

**EASTERN CARIBBEAN SUPREME COURT  
TERRITORY OF THE VIRGIN ISLANDS  
COMMERCIAL DIVISION**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM No. BVIHC (COM) 2014/0090**

**BETWEEN:**

**HUALON CORPORATION (M) SDN BHD (in receivership)  
Acting by its Receiver and Manager Mr. Duar Tuan Kiat**  
Applicant/Claimant

**and**

**MARTY LIMITED**  
Respondent/Defendant

**Appearances:**

Mr. John Carrington QC and Ms Dian Fahie-deCastro of SABALS Law for  
Applicant/Claimant

Mr. Paul Dennis QC and Ms. Nadine Whyte of O'Neal Webster for  
Respondent/Defendant

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2015: May 18  
2016: April 8  
.....

**JUDGMENT**

*Claimant applied for stay of its claim pending determination of international arbitration it commenced subsequently against defendant respecting same claims when it became aware of arbitration agreement in corporate charter – Understandable that not aware of it – Delay should not have negative legal consequences or preclude stay – Claimant concerned that resulting judgment in*

*claim would not be recognized in other jurisdictions if litigation pursued in face of arbitration agreement – Application not a tactical maneuver.*

*Neither mandatory stay provision in Arbitration Act, 2013 (Section 18(1)) / UNCITRAL Model Law in (Article 8(1)) nor in New York Convention (Article II (3)) precludes a claimant (as opposed to a defendant) in court litigation from requesting referral to arbitration and a stay of claimant's claim – New York Convention provision does not contain restriction found in Act / Model Law that request for referral must be not later than when "submitting his first statement on the substance of the dispute" – New York Convention provision prevails over Model Law provision as Model Law is "subject to any agreement in force between this State and any other State or States" [i.e. New York Convention] – Even though Act does not include "subject to" provision, New York Convention still prevails as applying broader referral provision in Convention more consistent with public policy of Territory favouring arbitration – Clear in Act, arbitration jurisprudence, and public commitment of Territory to arbitration as part of its strategic plan, that Territory strongly supports use of arbitration to resolve international commercial and other disputes – Wherever, whenever and to extent possible Court should support that policy in interpretation and application of the Act, New York Convention, its inherent jurisdiction, the CPR, and any other relevant statutes or rules – Provision that most favours arbitration should prevail and be applied – Also applying Convention provision results in Territory complying with its international treaty obligation to all other Convention members.*

*When court is requested to refer parties to arbitration and stay court proceedings based on an arbitration agreement, a "prima facie approach" to review should be taken the consideration of whether there is an arbitration agreement that applies to the dispute, including whether arbitration agreement is "null and void, inoperative or incapable of being performed", and including any question about scope of arbitration agreement – Not for Court to get into full merits review at referral to arbitration stage.*

*Held that claim must be stayed under New York Convention and alternatively under Act – Arbitration agreement not "inoperative" under Convention or Act – By taking unexplained substantive step in court litigation, or acting inconsistently with right to arbitrate, with knowledge of an arbitration agreement or with wilful blindness to it, and without preserving right to arbitrate, assessed objectively, a*

*party may be taken to have waived arbitration and elected court litigation - Then arbitration agreement becomes “inoperative” – Role of court, consistent with pro-arbitration policy of jurisdiction, is to do its utmost to hold that an arbitration agreement remains operative and to implement the agreement of the parties to determine their disputes in arbitration – Circumstances alleged to make arbitration agreement inoperative must be carefully scrutinized and narrowly construed – Burden of proof on party alleging waiver – Presumption against waiver – No waiver or election occurred.*

*Under Act, claimant submitting claim and statement of claim while unaware of arbitration agreement has not actually “submitted first statement on substance of the dispute” at least until defendant joins issue by submitting its defence – Otherwise a claimant’s right to request referral and stay would be meaningless.*

*Court has inherent discretionary power to stay – Not ousted by mandatory stay provisions of Act / Model Law and Convention – Valuable tool to aid implementation of policy favouring arbitration, where staying in favour of arbitration is desirable but not possible under other provisions – For this application, no need to rely on Court’s case management powers either directly or as support to inherent jurisdiction – Court would do so, at least for temporary stay, if other grounds supporting mandatory and discretionary stay did not exist.*

*In exercising inherent jurisdiction on claimant’s application, discretion should take account of all relevant circumstances including (but not necessarily limited to) (1) reason there was not a resort to arbitration initially, (2) stage of court proceedings and steps taken in proceedings by applicant for stay, (3) whether arbitration encompasses or can encompass all disputes in court litigation, (4) other actions or omissions of applicant for stay that would indicate waiver of arbitration or election to resolve disputes in court, (5) reasons, proper or improper, that applicant wants claims determined in arbitration, (6) public policy favouring arbitration, (7) prejudice to party opposing stay and whether may be compensated for in costs, and (8) conduct of party opposing stay that contributed to applicant for stay resorting to court or not knowing of arbitration agreement – Having regard to all factors, and in all the circumstances, Court would grant stay to allow parties to arbitrate arbitral tribunal’s jurisdiction – If jurisdiction found by arbitral tribunal, stay to become permanent.*

*Hearsay permitted in affidavits in certain circumstances – Must specify information or belief and set out source – Generally hearsay not best practice – Goes to weight given to that evidence – Not as compelling for solicitors to swear, based on instructions, lengthy affidavit dealing with contentious or complex matters – Circumstances where urgency, nature of evidence or practicalities make it necessary, or efficient and adequately effective – Better and more effective evidentiary practice to provide first-hand knowledge where contentious evidence, particularly if going to heart of issue, unless compliance impossible or impractical.*

[1] **LEON J [Ag]**: The Claimant applies for a stay of this Claim, which it commenced on 22 July 2014 in respect of disputes between itself and the Defendant (“**Disputes**”), pending determination of an arbitration that it commenced against the Defendant on 10 March 2015 (“**Arbitration**”) under the Rules of the Singapore International Arbitration Centre (“**SIAC**”) in Singapore.

[2] The Claimant asserts that it commenced the Arbitration after it came to the Claimant’s attention in about mid-February 2015, in circumstances described below, that the revised Charter (“**Revised Charter**”) of Hualon Corporation Vietnam, a limited liability company incorporated under the Law of Vietnam that is central to the Disputes, contains an arbitration clause providing for SIAC arbitration (“**Arbitration Clause**”).

[3] The Arbitration Clause in the Revised Charter reads as follows:

Article 22: Settlement of Disputes

1. Disputes between Members of the Company and between Members with the Company shall be firstly resolved through negotiations and conciliation.
2. In the case the Members cannot negotiate and conciliate, the dispute may be entered into the [SIAC] for settlement under the

rules of the SIAC. The decision of the arbitrator shall be final and binding.<sup>1</sup>

- [4] The Claimant disputes in the Claim, and in the Arbitration, that the Revised Charter was validly revised, as explained below.
- [5] The Claimant sought in the Arbitration a determination by the arbitral tribunal of the arbitral tribunal's jurisdiction to determine the Disputes. Particularly for jurisdictional questions, arbitration clauses contained in agreements are treated as independent and separate contracts.<sup>2</sup>
- [6] The issue raised in the Arbitration regarding the arbitral tribunal's jurisdiction is an issue for the arbitral tribunal, at least at first instance, subject to the limited role of

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<sup>1</sup> The Arbitration Clause uses the word "may", which in that respect is comparable to the arbitration agreement recently considered by the Judicial Committee of the Privy Council ("**Privy Council**") in *Anzen Limited and others v Hermes One Limited* [2016] UKPC 1 (on appeal from this Territory). The case involved an application by a defendant under section 6(2) of the Arbitration Ordinance 1976 (Cap 6) to stay court proceedings commenced by a claimant. The Privy Council held that an arbitration agreement containing the word "may" "enables a party wishing for a dispute to be arbitrated, either to commence arbitration itself, or to insist on arbitration, before or after the other party commences litigation, without itself actually having to commence arbitration if it does not wish to." (paragraph 35). However, save for the Privy Council indicating by its judgment that courts should take a pro-arbitration approach to referral to arbitration in the face of an arbitration agreement, the judgment does not assist directly in the resolution of the present application.

<sup>2</sup> The position of the Claimant in the Arbitration being (as appears in the evidence on this application) that the Arbitration Clause, like any arbitration agreement under established arbitration law and practice, is a freestanding agreement separate from the larger agreement in which it is contained, and is valid and enforceable even if the balance of the larger agreement is not. The accepted principle is often referred to as the "separability", "severability" or "autonomy" of arbitration clauses. Although the arbitration clause is a part of the underlying agreement, the two are essentially independent from each other. Therefore, the arbitration clause should remain unaffected by a claim of breach or invalidity of the main agreement. This principle is enshrined in the rules of SIAC, as discussed in this Judgment, and is enshrined in Section 32(1) of the Arbitration Act, 2013 (defined in paragraph 7 of this Judgment as the "Act") which incorporates into the Act the provisions of Article 16 of the UNCITRAL Model Law on International Commercial Arbitration (defined in paragraph 7 of this Judgment as the "Model Law"): "Article 16. *Competence of arbitral tribunal to rule on its jurisdiction* (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

this Court on this application in determining whether to refer the parties to arbitration and stay the Claim, as explained below.

[7] Central to this application are first, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**New York Convention**”)<sup>3</sup> which was extended to the Territory of the Virgin Islands on 25 May 2014, and second, the Arbitration Act, 2013 (“**Act**”) which incorporates, with some variations and enhancements, the UNCITRAL Model Law on International Commercial Arbitration (“**Model Law**”).<sup>4</sup>

[8] The Court needs to determine on this application, in the circumstances described below, whether,

1. for reasons explained below, it is required to stay the Claim, or alternatively,
2. if it has inherent or other jurisdiction to grant a discretionary stay of the Claim, it should do so,

(a) while the arbitral tribunal determines in the Arbitration its jurisdiction respecting the Disputes, and (b) if the arbitral tribunal determines that it has jurisdiction, to leave it to the arbitral tribunal to determine in the Arbitration the Disputes.

[9] In order to make the first of these determinations (paragraph [8]1 above), this Court will need to determine<sup>5</sup> whether the Arbitration Clause can be relied upon by the Claimant in the circumstances. That is, the Court will need to determine, on the

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<sup>3</sup> The New York Convention was made at New York on 10 June 1958.

<sup>4</sup> As adopted by the UN Commission on 21st June, 1985 and as amended by the UN Commission on 7th July 2006 [the definition in Section 2(2) of the Act]. It is Schedule 1 to the Act.

<sup>5</sup> The nature of the review which the Court needs to conduct in order to make a determination (“find”) whether the Arbitration Clause is “null and void, inoperative or incapable of being performed” is discussed and determined in the subsection of this Judgment headed “Standard of Review” in the section headed “Mandatory Stays”.

applicable standard of review, whether the Claimant has sought to invoke the Arbitration Clause on a sufficiently timely basis, or whether the Claimant (a) is to be taken to have elected for the Disputes to be determined in this Court, and (b) has lost its right to require that the Disputes be determined in the Arbitration. Counsel for both parties put the question as “whether there has been an election not to proceed with the arbitration.” [emphasis in original]

[10] The Defendant, while asserting that the Claimant’s application to this Court is untimely and that the Arbitration Clause has become “inoperative”, does not rely on two other bases respecting an arbitration agreement upon which the right to a mandatory stay may be lost<sup>6</sup>: it has not submitted that the Arbitration Clause is “null and void” nor has it submitted that the Arbitration Clause is “incapable of being performed”.

[11] While applying for a stay of this Claim “pending determination of the arbitration proceedings”, what the Claimant actually seeks is a stay of the Claim pending determination of the jurisdiction issue in the Arbitration, with the intent that if the arbitral tribunal concludes it lacks jurisdiction, the Claimant can seek to resume this Claim.<sup>7</sup>

[12] The Claimant asserts that all of its claims in the Claim “can be entirely determined in the [Arbitration]”.<sup>8</sup>

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<sup>6</sup> The phrase in the relevant provisions of the Act / Model Law and New York Convention being “null and void, inoperative or incapable of being performed”, as discussed in this Judgment below.

<sup>7</sup> Written Submissions of Claimant for Hearing on 22 April 2015 [the date for which this application was originally fixed] (“**Claimants Submissions 1**”), paragraph 33.

<sup>8</sup> Claimants Submissions 1, paragraph 33.

[13] If the arbitral tribunal determines it has jurisdiction, the expectation is that the Claimant (or the Defendant) will seek a permanent stay of the Claim<sup>9</sup>, save for any interim relief outstanding in this jurisdiction (an injunction obtained ex parte has been discharged subject to a pending appeal to the Court of Appeal)<sup>10</sup>, and perhaps to seek any ancillary relief to the Arbitration, which the Claimant asserts “can be entirely determined in the [Arbitration].”<sup>11</sup>

## **OUTCOME OF THIS APPLICATION**

[14] In summary, for the reasons set out in this Judgment below, the application is granted. The parties are referred to arbitrate the issue of the arbitral tribunal’s jurisdiction in the Arbitration and this proceeding is stayed pending a determination by the arbitral tribunal on the issue of jurisdiction. If the arbitral tribunal determines it has jurisdiction to determine the Disputes, the temporary stay shall automatically become a permanent stay, subject to any application, as provided at the end of this Judgment, for any further order. If the arbitral tribunal determines it does not have jurisdiction to determine the Disputes, or part of them, the temporary stay shall automatically be lifted so that the Disputes, or the part of the Disputes not to be determined in the Arbitration, may be determined in this Claim, subject to any outstanding orders of this Court that would affect the lifting of the temporary stay or the continuation of the Claim.

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<sup>9</sup> The Claim was stayed by the Judgment of the Honourable Justice Farara on 20 January 2016, except for the determination of this Application, pending payment of security for costs and provided that if such security is not paid by the Claimant, the Claim shall stand struck out.

<sup>10</sup> An ex parte interim injunction was granted by the Judgment of the Honourable Justice Bannister on 16 September 2014 and the injunction was discharged by the Judgment of Justice Farara on 20 November 2015. Subsequently, the Court of Appeal granted an injunction pending the decision on the Claimant’s appeal of Justice Farara’s Judgment dated 20 November 2015.

<sup>11</sup> Claimants Submissions 1, paragraph 33.

## THE DISPUTES

- [15] The Claimant was incorporated under the laws of Malaysia on 26 October 1989. Until the sale of its business on 25 June 2008, the Claimant was engaged in the manufacture of textile products. The Claimant is in receivership and is acting through its Receiver and Manager, Mr. Duar Tuan Kiat, Stephen (“**Receiver and Manager**”)<sup>12</sup>. The Receiver and Manager was appointed under the terms of a debenture, with effect from 30 November 2006.
- [16] The essence of the Claimant’s claims is that it was wrongfully deprived of its shareholding in Hualon Corporation Vietnam, a company incorporated in 1993 as a wholly-owned subsidiary.
- [17] The Claimant alleges that the Defendant, which was incorporated under the laws of the Territory of the Virgin Islands in 2006, is liable to account to the Claimant for its wrongful receipt and/or diminution of the Claimant’s shareholding in Hualon Corporation Vietnam and all income received by the Defendant on such shareholding, and is liable to compensate the Claimant for its dishonest assistance in breaches of trust. It also seeks the re-transfer to the Claimant of its shareholding in Hualon Corporation Vietnam and other relief.

## EVIDENCE ON THIS APPLICATION AND FACTUAL FINDINGS

- [18] The evidence on this application is in five affidavits, all filed on behalf of the Claimant. The Defendant filed no evidence for or that was relied upon on this

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<sup>12</sup> The Defendant had questioned the Receiver and Manager’s authority however that is not an issue on this application.

application. In particular, it has not submitted evidence of any prejudice it would or could suffer if a stay is granted on the basis on which it was sought.

[19] The evidence is described in some detail below given the importance of the factual foundation to the relief sought in the circumstances of this application.

[20] In summary, before turning to the detail, it appears from the evidence and from inferences set out below (drawn from the evidence) that the Arbitration Clause actually came to the attention of the Receiver and Manager and to the Claimant's legal practitioners in about mid-February 2015.

[21] It is not clear from the evidence who focused on it first, and what led him or her to be reviewing the Revised Charter at that time or to becoming aware of the Arbitration Clause in it. Indeed, there is some confusion in the evidence although it seems understandable given that a few applications were ongoing in relation to the Claim in the latter part of 2014 and the early months of 2015.

[22] The Revised Charter was a document that the Receiver and Manager received in a Legal Due Diligence Report in 2009 (as described more fully below) and a document that was part of an exhibit in the evidence (in a July 2015 affidavit on behalf of the Claimant described below) for ex parte interim injunction and service of the jurisdiction applications in respect of the Claim.

[23] The key points are, first, that while the Claimant, through the Receiver and Manager and the Claimant's legal practitioners, had possession of the Revised Charter containing the Arbitration Clause well before February 2015 – and indeed before the Claim was commenced (in the case of the Receiver and Manager, years before the Claim was commenced) – the Arbitration Clause did not actually come to their attention until about mid-February 2015, and second, the fact that it

did not is understandable, as discussed below. Logically, it is most likely that the discovery was in the course of preparation of the Amended Statement of Claim (not in connection with the forum challenge application, which was somewhat earlier).

[24] The state of the proceedings in this litigation at this point is that the Claim and Statement of Claim were served, and the Statement of Claim was amended, but no Defence has been delivered, no steps taken to arrange an extension, and no steps taken by the Claimant in default of same. There have been various procedural applications, including for service on two defendants (now former defendants) out of the jurisdiction in respect of whom this Claim was subsequently discontinued; an interim injunction application that led to an interim injunction being issued, more recently not continued, and reinstated pending determination of an appeal of the latter decision<sup>13</sup>; a forum challenge by the two former defendants; and a security for costs application by the defendants. In short, the Claim in substantive terms is just coming out of the 'starting gate'.

[25] The Defendant's initial position was simply that the Claimant's request to refer the parties to arbitration came "some 8 months after" the Claimant has submitted its "first statement of the substance of the dispute" (within the meaning of Section 18 of the Act /Article 8 of the Model Law, which provisions are set out, defined, explained and discussed below), namely its Statement of Claim, and later, following commencement of the Arbitration (on 10 March 2015), its Amended Statement of Claim (filed on 14 April 2015).<sup>14</sup>

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<sup>13</sup> See Footnote 10.

<sup>14</sup> Defendant's Submission on the Claimant's Application for a Stay of Proceedings, undated "**Defendant's Submissions 1**", paragraphs 4 and 6.

- [26] The Defendant subsequently added to its position the fact of the Claimant's ex parte interim injunction application (dated 22 July 2014 and determined on 16 September 2014), its application for permission to serve the Claim and Statement of Claim outside the jurisdiction (which was dated 22 July 2014 and determined on 16 September 2014), and its affidavit evidence in opposition to the forum challenge applications of the two former defendants (the applications brought on 18 December 2014 by what was then the first defendant and on 6 January 2015 by what was then the second defendant were determined on 10 February 2015).<sup>15</sup>
- [27] Turning to the detail, the main evidence for this application is contained in the third affidavit of Corine George, a Barrister of this Court and an associate with SABALS Law, the legal practitioners for the Claimant, sworn 14 April 2015 ("**George 3**").
- [28] Ms. George exhibited three documents to George 3, marked "CG-3", being an English translation of the Revised Charter, the Claimant's Notice of Arbitration dated 10 March 2015, and SIAC's letter of 16 March 2016 acknowledging receipt on 12 March 2015 of the Notice of Arbitration as well as its cover letter and case filing fee. The SIAC letter sets out the case number and deals with various other administrative and procedural matters (including Response to the Notice of Arbitration; Constitution of the Tribunal; Communications; Financial Matters; and Assignment of the Case (SIAC case administrators).
- [29] Ms. George stated as follows (in paragraph 2 of George 3):

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<sup>15</sup> Applicant's Supplemental Submissions (on the Claimant's application for stay of proceedings) dated 19 May 2015 ("**Defendant's Submissions 2**"), paragraph 8. It should be noted that while those actions subsequently added by the Defendant as facts it relied upon may be relevant to a discretionary stay, and possible to whether the Arbitration Clause became "inoperative" by reason of an election by the Claimant to use court litigation rather than arbitration for the Disputes, they are not statements on the "substance of the dispute" and so do not make the Claimant untimely under the Act.

The facts deposed to herein are, unless otherwise stated, based on instruction given to me by the Receiver and Manger, and advice from his legal advisers in Malaysia, Singapore and Vietnam. The Claimant does not waive any privilege in relation to such advice. These facts are true to the best of my information and belief.

More will be said of the nature of the evidence later.

[30] With respect to this application, Ms. George sets out in one paragraph of George 3 the evidence regarding the Claimant becoming aware of the Arbitration Clause, stating that “it came to the attention of the Claimant’s lawyers in the course of reviewing the documents filed to date in these proceedings by the Defendant in support of the forum application.” In paragraph 7 of George 3 she deposes as follows:

During February 2015, in the course of reviewing the documents filed to date in these proceedings by the Defendant in support of the forum application, it came to the attention of the Claimant’s lawyers that the revised Charter of the Claimant’s Vietnamese affiliate, Hualon Vietnam, adopted on 4 February 2008, contained an arbitration clause. This clause had not previously been noticed by any of the law firms instructed in this matter.  
[emphasis added]

[31] The Request for Arbitration also deals with the discovery of the Arbitration Clause. After an allegation about the Revised Charter changing the Claimant’s status without the necessary consents of the Claimant by its Receiver and Manager (Section II.G. paragraphs 37 – 45), it refers to the discovery of the Arbitration Clause (Section IV “The Arbitration Agreement Recently Discovered by the Claimant and the Issue of Jurisdiction”). Specifically in paragraph 65 of the Notice of Arbitration, the Claimant alleges as follows:

65. In reviewing the documents in connection with responding to the Oung Brothers' and Marty's challenge of the jurisdiction of the Court in the BVI, the Claimant discovered the arbitration clause contained in the Revised Charter. [emphasis added]

- [32] The Defendant challenges the assertion of the Claimant in George 3, quoted above, that it only became aware of the Arbitration Clause in the Revised Charter from documents provided by the Defendant in the forum challenge in this Claim.<sup>16</sup> It submits that the Claimant “clearly knew, or ought with reasonable diligence to have known, of the [Arbitration Agreement], from as long ago as July 2009” and that there was a “[f]ailure of its legal advisors to take cognizance of the [Arbitration Agreement].”<sup>17</sup>
- [33] First in that regard, the Defendant points out that the Claimant had the Revised Charter in its possession as early as 1 July 2009 because in a document the Receiver and Manager commissioned, referred to as a Legal Due Diligence Report, issued 19 June 2009, from Indochine Counsel (that being the name of the firm of legal practitioners in Vietnam) referred to the Revised Charter and attached it to the Legal Due Diligence Report.<sup>18</sup>
- [34] Second in that regard, the Defendant points out that the Revised Charter was not exhibited in either of the two affidavits filed on the forum challenge so, it asserts, it is “patently unsustainable for the Claimant to assert that it only became aware of the [Revised] Charter and the [Arbitration Agreement] from the documents provided in the forum challenge.

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<sup>16</sup> Defendant's Submissions 1, paragraphs 5 and 6.

<sup>17</sup> Defendant's Submissions 2, paragraphs 8 and 9.

<sup>18</sup> Affidavit of Corine George sworn 22 July 2014, Exhibit CG1, filed in support of the ex parte interim injunction and service out application.

[35] In any event, it is clear that the Claimant had the Revised Charter well before that application and did not obtain it for the first time from the Defendant in this proceeding.

[36] Returning to George 3, Ms. George then sets out the Arbitration Clause and states (in paragraph 9):

Having discovered the Arbitration Clause, the Receiver and Manager [that is, on behalf of the Claimant], upon the advice of his lawyers, took the decision to file a Notice of Arbitration with the SIAC Secretariat.

[37] In George 3, Ms. George then sets out the receipt by SIAC and service on the Defendant of the Notice of Arbitration and other administrative and procedural matters. She states that the Claimant has requested a preliminary determination of jurisdiction from the arbitral tribunal, once constituted, quoting from the Notice of Arbitration in that regard, and setting out the importance of a determination of that issue as rapidly as possible.

[38] She then provides some explanation why the Claimant would not want to pursue the Claim if the Arbitration Clause is deemed valid “and an eventual judgment from the BVI could potentially be considered unenforceable”<sup>19</sup>, and would not want to proceed exclusively in arbitration if it is determined in due course that the Arbitration Clause is invalid.

[39] The evidence or submissions of the Claimant could have included more on the alleged judgment enforcement difficulty that the Arbitration Clause might pose. While it is difficult to see that in the circumstances there could be any enforcement

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<sup>19</sup> George 3, paragraph 17.

difficulty in this jurisdiction (where the Claim is being adjudicated and the Defendant is incorporated), it appears to be the case internationally that if a party pursues litigation in breach of a valid arbitration agreement – and if there is no waiver of the right to arbitrate by its counter-party – then the resulting judgment should not be entitled to recognition in other jurisdictions.<sup>20</sup>

[40] The New York Convention, in Article II (3), requires a court to refer to arbitration and therefore not take jurisdiction and hear a case when there is an arbitration clause (a so-called “negative competence effect”). If a court does take jurisdiction

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<sup>20</sup> “International Commercial Arbitration”, Gary Born, (Kluwer, 2d Edition) (2014) [“**Born**”], page 1288, states as follows [footnotes omitted]: “If a party pursues litigation in breach of a valid arbitration agreement (and if there is no waiver of the right to arbitrate by its counter-party), then the resulting judgment should not be entitled to recognition. Indeed, it would violate the New York Convention for a Contracting State to recognize and enforce a judgment obtained in breach of a valid agreement to arbitrate, that has not been waived and that is subject to the Convention. Contracting States are committed under Articles II(1) and II(3) of the Convention to recognizing valid arbitration agreements and to referring parties to such agreements to arbitration. Where a national court judgment is obtained in breach of an agreement protected by the Convention, a Contracting State would violate these commitments by giving effect to that judgment, rather than ordering the parties to arbitrate their disputes, as they promised to do and as Article II requires.

The Singapore High Court expressed the foregoing rationale very directly, albeit in a case involving breach of an antisuit injunction enforcing an arbitration agreement. The Singapore court reasoned that “if cl[ause] 19 is an arbitration agreement [as the court concluded it was], continuation of the proceedings in the Colombo High Court would constitute a breach by Sri Lanka of her obligations under [Article II of the New York Convention].” Thus:

“By virtue of [the parties’ agreement, the respondent] had agreed to submit disputes to arbitration in Singapore upon election by any party and the plaintiffs have so elected. In the circumstances it would be manifestly against public policy to give recognition to the foreign judgment at the behest of the defendants who have procured it in breach of an order emanating from this Court.”

Similarly, Swiss courts have held that they will not recognize foreign judgments that are obtained in an action that breached Article II of the [New York] Convention. In one decision, the Swiss Federal Tribunal refused to annul an arbitral award on the grounds that it allegedly conflicted with a foreign judgment, reasoning among other things that the foreign judgment had been issued on the basis of proceedings conducted in breach of a valid arbitration agreement and Article II of the [New York] Convention. The court explained: ... “A foreign state court which, notwithstanding the presence of the conditions of Art. II of the [New York] Convention, does not refer the parties to arbitration but takes the dispute into its own hands lacks thus indirect jurisdiction [necessary for recognition of a foreign judgment] and its decision cannot be recognized in Switzerland, unless the lack of jurisdiction of the arbitral tribunal is determined by the tribunal itself or in the context of a review by a state court.” ...

Other national courts have also made it clear that they will not recognize and enforce foreign judgments rendered in breach of a valid international arbitration agreement. In particular, both U.S. and English courts have refused to recognize foreign judgments made in violation of a valid arbitration agreement.

when it should not do so, there is a risk of its judgment not being recognized by courts in other New York Convention States.

[41] Ms. George then sets out in George 3 the benefit of a stay to guard against the arbitral tribunal determining in the Arbitration that it does not have jurisdiction and that if the tribunal has jurisdiction “the Claimant will not pursue these proceedings further, save perhaps in order to see any ancillary relief to the [Arbitration].”

[42] The Receiver and Manager<sup>21</sup> provided evidence in an affidavit sworn 14 April 2015. Three paragraphs are particularly material to this application, as follows.

7. I confirm that the affidavits filed by Corine George on behalf of the Claimant in these proceedings have been sworn and filed on my instructions. I have reviewed these affidavits before they were sworn and confirm the truth of their contents which knowledge and belief I derived from my and my team’s investigations into the affairs of the Claimant, and the advice that we have received to date from Malaysian and Vietnamese counsel. I do not waive privilege in relation to such advice.

8. I have been advised that in any event it is not uncommon in complex commercial litigation in BVI that solicitors swear lengthy affidavits based on their instructions.

9. The current position in this matter is that the Claimant seeks to stay these proceedings as it intends to pursue its claim against the Defendant in the [Arbitration] in Singapore if the arbitrators determine that they have jurisdiction to hear this claim. I believe that it is to the benefit of all parties that we first determine the position in the arbitration before taking further steps in these proceedings. The Defendant would have been aware at all

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<sup>21</sup> In paragraph 4 of his affidavit, the Receiver and Manager states that under Malaysian law and the terms of the Debenture under which he was appointed, he is an agent of the company over whose assets he has been appointed (i.e. the Claimant).

material times of the existence of the [Arbitration Clause] but chose not to bring this to the attention of the Claimant or the court.

[43] Ms. George swore a further affidavit for this application on 20 April 2015 (“**George 4**”) with Exhibit CG-4 that includes three letters that passed between SABALS Law, legal practitioners for the Claimant, and O’Neal Webster, the legal practitioners for the Defendant.<sup>22</sup> In paragraph 7 of George 4, Ms. George highlights that in a letter of 13 March 2015 from her firm to O’Neal Webster, the Claimant proposed to the Defendant “a stay of these proceeding pending arbitration”.

[44] The letter also contains a statement on the discovery of the Arbitration Clause, stating likely correctly (as noted above) that it was by the Receiver and Manager in the course of preparation of the amendments to the Statement of Claim, as follows:

We are instructed that our client has discovered, in the course of his preparation for the amendments to the statement of claim, that in February 2008, Mr. Oung Da Ming and Marty Limited, unknowing to our client who was then the receiver/manager of Hualon Corporation, had changed the Charter of Hualon Vietnam converting it from a private enterprise to a LLC under Vietnamese law. Our instructions are that this change to the charter was effected in breach of the provisions of the original charter, which stated that any change required the consent of private enterprise. Notwithstanding our client’s challenge to this change as being unlawful and ineffective, our client has noted that the revised charter contains a dispute resolution clause (Article 22) by which disputes between members are to be referred to arbitration in Singapore. As it is well accepted that an arbitration clause may be valid notwithstanding the challenge to

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<sup>22</sup> Exhibit CG 4 to the Affidavit of Corine George sworn 20 April 2015.

the contract in which it is contained, our client this week issued a Notice of Arbitration in the [SIAC] concerning the dispute with your client. ... [emphasis added]

- [45] The Amended Statement of Claim was filed on 14 April 2015, after the Arbitration was commenced and after the Claimant proposed to the Defendant that this Claim be stayed pending the outcome of the Arbitration. The Claimant's position is that by filing the Amended Statement of Claim, it had no intention of electing these court proceedings over the Arbitration, and that would have been made clear by the prior commencement of the Arbitration and the above communication to the Defendant.
- [46] As concluded above, it appears that the Arbitration Clause was discovered in about mid-February 2015, a month or so prior to the formal commencement of the Arbitration on 12 March 2015<sup>23</sup>.
- [47] This Court's conclusion regarding the timing and context of discovery of the Arbitration Clause is supported by other facts.
- [48] First, there is no reference to the Arbitration Clause in the original Statement of Claim dated 22 July 2014 or in Ms. George's affidavit sworn 22 July 2014 ("**George 1**") or her affidavit sworn 11 September 2014 ("**George 2**") in support of the Claimant's application for the ex parte injunction and service out of the jurisdiction.
- [49] One would have expected a reference to the Arbitration Clause, if known, to have been made expressly in the affidavits in support of the ex parte interim injunction

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<sup>23</sup> Commencement of the Arbitration under the SIAC Rules is deemed to occur upon receipt of the Notice of Arbitration by SIAC. This is set out in SIAC's letter of 12 March 2015 to the Claimant and the Defendant, contain in Exhibit CG3 to the Affidavit of Corine George sworn 14 April 2015.

application, particularly affidavits of a BVI legal practitioner, in the “Duty of full disclosure” section (commencing at paragraph 51 of George 1). This is even more so as reference was made to intended proceedings seeking a restraining order in Vietnam and the Revised Charter is in a document, called a Legal Due Diligence Report, that is exhibited as CG1 to George 1.

[50] It is clear from the Legal Due Diligence Report that the Receiver and Manager received the Revised Charter in July 2009 (the cover letter is dated 1 July 2009 and states it was sent “Via Post Only”). Also it is clear that the Claimant’s BVI legal practitioners had it by July 2014 before the Claim was commenced. However, there is no evidence that the Arbitration Clause came to the attention of the Receiver Manager or the Claimant’s legal practitioners before about mid-February 2015.

[51] The Legal Due Diligence Report is 34 pages with two appendices, the first being a “List of the Documents Provided / Obtained” (3 pages listing 8 categories of documents including the Charter and Revised Charter) and the second being translated copies of documents, including the Revised Charter. The Legal Due Diligence Report with the two appendices appears to be 79 pages.

[52] The report includes a discussion of potential claims in respect of “the transaction of transfer of the capital from Hualon Malaysia to Marty Ltd.” without proper authorization. The report states (in paragraph 6.2) that the Receiver and Manager:

... also [has] the right to bring this matter to the authorized court/arbitration against such unauthorized representative in order to request the court to consider and judge invalidity of such fabricated capital assignment transaction. Afterward, you can submit the judgment of the court to the licensing authority  
...

- [53] There is no discussion in the report of the “authorized court/arbitration” and no indication that the reference to “arbitration” was anything more than part of a generic reference to one of two forms of adjudicative dispute resolution, “court” being the other. If anything, the limited discussion was assuming court proceedings.
- [54] Further, had the Arbitration Clause become known before 11 September 2014 when George 2 was sworn, one would have expected it to be referenced in George 2.
- [55] Second, there is no reference to arbitration in the Note of Oral Judgment of the Honourable Justice Bannister of 10 February 2015 dealing with the appropriate forum for this litigation (the defendant having applied unsuccessfully to Justice Bannister for an order that the Court refuse to exercise its jurisdiction on the grounds that Malaysia, or alternatively Vietnam, was the natural and most appropriate forum) and with discontinuance of the Claim against two former directors of the Claimant (which preceded and presumably at least in part, if not in whole, gave rise to the need for amendment of the Statement of Claim). If the Arbitration Clause was known – to either party – at the time of the jurisdiction application, one would have expected it to be drawn to the Court’s attention as it at least had potential relevance to the subject.
- [56] This Court accepts that while the Claimant, through its Receiver and Manager, and later its BVI legal practitioners, had possession of the Arbitration Clause in that they had possession of the Amended Charter, they did not actually become conscious of the Arbitration Clause until around mid-February 2015. There is no reason to conclude that the Receiver and Manager noticed it or had any reason to

focus on it, particularly when the Legal Due Diligence Report, as noted above, was focused on court proceedings to the extent it discussed dispute resolution methods at all (and despite the initial use of the words “court/arbitration”).

[57] **NO LEGAL CONSEQUENCE OF NOT DISCOVERING ARBITRATION CLAUSE DESPITE HAVING IT.** While arguably the Claimant's BVI legal practitioners, or indeed the Receiver and Manager, might have or could have looked to see if the Revised Charter had a dispute resolution provision, historically such provisions in corporate constitutional documents are not so common that one might look for a dispute resolution provision in the way one more likely would look in the case of a commercial contract, for example.<sup>24</sup>

[58] The Court does not consider that the Claimant “should have been aware” of the Arbitration Clause, as Mr. Dennis submitted, in the sense that the Claimant not discovering, becoming aware or conscious of, or focusing on it until about mid-February 2015 should have negative legal consequences for the Claimant on this application, or that the “[f]ailure of its legal advisors to take cognizance of the [Arbitration Agreement] is no excuse”. This Court considers that it was inadvertent at worst, and as stated above, understandable. As discussed below, implicit in the concept of election and waiver is knowledge of the alternatives and the material circumstances. The lack of knowledge or awareness of the Arbitration Clause should not preclude a referral to arbitration and a stay of the Claim.

[59] Another point that may be relevant on an application such as this, particularly if the ground for a stay is discretionary rather than mandatory, is whether an attempt of

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<sup>24</sup> As arbitration of disputes between a company and its members, and among members of a company, becomes more common in this jurisdiction and in many jurisdictions, legal practitioners in this jurisdiction may be well advised to routinely check for dispute resolution provisions before commencing proceedings, just as they should routinely do in the case of contracts and other commercial documents. However, this is prospective comment, not a criticism of the Claimant's legal practitioners (or the Receiver Manager).

a claimant to move to arbitration after commencing and pursuing (to some degree) court litigation is a tactical maneuver by a claimant. One can conceive of such a tactical maneuver by a claimant which, for example, has lost or is losing some procedural dispute or is otherwise unhappy with how its case is going in the chosen forum.

[60] In a few judgments and authoritative texts it is mentioned that the courts would want to avoid permitting a party, having obtained an adverse interim decision or otherwise having a reason to have a change of heart about the dispute resolution method selected, from applying to refer the dispute to arbitration. To the extent a court is considering a discretionary (as opposed to a mandatory remedy) or assessing whether in the case of a mandatory remedy the conditions for it have been met, that is a relevant factor.

[61] However, the Court does not consider that anything like that is the case here. Indeed, not only does there not appear to be any factual basis for such a tactical maneuver but, as explained above, the Claimant has advanced a reason in terms of recognition and enforcement for commencing the Arbitration once it became aware of the Arbitration Clause and, in turn, for bringing this application.

[62] **DEFENDANT’S ALLEGED AWARENESS OF ARBITRATION CLAUSE.** The Receiver and Manager asserts (by way of argument, not evidence) in paragraph 9 of his affidavit, quoted above, that the Defendant would have been aware at all material times of the existence of the Arbitration Clause but chose not to bring this to the attention of the Claimant or the Court.

[63] It appears to be the case that the Defendant brought about the Revised Charter by having the Charter revised, and apparently had the Revised Charter in its possession. In that sense the Defendant would have been “aware” of the

Arbitration Clause. But it does not mean that when the Defendant was served with the Claim and Statement of Claim it was any more aware than the Claimant of the Arbitration Clause. Indeed, it does not necessarily mean that the Defendant was even “aware” of the inclusion of the Arbitration Clause when the Amended Charter was done, any more than the Claimant was “aware” of it when it commenced the Claim.

- [64] Also, as noted above, if the Defendant’s counsel in this Claim was aware of it, one would have expected it would have been brought to the attention of the Court on the jurisdiction challenge application.
- [65] Even if the Defendant was or became aware of the Arbitration Clause, apart from the obligation to this Court noted above, at least absent a reason to believe that the Claimant was being misled, the Defendant may have had no obligation to bring the Arbitration Clause to its attention.
- [66] The Defendant, if aware of the Arbitration Clause, which likely was not the case, could have concluded reasonably and fairly, when served with the Claim and Statement of Claim, that the Claimant had chosen not to pursue the claims that are in the Claim through arbitration but preferred to sue in this jurisdiction and at least wait to see if the Defendant would insist on arbitration.
- [67] The Defendant may have, and apparently does, prefer to have the Disputes determined by this Court rather than in arbitration under the Arbitration Clause. But did it say to itself, “well, it looks like the Claimant missed seeing the Arbitration Clause”, or even worse, “the Claimant appears not to know about the Arbitration Clause and likely wouldn’t know because the Claimant and the Receiver and Manager were not aware (or likely not aware) (or could not have been aware) of

the Revised Charter.” There is nothing in the evidence on this application to suggest anything like that.

[68] **FOOTNOTE ON FIRST-HAND EVIDENCE.** Before leaving the subject of the Claimant becoming aware of the Arbitration Clause, it should be noted that what is unfortunately absent in the evidence, and presumably easily could have been provided to the Court, is clear, direct, *first-hand* evidence of when, how and by whom the Arbitration Clause was discovered.

[69] Paragraph 8 of the Receiver and Manager’s affidavit, quoted above, states that he was advised that “it is not uncommon in complex commercial litigation in BVI that solicitors swear lengthy affidavits based on their instructions.” Obviously he was able to swear an affidavit for this application and did so. It would have been preferable for the Receiver and Manager to give his own evidence about when and how he became aware of the Arbitration Clause, and why he did not focus on it prior to that time.

[70] CPR 30.3(1) specifies that the general rule is that “an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge”. Of course hearsay is permitted in certain circumstances and CPR 30.3(2) provides that where the affidavit contains statements of information and belief, the affidavit must specify “(i) which of the statements in it are made from the deponent’s own knowledge and which are matters of information or belief; and (ii) the source of any matters of information or belief.”

[71] Generally speaking, it is not the best practice, and not as compelling as first-hand evidence, for solicitors to swear affidavits based on instructions where the evidence is contentious. It seems even more so to be the case when the affidavit

is lengthy and dealing with complex matters. It goes to the weight to be given to that evidence.

[72] There may be circumstances in commercial matters where due to urgency, the nature of the evidence (particularly non-contentious evidence) or certain practicalities, or otherwise, it is necessary, or perhaps even efficient and adequately effective, for there to be a solicitor's affidavit based on instructions (that complies with CPR 30.3(2) as necessary). (Of course sometimes there will be a solicitor's affidavit dealing with matters in her or his own knowledge which of course is perfectly acceptable.)

[73] However, there remains something to be said for the concept of "the best evidence rule", at least as a matter of effective court practice.

[74] When evidence is or may be contentious, and particularly when it goes to the heart of an issue on an application, absent circumstances that make compliance with the general rule impossible or impractical, at a minimum it is the better and more effective evidentiary practice to submit evidence that complies with the general rule.

[75] While the unclear evidence on this application tended to weaken the Claimant's factual case to some degree, and made the work of the Court more difficult, it was far from fatal to the Claimant's application. The evidence and other documents referred to above painted a reasonably clear picture that the Claimant was not aware of the Arbitration Clause when it commenced the Claim, and took the various steps in the Claim, and that it was not until about mid-February 2015 that the Claimant became aware of the Arbitration Clause. Thereafter it expeditiously

commenced the Arbitration, informed the Defendant that it had done so, and sought the relief claimed on this application.

## **LEGAL BASES, TESTS AND FACTORS FOR COURT TO STAY A CLAIM**

[76] First it is necessary to consider the bases that this Court can consider in deciding whether to stay the Claim, and the tests and factors to be applied in determining whether to do so.

[77] There are two types of bases for a stay of a claim in favour of arbitration:

1. two bases – one under the Act and one under the New York Convention – for mandatory stays that require the Court to refer the parties to arbitration and stay the claim, and
2. one basis – inherent jurisdiction – and perhaps a second – case management powers – that give the Court a discretion to stay the Claim.

Both types of bases are discussed below, along with the tests and the factors that preclude or militate against a stay.

[78] Not surprisingly, there is overlap among the tests and among the factors.

## **MANDATORY STAYS**

[79] Both the Act and the New York Convention have provisions for mandatory stays of court proceedings in favour of arbitration. If the applicable tests and factors are met, this Court is required to refer the parties to the Arbitration and stay the Claim.

[80] The Act provides as follows in Section 18:

18. (1) Article 8 of the UNCITRAL Model Law, the text of which is reproduced below, has effect:

*“Article 8. Arbitration agreement and substantive claim before court*

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. [emphasis added]

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.”.

.....

(7) A decision of the Court to refer the parties to arbitration under article 8 of the UNCITRAL Model Law pursuant to subsection (1) or under subsection (2) is not subject to appeal.

(8) The leave of the Court with respect to a decision to refuse to refer the parties to arbitration under article 8 of the UNCITRAL Model Law pursuant to subsection (1) or under subsection (2) is required for any appeal from that decision.

[81] The New York Convention provides in Article II as follows:

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. [emphasis added]

[82] **WHO MAY REQUEST REFERRAL?** The wording of neither the Act in Section 18(1) / Model Law in Article 8(1)) nor the New York Convention in Article II (3) precludes a claimant in court litigation from requesting a referral – respectively the provisions use the term “a party” or “one of the parties” when describing who may raise an arbitration agreement and hence seek a stay. Also, this is consistent with the fundamental principle of equal treatment of the parties.

[83] As a starting point, therefore, it should not matter that the party raising the arbitration agreement with the Court and making the request for referral to arbitration and a stay is the party that commenced the court litigation.

[84] **WHEN REQUEST MUST BE MADE?** Article II (3) in the New York Convention does not contain the temporal restriction of the Act / Model Law – “if a party so requests not later than when submitting his first statement on the substance of the dispute” – or any restriction about when the referral request must be made. The New York Convention states more broadly that “the court ... shall, at the request of one of the parties, refer the parties to arbitration ...”

[85] If the relevant provisions on this application were in the New York Convention and the Model Law itself – rather than the Act which incorporates much of the Model Law unchanged or with modifications – the New York Convention provision should prevail over the Model Law provision without further analysis.<sup>25</sup> This is so because Article 1 of the Model Law provides as follows:

(1) This Law applies to international commercial\*\* arbitration, subject to any agreement in force between this State and any other State or States. [emphasis added]

[86] Thus the provision of the New York Convention, being an agreement between the Territory of the Virgin Islands (“this State”) and the other members of the New York Convention (“any other State or States”), would ‘trump’ the Model law provision. The Model Law is “subject to” it.

[87] However, for reasons unknown, the Act does not include Article 1 of the Model Law or some modified version of it. Instead the Act provides in Section 6(1) as follows:

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<sup>25</sup> Anthony R Daimsis, “Canada’s Indoor Arbitration Management: Making Good on Promises to the Outside World” in Chios Carmody, ed, *Is Our House in Order? Canada’s Implementation of International Law* (Montreal and Kingston, Ont.: McGill-Queen’s University Press, 2010) 174 at 176-88 at page 180.

6. (1) This section has effect in substitution of article 1 of the UNCITRAL article 1 of the Model Law.

- [88] However, section 6(1) goes on to deal with other matters, not anything related to the subject matter of the above-noted provision of Article 1 of the Model Law.
- [89] However, even absent Article 1 of the Model Law in the Act, Article II (3) of the New York Convention should 'trump' the Model Law Article 8(1) provision in Section 18(1) of the Act for at least two reasons.
- [90] First, applying the broader referral to arbitration provision in the New York Convention is more consistent with the public policy of the Territory favouring arbitration. To the extent there are two conflicting provisions, the one that favours arbitration should be preferred, prevail and be applied.
- [91] It is clear in the Act, in the extension of the New York Convention to this jurisdiction, in the arbitration jurisprudence of this jurisdiction (including before the Act), and in the public commitment of the Territory to arbitration as part of its strategic plan<sup>26</sup>, that the Territory of the Virgin Islands as a matter of public policy strongly supports the use of arbitration to resolve international commercial and other disputes.
- [92] Implicit in that support for arbitration is a commitment to the fundamental hallmark of arbitration: party autonomy.
- [93] To begin with, parties have the right to agree on how they wish to resolve their disputes, whether in court, in arbitration or by expert determination, and/or by

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<sup>26</sup> For example, Premier and Minister of Finance of the Virgin Islands, Dr. the Honourable D. Orlando Smith, OBE stated publically on 21 May 2015 that the Government of the Territory is "100 per cent committed to making the Territory a jurisdiction of choice for international arbitration" (Global Arbitration Review (GAR) News, Alison Ross, 4 June 2015).

other means including non-adjudicative means (principally negotiation and mediation) which may be used in conjunction with adjudicative means. The will of the parties, which importantly may be exercised in their self-interests, is restricted only by a limited number of mandatory constraints imposed by the applicable law (for example, any subject matters that are not arbitrable).

[94] If the parties choose arbitration, they may decide on almost all aspects of their arbitration, again in their self-interests and restricted only by a limited number of constraints imposed by the applicable law. The parties may decide, among other things, if they wish privacy and confidentiality, and to what extent; if they wish to have expanded or contracted court review rights; if they wish to include appeal rights, and if so whether in the public domain to the extent available or privately by way of a further arbitration; if they wish to utilize expedited procedures, accepted arbitration procedures or court-like procedures; if they wish greater or lesser formality in their process; if they wish to define their procedures or trust the arbitral tribunal to resolve procedures after hearing their submissions in the context of the disputes that have arisen; the size and qualifications of their arbitral tribunal; how they wish to choose their arbitral tribunal; and if they want the outcome of their dispute possibly to have precedential value. The choices, some of which are interconnected, are for the parties to make within the limited restrictions of the applicable law to which reference is made above.

[95] Wherever, whenever and to the extent possible this Court should support the public policy favouring arbitration in the interpretation and application of the Act, the New York Convention, its inherent jurisdiction, the CPR, and any other statutes or rules that may be relevant.

- [96] Second, applying the referral to arbitration provision in Article II (3) of the New York Convention will result in the Territory complying with its international treaty obligation made to all other members of the New York Convention.
- [97] The distinction in the requirement for referral between the Act / Model Law and the New York Convention will matter on this application, however, only if the Claimant did not apply for referral in a timely manner, as asserted by the Defendant, such that referral to arbitration is not mandatory.
- [98] **REFERRAL TO ARBITRATION; STAY OF COURT PROCEEDINGS.** A word about the wording and concept of “referral” to arbitration. The formal action of the Court under the Act / Model Law and New York Convention is “refer the parties to arbitration”. In practice in various jurisdictions other phrases that may be used include “refer the dispute to arbitration” and “to stay the claim in favour of arbitration”.
- [99] However, courts in this and many jurisdictions do not actually “refer” the parties or the dispute to arbitration in the sense of ordering them to go to arbitration. Rather, they simply stay (stop) the court proceedings and leave it to the litigating parties (usually the claimant) to commence (or continue) an arbitration to determine the dispute.
- [100] It appears that virtually none of the New York Convention’s Contracting States or UNCITRAL Model Law’s adherents enforce arbitration agreements by way of orders directing a party specifically to perform the positive aspects of such agreements. Rather, the consistent approach is only to dismiss or stay litigation

brought in breach of an agreement to arbitrate, and not to affirmatively order or compel participation by a party in arbitral proceedings.<sup>27</sup>

[101] The Act recognizes this, at least in part, in Section 18(4) which provides as follows:

(4) Where the Court refers the parties in an action to arbitration, it shall make an order staying the legal proceedings in that action.

[102] **A CLAIMANT AS APPLICANT FOR A STAY.** Typically an application or request to a court to refer to arbitration and stay court proceedings arises when one party to an arbitration agreement commences court litigation, despite being bound by the arbitration agreement, and another party to the arbitration agreement receives the court claim (that is, as defendant) and applies to the court with jurisdiction to refer the parties to arbitration and stay the court litigation.<sup>28</sup>

[103] The circumstances in relation to this application are unusual (but not unique<sup>29</sup>) in that it is a claimant in court proceedings that is seeking a stay of its own court proceedings in favour of an arbitration that it commenced subsequently.

[104] Also, this is not a case, like some, where a claimant has commenced court proceedings to obtain interim relief (which is expressly permitted in many jurisdictions including this one), to safeguard against a limitation (prescription) period, and/or upon prior notice to the defendant/respondent that arbitration is intended.

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<sup>27</sup> Born, Chapter 8: Effects and Enforcement of International Arbitration Agreements.

<sup>28</sup> Marina Pavlovic & Anthony Daimsis, "Arbitration" in John C. Kleefeld, ed, *Dispute Resolution: Readings and case Studies* (Toronto: Emond, 2016) 483-659 at 534.

<sup>29</sup> UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, United Nations, 2012, Part one, Digest of Case Law ("**Digest**"), paragraph 36, page 47.

- [105] Almost by definition in this jurisdiction, like in many jurisdictions, a claimant seeking a referral to arbitration and a stay of its own court proceeding will be doing it on an untimely basis if the words of Section 18.1 of the Act / Article 8(1) of the Model Law – “not later than when submitting his first statement on the substance of the dispute” – are interpreted literally. The requirement is that a claimant make the request for referral before, or at the latest at the same time, as it submits its first substantive statement.
- [106] As a practical matter, any time the claimant seeks a referral, the claimant will already have “submitted” its claim and statement of claim for determination of the disputes by the court which, on a literal reading of the restriction, would constitute its “first statement on the substance of the dispute”.
- [107] Logically, there are unlikely to be circumstances in which a claimant would have any reason to make a request for referral either before or at the same time as submitting its claim and statement of claim seeking to have the disputes determined in court. It would be odd for a claimant to commence court proceedings after or concurrently with filing a request for referral, unless of course to seek interim relief or something else not inconsistent with the desire to have the disputes determined in arbitration. The prospective claimant that is aware of the arbitration agreement and wants to have the disputes determined in arbitration would simply commence an arbitration. (The situation of a claimant that commences court litigation while aware of the arbitration agreement is discussed below in the context of an arbitration agreement becoming “inoperative” by way on an election in favour of court litigation.)
- [108] Given, as discussed above, that by the use of the word “a party” claimants are authorized in the Act / Model Law to make the request for referral to arbitration, the

words “first statement on the substance of the dispute” must be read less literally and less strictly than might at first appear to be the case. The words must be given an interpretation that does not leave the claimant’s right to request a referral an impotent or useless right. Indeed, the pro-arbitration philosophy that underlies the Model Law has led courts to interpret the phrase consistent with that philosophy.<sup>30</sup>

[109] It is not clear in the travaux préparatoires of the Model Law or otherwise why the drafters of the Model Law chose to vary the comparable New York Convention language with the addition of the timing restriction concept (filing of first substantive statement). They may have been seeking to add some earlier certainty to requests for referral for the benefit of both sides. Also, it is possible, but not apparent, that they were concerned with avoiding wasted expense in court litigation that would be stayed later.

[110] To give a meaning to the phrase “first statement on the substance of the dispute” in Section 18(1) of the Act / Article 8(1) of the Model Law that is consistent between the parties, fair to claimant and to defendant, practical and pro-arbitration, it must be that the first substantive statement is something other than the initial document or documents used to commence the court proceeding under the applicable court rules of the jurisdiction (if the applicable rules require more than a simple notification of commencement of a claim in order to commence court proceedings).

[111] In this case, nothing beyond the Claim and Statement of Claim was filed “on the substance of the dispute” before the Claimant became aware of the Arbitration Clause and the Defendant was notified by the Claimant of the Claimant’s desire

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<sup>30</sup> Digest, paragraph 40, pages 47-48 and Footnote 225 citing an American and a Hong Kong court decision.

and intent to arbitrate and of the commencement of the Arbitration. As noted above, it was only after that time that the Amended Statement of Claim was filed. No defence was filed.

- [112] To give meaning to the right of a claimant to request a referral, the phrase “first statement on the substance of the dispute” may be taken to imply at least the concept of the defendant ‘joining issue’ with the claimant on its statement of claim. A defendant joins issue with a claimant when the defendant submits its defence pleading. Then it may be that the claimant’s first statement on the substance of the dispute may be taken to have been submitted (although, as noted below, it may be even later).
- [113] This interpretation of “first substantive statement” in the case of a claimant makes sense of the provision of the Model Law and meets the criteria of being consistent between the parties, fair, practical and pro-arbitration.
- [114] As noted, in this case no defence has been filed. The Defendant has not joined issue with the Claimant and thus it can be said that the process of the Claimant’s first substantive statement being submitted has not been completed. Accordingly, the Claimant is not out of time to request a referral to arbitration.
- [115] This Court does not need to decide for the purposes of this application whether the deadline for a claimant to request a referral may be even later in the process. For a claimant it may be that submitting a first substantive statement connotes a statement of the claimant that joins issue with the defendant, such as a reply to a defence, or an evidentiary submission. Again, while not necessarily an ordinary and natural meaning of a first substantive statement, it is a meaning that also may make sense of the provision and also meet the criteria of being consistent between the parties, fair, practical and pro-arbitration.

- [116] Thus, on that interpretation, a claimant may seek referral to arbitration at least until it joins issue with the defendant on the defendant's first substantive statement, namely its defence, by replying to the defence, or not replying in the permitted time to do so and/or making an evidentiary submission.
- [117] Another question that may arise, but does not arise on this application, is what happens in the case of a party that joins issue with the other party without being aware of the arbitration agreement? To the extent there was some desire by the drafters of the Model Law to cause parties to elect – to make a decision – at a reasonably early time whether to utilize their arbitration agreement, it necessarily implies that there needs to be awareness of the arbitration agreement, at least unless there has been willful blindness to the existence of the arbitration agreement.
- [118] Another aspect of giving meaning to the phrase for both parties may need to be to include the concept that the substantive statement must have been submitted with knowledge of the existence of the arbitration agreement. However, as noted, in this case, the Claimant became aware of the Arbitration Clause, commenced the Arbitration and brought this application before a defence was filed and hence, on the interpretation above, before the Claimant submitted its first substantive statement.
- [119] This Court does not need to decide for the purposes of this application the consequences of a party becoming aware of an arbitration agreement even later in the court litigation process. The outer time restriction for a referral request, if there is one, need not be determined on this application.

- [120] The Court simply notes that there is an obvious difficulty with an interpretation of the time restriction that requires the first substantive statement to be submitted with an awareness of the arbitration agreement. Such an interpretation would leave the matter of a referral to arbitration open-ended, in a worst case scenario until well into the court litigation process. However, there may be ways to deal with that difficulty such as by the party being referred to arbitration unwillingly being able to claim its wasted expenses in the arbitration.
- [121] As an alternative basis for mandatory referral (subject to the “inoperative” discussion below on mandatory referral under the New York Convention but equally applicable to a mandatory referral under the Act (and Model Law)), and to be consistent with the pro-arbitration public policy of this jurisdiction discussed above, a court may decide to interpret the phrase, in the case of either a claimant or a defendant, to include the concept of awareness and election. That is, the party would need to submit a first substantive statement when aware of the arbitration agreement, or with willful blindness to it, and without having indicated to the other party its intention to seek to have the disputes determined in arbitration, in order to become disentitled to request a mandatory referral.
- [122] In the result, in the alternative to the New York Convention basis for a mandatory stay of the Claim discussed and determined below, and in light of the determination below that the Arbitration Clause is not inoperative, the parties must be referred to arbitration in the Arbitration, and the Claim must be stayed (essentially in the manner sought on the application) pursuant to Section 18(1) of the Act.

- [123] However, the New York Convention mandatory referral, discussed below, may be a preferred basis for mandatory referral in the case of a claimant being the applicant as it avoids the first substantive statement timing issue.
- [124] **NEW YORK CONVENTION MANDATORY REFERRAL.** The issue of a first substantive statement need not arise directly as a practical matter in a jurisdiction in which recourse may be had to the New York Convention provision for mandatory referral to arbitration.
- [125] The important threshold issue that arises under both the New York Convention and (as stated above) the Act / Model Law is whether the court finds upon its prima facie review (as discussed below), the arbitration agreement is “null and void, inoperative or incapable of being performed”, and in this case, whether the court finds it is “inoperative” because of an election of the Claimant in favour of court litigation.
- [126] Often court decisions use the entire phrase, rather than identifying which of the three sub-phrases is applicable. As noted above, in this case the allegation of the Defendant is of the Arbitration Clause being “inoperative” only. The Defendant has not asserted that the Arbitration Clause is “null and void” or “incapable of being performed”.
- [127] **STANDARD OF REVIEW.** When a court is requested to refer parties in court proceedings to arbitration and stay the court proceedings based on an arbitration agreement between the parties, the court’s consideration of the question of whether there is an arbitration agreement that applies to the dispute – including whether the arbitration agreement is “null and void, inoperative or incapable of being performed”, and including any question about the scope of the arbitration

agreement – must begin with ascertaining the standard of review to be applied by the court.

[128] The extent of the review by the court upon an application for referral to arbitration has not been settled in this jurisdiction since the Act came into force and the policy of the Territory of the Virgin Islands supporting arbitration became as strong and vibrant as it is now.

[129] The difference among jurisdictions on the standard of review was clearly described and discussed recently by the Singapore Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd* (“**Tomolugen**”)<sup>31</sup> as follows:

29 ... In this regard, the first of two prevailing views is that the court should only undertake a prima facie review of the existence and scope of the arbitration clause. Thus, if the court is satisfied on a prima facie standard that the conditions for the grant of a stay (ie, that there exists an arbitration clause which is valid and which covers the dispute at hand) have been met, it should grant the stay and defer to the arbitral tribunal the determination of whether those conditions have indeed been satisfied. We refer to this as the prima facie approach. This approach preserves the arbitral tribunal’s kompetenz-kompetenz to examine the existence and scope of its jurisdiction afresh and determine it fully.

30 The second prevailing view is that the court should undertake an actual determination of the existence and scope of the arbitration agreement when it hears a stay application under s 6 of the IAA. On this view, the court grants a stay if, and only if, it is satisfied that the requirements for the grant of a stay have in fact been met. We refer to this as the full merits approach. This approach might have the advantage of expedience in that it

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<sup>31</sup> [2015] SGCA 57 (per Sundaresh Menon CJ) at paragraphs 29-30; [2015] 1 SLR 373.

allows the court to pronounce with finality on an arbitral tribunal's jurisdiction in the first instance, instead of deferring the question to the arbitral tribunal, only to face the prospect of the same question coming back to the court in the event of an appeal against the arbitral tribunal's jurisdictional ruling, or if the unsuccessful party in the arbitration resists enforcement of the arbitral award or applies to set it aside on the basis of the arbitral tribunal's lack of jurisdiction. There appears to be a clear split between these two views in both the case authorities across various jurisdictions as well as the literature (see United Nations Commission on International Trade Law, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (2012) at paras 29–32).

[130] The English courts have generally taken the full merits approach, as articulated in Joint Stock Company “Aeroflot Russian Airlines” v Berezovsky<sup>32</sup> which was described in Tomolugen as follows:

48 The English courts generally adopt the full merits approach when hearing stay applications under s 9 of the UK Arbitration Act 1996, subject to a residual discretion to stay the court proceedings under the court's inherent jurisdiction so as to allow the arbitral tribunal to make a determination on its own jurisdiction instead. The English position was summarised by Aikens LJ in Joint Stock Company “Aeroflot Russian Airlines” v Berezovsky [2013] 2 Lloyd's Rep 242 (“Aeroflot v Berezovsky”) at [73] – [79] as follows:

(a) There is a burden on the party asserting: (i) that there is a concluded arbitration agreement; and (ii) that it covers the disputes which are the subject of the court proceedings to prove that that is indeed the case: Ahmad Al-Naimi (T/A Buildmaster Construction Services) v Islamic Press Agency Inc [2000] 1 Lloyd's Rep 522 at 525 per Waller LJ. If that

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<sup>32</sup> [2013] 2 Lloyd's Rep 242 (per Aikens LJ).

party cannot prove either limb (i) or limb (ii), then the court has no jurisdiction to grant a stay under s 9(1) read with s 9(4) of the UK Arbitration Act 1996.

- (b) If the court cannot decide limb (i) or limb (ii) above in a summary fashion on the written evidence, there are two courses open to it: *Birse Construction Ltd v St David Ltd* [1999] BLR 194 at 196 per Judge Humphrey Lloyd QC. First, the court can direct an issue to be tried pursuant to Part 62 of the English Civil Procedure Rules (“the English CPR”), which gives the English courts the express power to “decide [the] question”, amongst others, of whether an arbitration agreement has been concluded (see [49] below); or, second, it can stay the court proceedings under its inherent jurisdiction (but not pursuant to s 9(1) read with s 9(4) of the UK Arbitration Act 1996) for the putative arbitral tribunal to decide the issue of the existence and scope of the arbitration agreement.
- (c) If the court adopts the former course, it must be satisfied of the existence and scope of the arbitration agreement on a balance of probabilities: *Aeroflot v Berezovsky* at [73]. If the court adopts the latter course, it must be satisfied that there is an arguable case that the arbitration clause is valid: *JSC BTA Bank v Ablyazov* [2011] 2 Lloyd’s Rep 129 at [31] – [33] per Christopher Clarke J.
- (d) Once the party applying for a stay has established the existence of an apparently concluded arbitration agreement that covers the matters in dispute in the court proceedings, it is for the party resisting the stay application to “satisf[y]” the court that the arbitration agreement is “null and void”, “inoperative” or “incapable of being performed”. This must be proved on a balance of probabilities: *Aeroflot v Berezovsky* at [77].
- (e) The court can, in theory, order a trial of an issue to determine whether the arbitration agreement was “null and void”, “inoperative” or “incapable of being performed”. But, if the evidence and possible findings going to that issue also impinge on the substantive rights and

obligations of the parties, the court is unlikely to so order unless the trial can be confined to a relatively circumscribed area of investigation: *A v B* [2007] 1 Lloyd's Rep 237 at 261 per Colman J.

[131] The Tomolugen judgment went on to consider the position in Hong Kong and Canada.

[132] In Hong Kong, the position was stated to be as follows:

50. Unlike the English courts, the courts of Hong Kong SAR generally adopt the prima facie approach when hearing applications for a stay of court proceedings in favour of arbitration.

[133] The position in Hong Kong was set out clearly in a recent judgment of Justice Mimmie Chan of the Court of First Instance in the High Court of the Hong Kong Special Administrative Region in which a stay was sought under s. 20 of the Hong Kong Arbitration Ordinance. Justice Chan held as follows:

14 The authorities are clear that the onus on the applicant for stay is only to demonstrate that there is a prima facie case that the parties were bound by an arbitration clause. Unless the point is clear, the Court should not attempt to resolve the issue and the matter should be stayed in favor of arbitration (*PCCW Global Ltd v Interactive Communications Service Ltd* [2007] 1 HKLRD 309). When there is a dispute as to whether there was an arbitration agreement or clause, the onus on the applicant for stay is to prove that there is a good prima facie or plainly arguable case, predicated on cogent, and not dubious or fanciful, evidence that an arbitration clause or agreement existed (*Pacific Crown Engineering Ltd v Hyundai Engineering & Construction Co Ltd* [2003] 3 HKC 659).<sup>33</sup>

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<sup>33</sup> *Bluegold Investment Holdings Ltd v Kwan Chun Fun Calvin* [2016] HKEC 532 at paragraph 14.

[134] In Canada, as set out in the Tomolugen judgment, the position is as articulated in the majority judgment in Supreme Court of Canada in *Union des consommateurs v Dell Computer Corp*<sup>34</sup> which likewise preferred the prima facie approach, with an exception where the dispute as to jurisdiction could be resolved purely as a matter of law (and the challenge to the arbitral tribunal's jurisdiction was not a delay tactic and would not unduly impair the conduct of the arbitral proceedings).<sup>35</sup>

[135] The Singapore Court of Appeal also reviewed the history of the Model Law provision and the writings of several arbitration scholars. The Court's conclusion from the former was as follows:

41 In our judgment, the travaux préparatoires of the Model Law are ultimately somewhat equivocal as to the appropriate approach to take for the purposes of the threshold question, although it seems to us from the historical analysis we have undertaken that, perhaps, the record offers a little more support for the prima facie approach.

[136] The Singapore Court of Appeal concluded in Tomolugen that Singapore should adopt a prima facie standard of review, reasoning as follows:

63 ... We agree that a Singapore court should adopt a prima facie standard of review when hearing a stay application under s 6 of the IAA. In our judgment, a court hearing such a stay application should grant a stay in favour of arbitration if the applicant is able to establish a prima facie case that:

- (a) there is a valid arbitration agreement between the parties to the court proceedings;
- (b) the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and

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<sup>34</sup> [2007] 2 SCR 801.

<sup>35</sup> Tomolugen, paragraphs 52 – 56.

- (c) the arbitration agreement is not null and void, inoperative or incapable of being performed.

64 Once this burden has been discharged by the party applying for a stay, the court should grant a stay and defer the actual determination of the arbitral tribunal's jurisdiction to the tribunal itself. The court will only refuse to grant a stay when it is clear on the evidence placed before it that one or more of the above three requirements have not been satisfied. The arbitral tribunal's determination of its jurisdiction will nonetheless remain subject to overriding court supervision in the form of an appeal under s 10(3) of the IAA against the arbitral tribunal's jurisdictional ruling, or in proceedings for setting aside or refusing enforcement of the award rendered by the arbitral tribunal (see, respectively, s 24 of the IAA and Art 34 of the Model Law, and s 31 of the IAA).

65 We part company with the English position and adopt the prima facie approach for the purposes of the threshold question essentially for four reasons. First, the prima facie approach coheres better with what we consider was envisaged by the drafters of the IAA.

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67 Second, to require the court, on a stay application under s 6 of the IAA, to undertake a full determination of an arbitral tribunal's jurisdiction could significantly hollow the kompetenz-kompetenz principle of its practical effect. The full merits approach has the potential to reduce an arbitral tribunal's kompetenz-kompetenz to a contingency dependent on the strategic choices of the claimant in a putative arbitration. Arbitration Bill: Singapore Parliamentary Debates vol 63 at cols 625–626). We should point out that the strain which the English position puts on these principles of judicial non-intervention and kompetenz-kompetenz has not escaped criticism (see Arbitration Law (Robert Merkin gen ed) (informa, Looseleaf Ed, 15 August 2011 release) at para 8.21, as well as David Joseph

QC, Jurisdiction and Arbitration Agreements and their Enforcement (Sweet & Maxwell, 2nd Ed, 2010) (“Jurisdiction and Arbitration Agreements”) at pp 346–347). This difficulty is avoided if the prima facie approach is adopted. ...

68 Third, we consider that the fear of resource duplication which, it is said, will arise from the prima facie approach is overstated. A robust recognition and enforcement of the kompetenz-kompetenz principle may, on the contrary, deter a plaintiff from commencing proceedings in court in the face of an arbitration agreement. ...

69 Finally, contrary to what the English Court of Appeal suggested in *Aeroflot v Berezovsky* at [73], we do not think the word “satisfied” in s 6(2) of the IAA suggests that the court is required to conduct a full merits review when it is faced with the threshold question.

70 We therefore hold that in considering a stay application under s 6 of the IAA [comparable but not identical in wording to Section 18(1) of the Act / Article 8(1) of the Model Law], the court need only be satisfied to a prima facie standard that the requirements for the grant of a stay under that section have been met before ordering a stay.

[137] As stated above, wherever, whenever and to the extent possible this Court should support the Territory’s public policy in the interpretation and application of the Act and the New York Convention.

[138] The prima facie approach should be taken in this jurisdiction on an application for a referral to arbitration and a stay in favour of arbitration where this Court is requested to “find” whether an arbitration agreement exists (or to determine its

scope). It is not for the Court to get into a full merits review at the referral to arbitration stage.

[139] Having said that, on this application the Court has considered the bases asserted for a stay in the alternative using the full merits approach, in the event it should be determined that it was incorrect to adopt the prima facie approach. Using the full merits approach leads this Court to the same conclusions as set out below using the prima facie approach

[140] **INOPERATIVE.** The means by which an arbitration agreement may become inoperative have not been limited in the jurisprudence internationally.

[141] The jurisprudence establishes that at some point a claimant, by commencing and pursuing court litigation instead of arbitration, or a defendant by defending the court litigation, must be taken to have made an election and lost its right to require that its dispute be determined by way of arbitration. It can be said that at that point the arbitration agreement becomes “inoperative” and a stay should not be granted.

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[142] The submission of a statement on the substance of the dispute, which is a bar under the Act / Model Law, as discussed above, usually would be a consideration in finding whether the arbitration agreement has become inoperative as it may go to whether, assessed objectively, there was an election of court proceedings and a waiver of arbitration by the applicant for the stay.

[143] A role of the court, consistent with the pro-arbitration public policy of this jurisdiction discussed above, is to do its utmost to find that an arbitration

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<sup>36</sup> Downing v Al Tameer Establishment and another (“**Downing**”) [2002] EWCA Civ 721, paragraph 39.

agreement remains operative and to implement the agreement of the parties to determine their disputes in arbitration.

[144] The circumstances in which it is alleged that an arbitration agreement has become inoperative must be carefully scrutinized and narrowly construed, again consistent with the pro-arbitration public policy of this jurisdiction discussed above.

[145] Further, both English law and American law is to the effect that the burden of proof is on the one who alleges such a waiver.<sup>37</sup> “Waiver of arbitration is not a favored finding, and there is a presumption against it.”<sup>38</sup> This approach is consistent with the policy of this jurisdiction (and many others) favouring arbitration.

[146] However, in some circumstances there will have been an election in favour of court litigation.

[147] By taking an unexplained substantive step in the court litigation, or acting inconsistently with the right to arbitrate<sup>39</sup>, with knowledge of the arbitration agreement, or with wilful blindness to it – and without preserving its right to arbitrate such as by informing the other party that it intends to seek arbitration – assessed objectively, a party may be taken to be electing court litigation. When it

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<sup>37</sup> In England, Downing, paragraph 20, following *Hume v A.A. Mutual International Insurance* [1996] LRLR 19 and in the United States, *Perforaciones Marinas Del Golfo, SA Permargo v. Sedco Inc* (5th Circ. 1985), in *Yearbook Commercial Arbitration XII* (1987) (United States no. 70) at 539–545, ¶ 22. See also *Hilti v. Oldach*, 392 F 2d 368, 371 (1st Cir 1968).

<sup>38</sup> See also *Keytrade USA Inc v. MVAin Temouchent, Transport Maritime & Compagnie Nationale Algerienne de Navigations Maritime* (5th Circ. 2005), in *Yearbook Commercial Arbitration XXX* (2005) (United States no. 486) at 777–789.

<sup>39</sup> Judgments cited to the Court in this regard include *Ivax Corp v B Braun of America Inc.* 286 F3d 1309 (especially at 1315) (11<sup>th</sup> Circuit 2002); *Zhang v Shanghai Wool and Jute Chemical Co Ltd* [200] VSCA 113; Downing, paragraph 25; and *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) CAFC 192, all discussed in “Waiver of the Right to Arbitrate by Resort to Litigation in the Context of International Commercial Arbitration”, Peter Gillies, (2207) *Journal of International Commercial Law and Technology*, Vol 2, 221.

has done so, the arbitration agreement becomes “inoperative”, based on the election.

- [148] Taken together, the case law on referral to arbitration points in that direction.
- [149] To deal with situations of court proceedings having been commenced despite an arbitration agreement, various traditional legal principles or theories have been used by various courts in addition to or as a basis for election including waiver, abandonment, repudiation and estoppel. There are some differences among them in their requirements, primarily that some consider prejudice to the opposite party.
- [150] While those traditional legal concepts may be helpful in bringing known legal frameworks to the analysis, and some courts have considered that they should be used as the means of assessing whether the right to arbitrate has been lost, the traditional legal concept are not completely appropriate as they do not come with the bias in favour of survival of the right to arbitrate. That bias in favour of upholding arbitration agreements exists in this jurisdiction, as noted elsewhere in this Judgment.
- [151] If loss of the right to arbitration is found, the result is that the arbitration agreement is “inoperative” (within the meaning of the New York Convention and the Act / Model Law).
- [152] The English Court of Appeal in *Eagle Star Insurance Co Ltd v Yuval Insurance Ltd*. (“**Eagle Star**”)<sup>41</sup>, in the judgment of Lord Denning, Master of the Rolls, was dealing

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<sup>40</sup> See: “Waiver of a Right to Arbitrate by Resort to Litigation in the Context of International Commercial Arbitration”, Peter Gillies and Andrew Dahdal, *Journal of International Commercial Law and Technology*, Vol 2, Issue 2 (2007), pages 221-230.

<sup>41</sup> [1976] LI L Rep 357 (Court of Appeal).

with an application to stay under the English Arbitration Act of 1975 which had (in its Section 1) a “taking a step in the proceeding” test (as in the former law in this jurisdiction) for denial of a mandatory stay of court proceedings in favour of arbitration. The Court held that in principle such a step needs to be one that “evinces an election to abide by the court proceedings and waives any right to ask for arbitration. Like any election, it must be an unequivocal act done with knowledge of the material circumstances.” He relied on Lord Justice Lindley’s statement in *Ives & Barber v Willans* (1894) 2 Chancery 478, at 484: “Before a man can make up his mind as to which of the alternatives he will take, he ought to know what the alternative are, and ought to be in a position to exercise some kind of judgment in the matter.”

[153] Lord Denning also referred to *Parker, Gaines & Co. Ltd. v Turpin*<sup>42</sup> where, in the words of Lord Denning: “The defendant had forgotten or overlooked the arbitration clause in the contract and tried to use that as an excuse. Obviously he would not be allowed to do that.” Lord Denning gave no explanation and cited no authority for that comment and it seems difficult, if not impossible, to reconcile with reasoning quoted above about “an unequivocal act done with knowledge of the material circumstances” and the need to “know what the alternative are” and being “in a position to exercise some kind of judgment in the matter.”

[154] *Patel v Patel*<sup>43</sup>, a judgment of the English Court of Appeal, focused on the importance of there being an election for the right to arbitrate to be lost. Counsel for both parties relied on this judgment.

[155] The judgment dealt with the Arbitration Act, 1996, Section 9, provision comparable (but not identical in wording) to Article 8(1) of the Model Law. The applicant for the

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<sup>42</sup> (1918) 1 King’s Bench 358.

<sup>43</sup> [1999] APP.L.R. 03/24; [1999] 1 BLR 227.

stay, being the defendant in the court proceedings, had taken steps in relation to a default judgment which the judge at first instance considered to be a step in the proceedings. In doing so the defendant dealt with the merits of the claim and asked for leave (which the Court of Appeal said would not have been necessary) to defend the claim and to counterclaim. At the same time as he took steps to deal with the default judgment he swore an affidavit indicating that he wished a stay of the proceedings pursuant to the Arbitration Act, 1996. Lord Woolf, MR, referring to the approach under the former law, cited the second edition of Mustill and Boyd on Commercial Arbitration at page 472 that:

The reported cases are difficult to reconcile, and they give no clear guidance on the nature of a step in the proceedings. It appears, however, that two requirements must be satisfied. First, the conduct of the applicant must be such as to demonstrate an election to abandon the right to stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the Court.

[156] Lord Woolf also remarked that what then “the new Act” was “intended to make the law less technical than it has been hitherto. ... the underlying spirit of the new Arbitration Act is very much in accord with the underlying spirit of the new procedural rules which will be applicable to the civil courts in this jurisdiction.”<sup>44</sup> Lord Woolf returned to the importance of the “spirit of the Act” at the end of his judgment.

[157] Lord Justice Otton cited Professor Robert Merkin’s *Arbitration Law* (2<sup>nd</sup> ed) in the commentary to paragraph 6.19 where he stated that:

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<sup>44</sup> A reference, it clearly appears, to the “Woolf Reforms” that were about to come into force in the English CPR.

The right to apply for a stay will also be lost if the defendant in the judicial proceedings has expressly or impliedly represented that he does not intend to refer the issues in dispute to arbitration. The matter is determined by the usual rules applicable to estoppel, ie. has the defendant unequivocally represented that there will be no reference to arbitration, and has the plaintiff conducted his affairs on the basis that the matter will be determined by the court, in reliance on that representation.

[158] From *Patel v Patel*, the concepts of election, prejudice and the spirit of the new arbitration law are telling and support the approach taken in this Judgment, including its focus on the policy favouring arbitration in this jurisdiction. The spirit and policy favouring arbitration has strengthened considerably since 1999 in this jurisdiction, in England and in much of the world as is evident from many judgments of the highest appellate courts, and other courts, in many jurisdictions.

[159] The Defendant also relied on the obiter decision in the judgment of Justice Bannister of this Court in *Kenneth Kryz v. New World Value Fund Limited & Others* (“**New World**”)<sup>45</sup> (the application having been decided on a different issue) in which the Court refused to stay court proceedings in favour of arbitration. The application for a mandatory stay of the court proceedings was by a defendant and was under the former arbitration regime in this jurisdiction, the Arbitration Ordinance (Cap 6) of 1976, Section 6. The section required that the application be made “at any time after appearance, and before delivering any pleadings or taking any other step in the proceedings.”

[160] In respect of the whether a “step in the proceedings” had been taken, Justice Bannister found that the claimant’s solicitors, in participating in discussions in

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<sup>45</sup> BVIHCM (COM) 2013/0026, 19 April 2013.

relation to listing the matter for hearing, and asking the court for an adjournment of the trial in order that the claimant might be represented by counsel of its choice, had taken a series of steps in the proceedings which constituted a submission, waived the right to rely upon the arbitration clause, and disentitled the applicant to a mandatory stay under the Ordinance.

[161] Justice Bannister accepted and applied the approach of ascertaining whether there was “something which evinces an election to have the dispute resolved in Court and, correspondingly, a waiver of any right to have the dispute referred to arbitration”, citing<sup>46</sup> in support the English Court of Appeal judgment in *Eagle Star*.<sup>47</sup> His prime focus in relation to both election and waiver appears to have been that the party seeking arbitration early on had been:

... asked for its preference as between arbitration on the one hand and [court] proceedings in the BVI on the other. It gave reasoned objections for rejecting arbitration in favour of court proceedings here. The other parties yield to that expressed preference and the present proceedings were commenced in consequence.<sup>48</sup>

[162] In terms of outcome, what distinguishes the situation before Justice Bannister from the situation on this application is that there was not only an awareness by the applicant of the arbitration option but a rejection of it. While he held that steps in the proceedings had been taken which disentitled the applicant to a mandatory stay, the test for a mandatory stay encompassed any type of step.

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<sup>46</sup> *New World*, paragraph 23.

<sup>47</sup> At page 361 (LH column).

<sup>48</sup> *New World*, paragraph 26. See also paragraphs 5, 6 and 24.

[163] A recent judgment of the United States Court of Appeals for the Eleventh Circuit in *Grigsby & Associates, Inc. v. M Securities Investment*<sup>49</sup> is illustrative of and supports the approach taken in this Judgment, including its focus on the policy favouring arbitration in this jurisdiction.

[164] The case involved a plaintiff securities underwriter seeking to pursue arbitration after commencing court proceedings. The Court held that the plaintiff's four prior lawsuits against a co-underwriter did not waive the plaintiff's right to arbitration because the prior suits were insubstantial. The co-underwriter had not been served with three of the suits, and the fourth suit was dismissed for want of prosecution. Moreover, the plaintiff's ten-year delay in demanding arbitration was not a sufficient basis for finding waiver absent other substantial conduct inconsistent with an intent to arbitrate or a showing that the co-underwriter had sustained prejudice.

[165] The Court provided a helpful summary of leading American case law on waiver of a right to arbitration:

A party has waived its right to arbitrate if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right and, in so acting, has in some way prejudiced the other party." *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990) (citation, alteration, and internal quotation marks omitted). "There is no set rule . . . as to what constitutes a waiver . . . of the arbitration agreement." *Burton-Dixie Corp. v. Timothy McCarthy Constr. Co.*, 436 F.2d 405, 408 (5th Cir. 1971).<sup>8</sup> Whether waiver has occurred "depends upon the facts of each case." *Id.* Our precedent provides some guidance, however. We have recognized that a party who "substantially invokes the litigation machinery prior to demanding arbitration may waive its right to arbitrate." *S & H Contractors, Inc.*, 906 F.2d at 1514 (alterations and internal

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<sup>49</sup> No. 13-15208 (11th Cir. Dec. 28, 2015).

quotation marks omitted). Additionally, in determining whether there is prejudice to the other party, “we may consider the length of delay in demanding arbitration and the expense incurred by that party from participating in the litigation process.” *Id.* Notably, though, “the party who argues waiver ‘bears a heavy burden of proof.’” *Krinsk*, 654 F.3d at 1200 n.17 (quoting *Stone v. E.F. Hutton & Co.*, 898 F.2d 1542, 1543 (11th Cir.1990)).

But even were we to conclude that M Securities acted inconsistently with an intent to arbitrate, Grigsby has failed to demonstrate prejudice. Given the extremely limited nature of the proceedings, Grigsby could not have expended more than minimal time and resources in defending M Securities’ lawsuits, and he submitted no evidence of either. In any event, incurring minimal fees in responding to lawsuits is insufficient to establish prejudice supporting a finding of waiver. See *Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 775-76 (10th Cir. 2010); *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 206-07 (4th Cir. 2004) (recognizing that “minimal nature of the discovery” was “insufficient to establish prejudice”); *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 578 (5th Cir. 1991) (holding there was no prejudice in case in which parties conducted “minimal discovery” in litigation).

...

In sum, Grigsby has failed to satisfy his “heavy burden of proof” in demonstrating that M Securities acted so inconsistently with its right to arbitrate as to constitute waiver, or that he was prejudiced as a result of any action or inaction by M Securities. *Krinsk*, 654 F.3d at 1200 n.17 (quoting *Stone*, 898 F.2d at 1543).

[166] In some ways the most difficult situation may arise where the applicant for a stay has become aware of the arbitration agreement only ‘late in the day’, but unlike here, after the substantive court litigation has proceeded some distance.

- [167] In such a case, the applicant had not made an election because it did not know of the arbitration agreement and was not willfully blind to it.
- [168] It may be that in those cases considerations of prejudice may help to determine if the arbitration agreement has become inoperative.
- [169] The answer must be that an arbitration agreement may become inoperative by purely objective means – that is, even if the applicant went a long way down the court litigation path without knowledge of the clause, at some point the court must be able to say that the time to stay has passed, the arbitration agreement is inoperative, and the court proceedings shall continue.
- [170] However, that point must depend on all of the facts and circumstances including quite possibly prejudice, particularly uncompensable prejudice, to the opposite party.
- [171] In this case, prejudice has not been asserted and this Court, in exercising its role in assessing whether the Arbitration Clause has become inoperative, does not see any prejudice for which the Defendant cannot be compensated in costs, namely for wasted costs: costs incurred in relation to the Claim that would not have been incurred if the Arbitration had been commenced initially (interim relief being a possible example but that is not for determination now) (explained further at the end of this Judgment).
- [172] This Court has found that the Claimant was not aware of the Arbitration Clause before mid-February 2015 and should not necessarily have been aware of it: it was not willfully blind. No other basis for inoperability having been submitted or

found by this Court, the Arbitration Clause did not become inoperative, either within the meaning of the New York Convention or the Act / Model Law.

[173] Accordingly, the parties must be referred to arbitration in the Arbitration, and the Claim must be stayed (in the manner sought on the application) pursuant to Article II (2) of the New York Convention.

### **INHERENT JURISDICTION TO STAY (AND CASE MANAGEMENT POWERS)**

[174] Even if a court is not in a position of being required to “refer the parties to arbitration” under the Act or under the New York Convention, it has a discretion to do so under its inherent jurisdiction to stay proceedings before it. Bearing in mind that if the requirements for a mandatory stay are met, either under the Act or the New York Convention, then the question of the Court's inherent jurisdiction to stay (or not) is not triggered. The Court will have done what it was required to do – stay the proceedings pursuant to the requirements of the Act and/or the New York Convention – and that is the end of the matter. The Court has no discretion not to stay if the requirements for a stay under the Act or the New York Convention are met.

[175] In the alternative, the Claimant sought a discretionary stay.

[176] The English Court of Appeal in *Ahmed Al-Naimi (T/A Buildmaster Construction Services) v Islamic Press Agency Incorporated*<sup>50</sup> was considering whether under the relevant English statutory provision<sup>51</sup> the court or the arbitral tribunal should determine the scope of an arbitration clause in relation to a dispute, and hence the jurisdiction of the arbitral tribunal to determine the dispute. After discussing the

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<sup>50</sup> [2000] EWCA Civ 17, pages 5-6.

<sup>51</sup> Arbitration Act 1996, section 9.

proper approach to an application under the statutory provision, and the requirements upon which a court would need to be satisfied to grant a stay, Lord Justice Waller pointed out that apart from the statutory jurisdiction to grant a stay, “it must not be overlooked that the court has an inherent power to stay proceedings.” Then after referring to the points on which a court would need to be satisfied to grant a stay under the statutory provision, he continued:

But a stay under the inherent jurisdiction may in fact be sensible in a situation where the court cannot be sure of those matters [the matters on which it was required to be satisfied under the statutory provision] but can see that good sense and litigation management makes it desirable for an arbitrator to consider the whole matter first.

[177] While the statements of Lord Waller about the inherent jurisdiction may be obiter because the Court concluded that a statutory stay was correct, there seems to be little question but that his statement about inherent jurisdiction is supported by other authorities and must be correct.<sup>52</sup>

[178] The Applicant also submitted that in the exercise of its inherent jurisdiction, the Court can have regard to its case management powers under CPR Parts 26.1(2)(q)<sup>53</sup> and 25.1(h)<sup>54</sup> to stay proceedings in favour of “alternative dispute

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<sup>52</sup> Reichhold Norway ASA v Goldman Sachs International [1999] EWCA Civ 1703 (although the Court stated that such stays should only be granted “in rare and compelling circumstances”); Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd. [1993] AC 334; Lombard North Central plc and another v GATX Corporation [2012] EWHC 1067 (Comm); Stemcor UK Ltd v Global Steel Holdings Ltd and another [2015] EWHC 363 (Comm); Birse Construction Ltd v St David Ltd [1999] BLR 194.

<sup>53</sup> Court’s general powers of management: ... “the court may – stay the whole or part of any proceedings generally or until a specified date or event”.

<sup>54</sup> “The court must further the overriding objective by actively managing cases, this may include – (h) encouraging the parties to use any appropriate form of dispute resolution including, in particular, mediation, if the court considers it appropriate and facilitating the use of such procedures.”

resolution”, relying on *Chok Yick Interior Design & Engineering Co Ltd v Fortune World Enterprises Limited (“Chok Yick”)*.<sup>55</sup>

[179] In *Chok Yick*, the Hong Kong court relied on its general power in the High Court Ordinance and found further support in its general powers of case management which gave it a power to stay the whole or part of any proceeding.

[180] The context was a plaintiff applying to stay its own court proceedings after the defendant had defended and counterclaimed, and the plaintiff had filed a reply and defence to counterclaim. The proceeding had been ongoing for more than 18 months. It was not argued whether a plaintiff could apply for a stay under Article 8 of the Model Law (and section 6 of the Hong Kong Arbitration Ordinance), and accordingly the effect of those pleadings on the Model Law and Ordinance provisions was not argued either. However, the court held that the Model Law and Ordinance powers to stay did not reduce the court’s inherent jurisdiction to stay<sup>56</sup>, and that those substantive steps were not a bar to the inherent jurisdiction or the case management power. The court seemed focused on the nature of the dispute, being a “nuts and bolts” construction dispute, being more appropriate for an experienced building arbitration than for litigation in the High Court.

[181] The Defendant submitted that it is unlikely the case management powers were intended to include arbitration. While the subrule says “in particular, mediation”, it does not actually speak of “alternative dispute resolution” but “any appropriate form of dispute resolution”. Particularly where the stay (a temporary stay) is to

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<sup>55</sup> HCA 2394/2008 and 280/2009; [2010] HKEC 146; <http://uk.practicallaw.comtopicD-016-9022>.

<sup>56</sup> The Court relied on *Channel Tunnel Group Ltd & Anor v Balfour Beatty Construction* [1993] AC 334. Also see *Racecourse Betting Control Board v Secretary for Air* [1944] Ch. 114 where plaintiff was restrained from bringing litigation that would breach the underlying arbitration agreement, where Mackinnon L.J. stated it was “unfortunate that the power and duty of the court to stay the action was said to be under ... the Arbitration Act of 1889. In truth, that power and duty arose under a wider general principle, namely, that the court makes people abide by their contracts.”

enable an arbitral tribunal to rule on a jurisdictional issue, the Court could be exercising a case management power by granting a stay. It is less clear whether it would be doing so in granting a permanent stay.

[182] The use of the case management powers to grant a stay in an arbitration context also was referred to but not used in *Classic Maritime Inc. v Lion Diversified Holdings Berhad and Limbungan Makmur SDN BHDF* [2009] EWHC 1142 (Comm).

[183] For the purposes of this application, given the other bases upon which a stay can be granted, there is no need to rely on the case management powers of this Court either directly or as support to the inherent jurisdiction to stay. However this Court would do so, at least for the grant of a temporary stay, if the other grounds supporting a mandatory and a discretionary stay did not exist.

[184] It seems clear that the Court's inherent power to stay, which is a discretionary power, is not ousted by the mandatory stay provisions of the Act / Model Law and the New York Convention. Given the timing restriction in the Act / Model Law and the lack of certainty on whether a claimant may apply (even though this Court is of the view that a claimant may apply, as explained in this Judgment), the inherent stay power is a valuable tool to aid in the implementation of the public policy favouring arbitration, where staying in favour of arbitration is desirable but not possible under the other provision (or even if possible, for the avoidance or reduction of doubt so that the prospects of litigation over the referral are reduced).

[185] In exercising its inherent jurisdiction on a claimant's application, the court's discretion can and should take account of all relevant circumstances including (but not necessarily limited to) the following eight considerations:

1. the reason there was not a resort to arbitration initially,
2. the stage of the court proceedings and the steps taken in those proceedings by the applicant for the stay,
3. whether the arbitration encompasses or can encompass all of the disputes in the court litigation,
4. any other actions or omissions of the applicant for a stay that would indicate a waiver of arbitration or an election to resolve the disputes in court litigation,
5. the reasons, proper or improper, that the applicant wants its claims determined in arbitration,
6. the public policy favouring arbitration,
7. any prejudice to the party opposing the stay and whether it may be compensated for in costs, and
8. any conduct of the party opposing a stay that has contributed to the applicant for a stay resorting to court proceedings or not knowing of the arbitration agreement.

[186] As noted above, this Court should do its utmost to give effect to an arbitration clause. That is the public policy of the Territory of the Virgin Islands, also discussed above. Doing so is consistent with international jurisprudence favouring the enforcement of arbitration agreements.<sup>57</sup> As an important international financial centre, and to facilitate international finance and commerce, this jurisdiction's approach to arbitration, in this case international commercial arbitration, should be and is consistent with the approach of the most advanced pro-arbitration jurisdictions in the world.

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<sup>57</sup> Digest, paragraph 6, page 34. See also: *Burlington Norther Railroad Co. v Canadian National Railway Co.* [1997] 1 SCR 5, 1997 CanLII 395 (SCC).

## SHOULD A DISCRETIONARY STAY OF THE CLAIM BE GRANTED?

- [187] Having regard to the eight factors listed above, and in all of the circumstances, should this Court exercise its discretion to stay this Claim as sought in the alternative?
- [188] First, it is clear, as found in this Judgment, that there was no resort to arbitration initially because the Claimant was unaware of the Arbitration Clause until about mid-February 2016, and was unaware for reasons that this Court considers to be understandable. This first factor militates in favour of the grant of a stay.
- [189] Second, the court proceedings are at an early stage in that there has not been a defence, only various procedural and interim applications described earlier in this Judgment. The steps taken by the Claimant in these proceedings were to either bring or respond to those proceedings before it became aware of the Arbitration Clause, and then before taking other steps, it commenced the Arbitration and put the Defendant on notice of its desire to arbitrate. This second factor militates in favour of the grant of a stay.
- [190] Third, the Arbitration encompasses or can encompass all of the Disputes. This third factor militates in favour of the grant of a stay.
- [191] Fourth, there were no other actions or omissions of the Claimant that indicate a waiver of arbitration or an election to resolve the Disputes in court litigation, as outlined in this Judgment and summarized in the summary of the second factor for a discretionary stay, above. This fourth factor militates in favour of the grant of a stay.

[192] Fifth, the reason the Claimant wants its claims determined in arbitration is a concern that a judgment on the Claim obtained in the face of the Arbitration Clause would not be recognized in other jurisdictions. The application to refer to arbitration and stay the Claim was not a tactical maneuver by the Claimant.

[193] Sixth, as described earlier in this Judgment, the public policy of this jurisdiction strongly favours arbitration. This fifth factor militates in favour of the grant of a stay.

[194] Seventh, there has been no assertion by the Defendant and this Court cannot see that there will be any prejudice to the Defendant that cannot be compensated for in costs. The Claimant submitted that if the stay sought is granted,

... no prejudice will occur to the Defendant. The Defendant is yet to file its Defence to the Claim, preferring to rely on its attempt to get reverse summary judgment/strike out the claim. The grant of a stay means that the Defendant will not need to file this Defence to this claim in the BVI proceedings pending the decision of the arbitrator, if the arbitrator accepts jurisdiction, at all as the Claimant will not pursue the BVI proceedings in that event but seek a permanent stay.<sup>58</sup>

As set out above, the Defendant has not submitted any evidence on this application, and in particular no evidence of prejudice, nor has it submitted it will suffer prejudice. While objectively it can be said that the Defendant will have the Claim “hanging over its head”, there is nothing that will be hanging over its head beyond what is claimed in both the Claim and the Arbitration. Once the issues are ultimately determined on their merits, the matter will be over. This seventh factor militates in favour of the grant of a stay.

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<sup>58</sup> Claimants Submissions 1, paragraph 34.

[195] Eighth, as discussed above, this Court has not found any conduct of the Defendant that has contributed to the Claimant resorting to court proceedings or not knowing of the Arbitration Clause. This eighth factor does not provide support for the grant of a stay nor does it militate against the grant of a stay. It is a neutral factor in this case.

[196] Accordingly, in the alternative this Court would exercise its discretion to stay this Claim (in the manner sought on the application) to allow the parties to arbitrate the arbitral tribunal's jurisdiction.

#### **CLAIM FOR WASTED EXPENSES IF STAY BECOMES PERMANENT**

[197] In the event the stay granted on this application becomes permanent because jurisdiction is found in the Arbitration, the Defendant may decide to seek in the Arbitration to have the Claimant compensate it for wasted expenses: expenses incurred in relation to the Claim that would not have been incurred if the Arbitration had been commenced initially. It is more consistent with the respective roles of this Court and the arbitral tribunal for this issue to be left to be determined by the arbitral tribunal, if raised before it. Nothing in this Judgment is intended to preclude such a claim from being brought.

#### **FOOTNOTE ON SIAC JURISDICTIONAL DETERMINATION**

[198] Subsequent to the hearing of the Application the Claimant, to update the Court (which is appreciated), submitted the Affidavit of James Tidmarsh, sworn 11 June 2015, and Exhibit JT-1. Mr. Tidmarsh is the Principal of Tidmarsh and Associates,

a law firm based in Paris, and a solicitor of this Court, as well as a solicitor of the Senior Courts in England and Wales, and a New York Attorney. His firm is counsel to the Claimant in the Arbitration on the instructions of the Receiver Manager.

[199] Mr. Tidmarsh's affidavit states (in paragraph 6) as follows:

6. In a decision on 10 June 2015, SIAC rejected an objection by [the Defendant] in relation to arbitral jurisdiction, and denied a request by [the Defendant] that the [Arbitration] should be terminated.

[200] The affidavit quotes from the 10 June 2015 decision (in paragraph 16), and exhibits same, as follows:

Please be informed that the Registrar has determined, pursuant to Rule 25.1 of the SIAC Rules, that the [Defendant's] objection to jurisdiction should not be referred to the Court of Arbitration. The [Defendant's] request for termination of these proceedings is therefore denied.

[201] While the affidavit accurately quoted the email from the SIAC Secretariat, unfortunately it did not make as clear as it might have done that the decision was not a determination of the SIAC arbitral tribunal's jurisdiction but rather a determination of the Registrar of SIAC not to refer to the SIAC Court of Arbitration the question of whether the SIAC Court is *prima facie* satisfied that a valid arbitration agreement under the SIAC Rules may exist, and to terminate the Arbitration if it is not so satisfied. The SIAC Rules expressly provide that any decision by the Registrar or the SIAC Court is without prejudice to the power of the arbitral tribunal to rule on its own jurisdiction.

[202] SIAC Rule 25.1 – 25.4 reads as follows:

Rule 25: Jurisdiction of the Tribunal

25.  
1 If a party objects to the existence or validity of the arbitration agreement or to the competence of SIAC to administer an arbitration before the Tribunal is appointed, the Registrar shall determine if reference of such an objection is to be made to the Court. If the Registrar so determines, the Court shall decide if it is *prima facie* satisfied that a valid arbitration agreement under the Rules may exist. The proceedings shall be terminated if the Court is not so satisfied. Any decision by the Registrar or the Court is without prejudice to the power of the Tribunal to rule on its own jurisdiction.
25.  
2 The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, termination or validity of the arbitration agreement. For that purpose, an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration agreement
25.  
3 A plea that the Tribunal does not have jurisdiction shall be raised not later than in the Statement of Defence or in a Statement of Defence to a Counterclaim. A plea that the Tribunal is exceeding the scope of its jurisdiction shall be raised promptly after the Tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its jurisdiction. In either case the Tribunal may nevertheless admit a late plea

under this Rule if it considers the delay justified. A party is not precluded from raising such a plea by the fact that he has nominated, or participated in the nomination of, an arbitrator.

25. The Tribunal may rule on a plea referred to in  
4 Rule 25.3 either as a preliminary question or in an award on the merits.

[203] Thus, as specified in Rule 25.2, the arbitral tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence, termination or validity of the arbitration agreement. Also, it enshrines the “separability” doctrine (discussed in a Footnote 2 to this Judgment) in the SIAC Rules, that “an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.”

[204] To be clear, the Court is not intending to be critical of Mr. Tidmarsh, the Claimant’s BVI legal practitioners or the Receiver and Manager but rather just wishes to highlight the importance of being particularly clear when describing to a court proceedings or decisions in other fora so that the court appreciates what is going on and/or what occurred or was decided.

## **ORDERS**

[205] Accordingly, for the reasons set about above in this Judgment, this Court orders as follows:

1. The application is granted.

2. The parties are referred to arbitrate the issue of the arbitral tribunal's jurisdiction in the Arbitration and subject to paragraph 4 below, this proceeding is stayed pending a determination by the arbitral tribunal on the issue of jurisdiction.
3. If the arbitral tribunal determines it has jurisdiction to determine the Disputes, and subject to paragraph 5 below, the temporary stay pursuant to paragraph 2 above shall automatically become a permanent stay 30 calendar days from the date of the arbitral tribunal's award on jurisdiction, subject to any application being brought to this Court by either party within that period for any further order or orders, and in the event no such application is filed within that period, at the expiration of that period.
4. If the arbitral tribunal determines it does not have jurisdiction to determine the Disputes, or part of them, and subject to paragraph 5 below, the temporary stay pursuant to paragraph 2 above shall automatically be lifted so that the Disputes, or the part of the Disputes not to be determined in the Arbitration, may be determined in this Claim, subject to any outstanding orders of this Court that would affect the lifting of the temporary stay or the continuation of the Claim.
5. The temporary stay and any permanent stay shall not affect any outstanding orders made in this proceeding including any order for costs, or any assessment of costs, and any order granting interim relief that is at the time outstanding in this jurisdiction, nor shall it affect the ability of either party to seek any ancillary or other relief from this Court in relation to the Arbitration that may be available in this jurisdiction pursuant to the Act or otherwise and not otherwise precluded.

6. The question of whether there should be any order(s) under sections 15 and/or 16 of the Arbitration Act, 2013 regarding publication, and the award of the cost of this application are reserved pending agreement of or further submissions by the parties upon the handing down of this Judgment.
7. For greater certainty, nothing in this Order is intended to preclude the Defendant, in the event the stay granted above becomes permanent because jurisdiction is found in the Arbitration, from seek in the Arbitration to have the Claimant compensate it for wasted expenses: expenses incurred in relation to the Claim that would not have been incurred if the Arbitration had been commenced initially.

Justice Barry Leon  
**Commercial Court Judge**  
8 April 2016