3]), was apt to cover the question of whether the charterparties, as was alleged, had been procured by bribery and thus validly rescinded by the shipowners. It was in this context that Lord Hoffmann stated the rule of construction which he loosely termed a "presumption" (see *Fiona Trust* at [13]). Lord Hope of Craighead, in his speech agreeing with the result reached by Lord Hoffmann, pointed out (at [28]) that it would not be sensible to have the question of a contract's validity and claims for breach of the contract determined in different forums. This was because it could be envisaged that the two disputes would be so related that similar issues could arise from each of them.

47 Similarly, in *Econ Piling*, the parties entered into a joint venture agreement which contained a clause referring disputes to arbitration. As a result of one party's financial difficulties, a subsequent variation agreement was entered into between the same parties to restructure their relationship and secure the continued viability of the joint venture. However, in this subsequent agreement, the dispute resolution clause stated that disputes were to be referred exclusively to the Singapore courts. How was the latter clause to be construed? Did it mean that disputes under the original joint venture agreement would be referred to arbitration, but if an affected contractual provision had been altered by the later variation agreement, disputes relating to that provision would go before the courts? Plainly not. In such a context, because the two agreements traversed the *same* subject matter, it would not have made any sense to conclude that the parties had intended that their disputes were to be resolved through different dispute resolution mechanisms, depending on which agreement the disputes stemmed from, given that they were both party to the same agreements and any disputes between them would most likely be closely related.

48 This has nothing to do with the present case, where the Appellant entered into the Supplemental Agreements purely with a view to acting as a payment agent or a conduit for payment. Its obligation was solely to pay the Respondent upon receiving the monies due to Datamat from Thai Airways (see above at [39]–[41]). In agreeing to such an arrangement, the Appellant would not have expected to get involved in an arbitration concerning disputes as to whether the Respondent had or had not performed its substantive obligations in relation to the works and services stipulated in the Cooperation Agreement. It was clear, and, indeed, candidly acknowledged by Mr Dhillon, that the Appellant was not guaranteeing the performance of Datamat's obligations under the Cooperation

Agreement. The only issue that could arise between the Appellant and the Respondent was whether or not the Appellant had received the monies paid by Thai Airways. If it had received those monies, it was obliged to pay the Respondent the amounts due to the latter under the Cooperation Agreement, and it would not have been open to the Appellant to avoid making such payments to the Respondent on the ground that the latter had allegedly breached some duty to Datamat under the Cooperation Agreement. The Appellant's obligation under the Supplemental Agreements to pay the Respondent upon receiving the monies paid by Thai Airways was not affected by any issue as to Datamat's own obligation to make payment under the Cooperation Agreement.

49 This was a point that counsel for the Appellant, Mr Subramanian A Pillai ("Mr Pillai"), accepted in the course of arguments. In the final analysis, it was impossible for us, or anyone else for that matter, to envisage a situation where issues would arise between the Appellant and the Respondent that would be common to those which might arise between the Respondent and Datamat. Contrary to the Judge's finding (see the Judgment at [71]), we did not think that the Appellant's obligations under the Supplemental Agreements were dependent upon Datamat's obligations under the Cooperation Agreement. Mr Dhillon came to accept this analysis of the contractual position in the course of the hearing before us. However, he pointed out that in the arbitration proceedings thus far, the Appellant had in fact raised issues over the Respondent's performance of its substantive duties under the Cooperation Agreement. This, he argued, indicated that the Respondent would face an overlap in the issues that were likely to arise between the Appellant and the Respondent on the one hand and those concerning the Respondent and Datamat on the other; and this, he submitted, pointed to the Appellant and the Respondent intending that any disputes between them arising from the Supplemental Agreements be referred to the same forum where disputes under the Cooperation Agreement were to be resolved. When proceedings are instituted, it is perhaps to be expected that a party might, rightly or wrongly, think it necessary as a tactical matter to bring out the proverbial kitchen sink. Our task was to construe the Supplemental Agreements. In that context, the arguments in fact raised by the Appellant in the arbitration proceedings were immaterial if they were ultimately irrelevant to the issues that, in our judgment, could legitimately be raised there. In any event, as noted above, Mr Pillai did confirm that his client accepted the position that as long as it had received the monies paid by Thai Airways, it was obliged to use those monies to pay the Respondent its due, and it was not open to his client to raise issues relating to the Respondent's performance of the Cooperation Agreement as a basis for resisting payment.

The language and form of the Dispute Resolution Mechanism

50 Finally, in our judgment, the language and form of cll 37.2 and 37.3 of the Cooperation Agreement (see above at [7]), on the whole, pointed against the incorporation of the Dispute Resolution Mechanism into the Supplemental Agreements.

51 First, the preconditions for arbitration in cl 37.2 were set out in significant detail. Clause 37.2 provided a procedure for specific persons from the Respondent to meet with "designee[s]" of Datamat as a "committee" to try to resolve any dispute between them. If this clause were to be incorporated into the Supplemental Agreements and include the Appellant, its workability would become questionable. In the court below, the Judge considered that if cl 37.2 were validly incorporated into the Supplemental Agreements, the procedure could work just by substituting or adding someone from the Appellant to the various committees (see the Judgment at [89]). This did not, to our minds, adequately address the problem. Under cl 37.2, at the first tier, disputes were to be referred to "the Parties' Contact Persons or their appointed designates". It was not clear how this would apply to the Appellant since no "Contact Person" had been designated at the outset by it. At this and subsequent tiers, was it open to the Appellant to designate just anyone it pleased? Or did the Appellant have to designate a specific person? Was such a person to be of a minimum or specified seniority within the

Appellant's organisation, especially given that in respect of the Respondent, the personnel involved escalated up its hierarchy through cl 37.2.1–37.2.3?

52 Second, cl 37.2 referred to "[a]ny dispute ... relating to or in connection with *this Cooperation Agreement or a Statement of Work*" [emphasis added], and cl 37.3 referred to "[a]ll disputes arising out of *this Cooperation Agreement*", which cannot be settled by mediation pursuant to Clause 37.2" [emphasis added]. Again, these provisions would have required some, albeit minor, degree of recrafting to make them workable were they to be extended to the Appellant.

Our ruling

53 For all these reasons, we were of the view, on a contextual interpretation of the Supplemental Agreements, that the parties had not intended that the Dispute Resolution Mechanism (including the arbitration clause) contained in the Cooperation Agreement was to be incorporated as part of the Supplemental Agreements. The Appellant was accordingly not bound by it, and the Tribunal thus did not have jurisdiction over the Appellant and its dispute with the Respondent. We therefore allowed the appeal on this ground. This is sufficient to dispose of the matter in the Appellant's favour, but we comment on the remaining issues as they are of some importance.

Were the preconditions for arbitration contained in cl 37.2 enforceable, and if so, were they satisfied?

Enforceability

54 Before both the Tribunal and the High Court, the Respondent argued that the preconditions for arbitration in cl 37.2 of the Cooperation Agreement were unenforceable for uncertainty. The Judge held that those preconditions were not uncertain and that cl 37.2 was enforceable (see the Judgment at [92]–[97]). The Respondent did not appeal against this finding of the Judge. In our judgment, this was well-advised because we agree with the Judge on this count, assuming that the objection which we have noted above (at [51]) can be overcome. The language of cl 37.2 was clear – it set out in mandatory fashion and with specificity the personnel from the Respondent's side who were required to meet with Datamat's designees as part of a series of steps that were to precede the commencement of arbitration; it further specified the purpose of each such meeting, which was to try to resolve any dispute that had arisen between the parties. We also agreed with the Judge's finding (see the Judgment at [100]) that the steps set out in cl 37.2 were conditions precedent to any reference to arbitration pursuant to cl 37.3. Significantly, the arbitration clause itself in cl 37.3 refers only to "disputes ... which cannot be settled by mediation pursuant to Clause 37.2".

55 Finally, we noted that there was no suggestion that the Appellant had waived the preconditions for arbitration in cl 37.2.

Compliance

Actual compliance

56 When it came to deciding whether cl 37.2 had been satisfied on the evidence before him, the Judge referred to a table [\[note: 11\]](#) produced in an affidavit affirmed on 17 July 2012 by Oliver Marissal, who was the Respondent's chief financial officer at the material time. This table ("the Table"), the Judge noted, showed at least seven meetings between the Appellant and the Respondent in Bangkok from February 2007 to July 2009 (see the Judgment at [110]). The Judge concluded (likewise at [110] of the Judgment) that given the many rounds of meetings between the parties, "the *object* of

cl 37.2" [emphasis added] had been met.

57 We respectfully disagree with the Judge on this point. In our judgment, from a perusal of the Table, it would have been apparent that cl 37.2 had not been satisfied. In our judgment, what was contemplated under cl 37.2 was that any dispute would be escalated up the hierarchies of the respective parties with representatives of increasing seniority to meet to attempt resolution. The Table showed that a mix of various apparently random meetings had been held. However, our scrutiny of the Table and of the personnel who attended those meetings revealed that the precise persons *required* to be involved pursuant to the cl 37.2 process were not so involved (at least where the Respondent was concerned). For example, cl 37.2 envisaged the involvement of the Respondent's "Director Customer Relations" (see cl 37.2.2), and *then* its "Managing Director" (see cl 37.2.3). Yet, from the Respondent's side, none of these personnel who had been designated or specified in cl 37.2 ever participated in the meetings with the Appellant.

58 Aside from this, it was not altogether clear just what had been discussed at these meetings. The Judge did not think that this was problematic because he "[had] not seen any evidence from [the Appellant] that the [p]ayment [d]ispute was never discussed or sought to be resolved at these meetings" (see the Judgment at [110]). With respect, there was no basis for placing the burden of proof on this issue upon the Appellant. It was the Respondent which invoked the Dispute Resolution Mechanism and which, therefore, had to assert and prove compliance with the preconditions for arbitration. This, it did not do.

Substantial compliance

59 The Judge appeared to have been persuaded that the conditions precedent in cl 37.2 had been satisfied because its "object" (see the Judgment at [110]) had been met. In this regard, the Judge applied the English High Court decision of *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All ER (Comm) 303 ("*Halifax Financial*"), which was cited to him and also to us. Mr Dhillon submitted that *Halifax Financial* stood for the proposition that it was sufficient for the Respondent to have complied "in substance" with the procedure set out in cl 37.2. Therefore, it was argued, despite some shortcomings in what in fact might have been done, the conditions precedent to the commencement of arbitration should be found to have been fulfilled because their object, namely, to attempt and endeavour to address the dispute between the Appellant and the Respondent at the respective parties' senior management levels with the aim of resolving such dispute, had been satisfied.

60 *Halifax Financial* concerned an interlocutory appeal where, in respect of the claim brought by the claimant, the defendant sought a declaration that the court did not have jurisdiction because there was alleged non-compliance with a dispute resolution clause. There, the dispute resolution clause ("cl 33.1") read as follows (see *Halifax Financial* at 305):

33.1 In the event of any dispute arising between the Parties in connection with this agreement, senior representatives of the Parties will, within 10 Business Days of a written notice from either Party to the other, meet in good faith and attempt to resolve the dispute without recourse to legal proceedings.

Meetings were held between the representatives of the parties, but these were not *expressly labelled* "cl 33.1 meetings". McKinnon J held that cl 33.1 prescribed an optional contractual procedure, rather than a mandatory one which had to be complied with before legal proceedings could be brought. Clause 33.1 was thus found *not* to be a condition precedent to the commencement of legal proceedings. Having decided the matter on this basis, McKinnon J went on to express doubts over the enforceability of cl 33.1, although he also opined that it had been satisfied on the facts. McKinnon J

thought that even though the meetings between the parties had not been labelled “cl 33.1 meetings”, both parties had been represented at those meetings by the appropriate “senior representatives” (see *Halifax Financial* at, *inter alia*, 309) in their respective organisations. He therefore considered that cl 33.1 had been satisfied.

61 Two points are noteworthy. First, cl 33.1 in *Halifax Financial* was in much more general terms than cl 37.2 of the Cooperation Agreement in the present case. There is none of the specificity that is inherent in the latter, which envisages, with precision, an escalation of a dispute by way of progressively higher ranks of the Respondent’s management meeting with their designated counterparts from the other side in an endeavour to reach a resolution. Second, it is clear that McKinnon J in *Halifax Financial* would not have concluded as he did had the appropriate “senior representatives” not taken part in the meetings. On this basis, *Halifax Financial* did not support Mr Dhillon’s submission that substantial compliance of a condition precedent would be sufficient. In fact, *Halifax Financial* appears to have been decided on the basis that there had been actual compliance with cl 33.1, the only drawback being that the meetings between the parties had not been labelled as having been held pursuant to that clause. To this extent, the case is uncontroversial, although it is also unhelpful to the Respondent.

62 Where the parties have clearly contracted for a specific set of dispute resolution procedures as preconditions for arbitration, those preconditions must be fulfilled. In the case before us, it could not be said that the parties intended that *some* meetings between *some* people in their respective organisations discussing *some* variety of matters would be sufficient to constitute compliance with the preconditions for arbitration. This can be seen from, among others, the decision of the United States Court of Appeals for the Seventh Circuit in *DeValk Lincoln Mercury, Inc, Harold G DeValk and John M Fitzgerald v Ford Motor Company and Ford Leasing Development Company* 811 F 2d 326 (7th Cir, 1987) (more commonly cited as “*DeValk Lincoln Mercury, Inc v Ford Motor Company*”). That was a case involving a motion by the defendants for summary judgment upon the plaintiffs’ failure to comply with a pre-litigation mediation clause. The court rejected the plaintiffs’ argument that they had substantially complied with the clause on the basis that they had met the purpose of that clause, which, it was argued, was to give the defendants notice of a potential claim and to allow the defendants to attempt to settle the claim prior to litigation. The reasoning in that case is consistent with our own view that where a specific procedure has been prescribed as a condition precedent to arbitration or litigation, then absent any question of waiver, it must be shown to have been complied with.

Our ruling

63 Given that the preconditions for arbitration set out in cl 37.2 had not been complied with, and given our view that they were conditions precedent, the agreement to arbitrate in cl 37.3 (even if it were applicable to the Appellant) could not be invoked. The Tribunal therefore did not have jurisdiction over the Appellant and its dispute with the Respondent. This was the second ground on which we allowed this appeal.

Is there a lacuna in s 10 of the IAA and Art 16(3) of the Model Law 1985?

64 In dismissing the Appellant’s application below, the Judge made an observation suggesting that there was a lacuna in s 10 of the IAA (and correspondingly, Art 16(3) of the Model Law 1985) because, in his view, a Singapore court could not “set aside” an arbitral tribunal’s preliminary ruling on jurisdiction (see the Judgment at [111]–[114]). This happened to be the *form* of the relief that the Appellant prayed for in its substantive application (see above at [11(b)]).

65 The Judge's observation stemmed from this court's decision in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*"). In *PT Asuransi*, it was held that an arbitral tribunal's negative ruling on jurisdiction could not be set aside pursuant to s 24 of the IAA read with Art 34 of the Model Law 1985. This was because such a ruling was not an "award" as defined in s 2(1) of the IAA. The learned *amicus curiae* in that case, Adjunct Prof Lawrence Boo, submitted that an "award" under s 2(1) could only refer to a decision which dealt with the "substance of the dispute" (see *PT Asuransi* at [65]); and because an arbitral tribunal's preliminary ruling on jurisdiction did not concern the substance of the dispute referred to it, such a ruling was not an "award" for the purposes of the IAA and therefore could not be set aside pursuant to s 24. This court in *PT Asuransi* agreed with his opinion (at [66]). It is important to note that in *PT Asuransi*, the arbitral tribunal's decision on jurisdiction had purportedly been rendered in an "award" and the application before the court was one to set aside that "award" pursuant to s 24 of the IAA read with Art 34 of the Model Law 1985.

66 On the basis that only "awards" as characterised by this court in *PT Asuransi* could be set aside under s 24 of the IAA, the Judge opined that pursuant to an application under s 10 of the IAA (or Art 16(3) of the Model Law 1985), the court could not set aside an arbitral tribunal's preliminary ruling on jurisdiction.

67 Both parties disagreed with the Judge's observations and pointed out that under Art 16(3) of the Model Law 1985, the court was empowered to "decide the matter". Article 16(3) provides:

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article [*viz*, a plea that the arbitral tribunal does not have jurisdiction] either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, *the court specified in Article 6 to **decide the matter***, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. [emphasis added in italics and bold italics]

This remained the position after the IAA was amended in 2012 to provide, among other things, for such applications to be made to the court even where an arbitral tribunal makes a negative ruling on jurisdiction (see s 10(3)(b) of the current IAA).

68 Neither party invited us to revisit our earlier observations in *PT Asuransi*, nor was it not necessary for us to do so to dispose of this point. In our judgment, the Judge was, with respect, in error. He appeared to have been side-tracked by the *form* of the relief sought by the Appellant in OS 636/2012, which was expressed as an application to "set aside" the Tribunal's ruling on jurisdiction. The observations of this court in *PT Asuransi* were directed at instances where the application, in *substance*, is one that has been brought pursuant to s 24 of the IAA read with Art 34 of the Model Law 1985 to set aside a ruling that is not in fact an "award" for the purposes of the IAA, and so is not amenable to particular remedies that might *only* be available as against an award.

69 The expression "set aside" or "setting aside" is used in many different contexts. Understandably, it does not always mean the same thing. As with so many things, its meaning must depend on the context in which it is used and, in particular in this case, on *what* is being set aside. An application to the court to decide on the jurisdiction of an arbitral tribunal pursuant to s 10 of the IAA read with Art 16(3) of the Model Law 1985 is a perfectly legitimate means of challenging an arbitral tribunal's preliminary ruling on jurisdiction. It is immaterial in this context that, as a matter of form, the relief sought is expressed in terms of setting aside the arbitral tribunal's decision on jurisdiction.

70 It was evident to us that in praying for the Tribunal's positive ruling on jurisdiction to be set aside, the Appellant was merely asking that the Tribunal's positive ruling be reversed and that the court decide otherwise than the Tribunal had done. This much, it is clear, the court is empowered to do under the rubric of "decid[ing] the matter" in Art 16(3) of the Model Law 1985 (see above at [67]). There is therefore no lacuna in the law in this respect.

Conclusion

71 For these reasons, we allowed this appeal. We decided that the Tribunal did not have jurisdiction to determine and/or adjudicate upon the dispute between the Appellant and the Respondent arising out of the Supplemental Agreements.

72 We ordered that the Appellant should have the costs of the application below and of the appeal, and that these were to be taxed if not agreed. The disbursements and fees paid in the arbitration were to be indemnified by the Respondent. The costs of the arbitration were to be paid to the Appellant, and, with the consent of the parties, we ordered that these were to be taxed by the Registrar of the Supreme Court if not agreed.

73 We also made the usual consequential orders.

[\[note: 1\]](#) Record of Appeal (Vol III) (Part B) at pp 338–339 (Exhibit OM-1 in the affidavit of Oliver Marissal affirmed on 17 July 2012).

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