International Research Corp PLC
v
Lufthansa Systems Asia Pacific Pte Ltd and another

[2012] SGHC 226

High Court — Originating Summons No 636 of 2012
Chan Seng Onn J
5 September 2012

Arbitration — Arbitral Tribunal — Jurisdiction

12 November 2012 Judgment reserved.

Chan Seng Onn J:

Introduction

1 This case concerns the challenge of an arbitral tribunal's ("the Tribunal") ruling on jurisdiction pursuant to section 10 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"). The gist of the challenge is whether an arbitration clause contained in one contract between two parties binds a third party who subsequently enters into a supplemental agreement with the original two parties.

Background

Parties

2 The plaintiff, International Research Corporation Public Company Ltd ("IRCP"), is a company engaged primarily in the business of providing information and communication technology products and services. The first defendant, Lufthansa Systems Asia Pacific Pte Ltd ("Lufthansa"), is in the business of providing information technology services to companies in the aviation industry. The second defendant, Datamat Public Company Ltd ("Datamat"), provides information and computer technology services, including the distribution of hardware and software maintenance services.

3 Lufthansa is the claimant and IRCP and Datamat are the respondents in SIAC Arb. No. 061 of 2010 ("the arbitration proceedings") which was instituted by Lufthansa on 13 May 2010.

Facts

The Cooperation Agreement

4 The dispute in the arbitration proceedings pertains to payments due to Lufthansa under the Cooperation Agreement for Application and Services Implementation SAP R/3 IS A&D Contract No. LSY ASPAC 1ZW-B ("the Cooperation Agreement") entered into between Lufthansa and Datamat on or about 11 March 2005. Under the Cooperation Agreement, Lufthansa agreed to supply, deliver and commission a new Maintenance, Repair and Overhaul System ("MRO System"). The MRO System was a component of the Electronic Data Protection System ("the EDP System") which Datamat had agreed to provide to Thai Airways International Public Company Ltd ("Thai

Airways") under an agreement between Datamat and Thai Airways entered into earlier on 12 January 2005 ("the EDP System Agreement").

IRCP's initial involvement with Datamat

5 On or about 14 March 2005, Datamat entered into a Sale and Purchase Agreement ("the S&P Agreement") with IRCP under which IRCP had three main obligations. First, IRCP would provide a bankers' guarantee in the name of Datamat in order for Datamat to comply with its obligations under the EDP System Agreement. Second, IRCP would also supply and deliver various hardware and software products for the EDP System. Third, IRCP would pay Lufthansa for the goods and services provided by Lufthansa under the Cooperation Agreement. Datamat assigned its right to receive payment from Thai Airways to the Siam Commercial Bank Public Company Ltd ("SCB"), with which Datamat also opened an account for the said payments to be deposited.

Supplemental Agreements No. 1 and 2

6 Datamat subsequently ran into financial difficulties and was unable to meet its payment obligations to Lufthansa. In April 2005, Lufthansa informed Datamat that it would cease work unless Datamat could secure another party to pay the outstanding as well as future invoices. On 8 August 2005, Lufthansa, Datamat and IRCP entered into Supplemental Agreement No. 1, though its effective date was backdated to 2 May 2005. Under this agreement, Datamat was obliged to transfer to IRCP monies received from Thai Airways. Upon receiving these monies, IRCP would pay Lufthansa for the works and services rendered by Lufthansa under the Cooperation Agreement.

7 Supplemental Agreement No. 2 was entered into on 3 May 2006. The reasons for the three parties (*ie* Lufthansa, Datamat and IRCP) entering into Supplemental Agreement No. 2 are disputed. Nevertheless, it is common ground that under Supplemental Agreement No. 2, IRCP would pay Lufthansa for the sums payable by Datamat under the Cooperation Agreement directly from IRCP's bank account with SCB. IRCP would only disburse the payments to Lufthansa after payments by Thai Airways to Datamat were received by Datamat and transferred to IRCP's SCB account. This arrangement was effected by way of a Payment Instruction and Authorisation by IRCP to SCB which was executed on the same day as Supplemental Agreement No. 2.

Clauses 37.2 and 37.3 of the Cooperation Agreement

8 The Cooperation Agreement contains a multi-tiered dispute resolution mechanism ("the Dispute Resolution Mechanism"). The first part of the Dispute Resolution Mechanism is spelt out in cl 37.2:

> Any dispute between the Parties relating to or in connection with this Cooperation Agreement or a Statement of Works shall be referred:
>
> > 37.2.1 first, to a committee consisting of the Parties' Contact Persons or their appointed designates for their review and opinion; and (if the matter remains unresolved);
> >
> > 37.2.2 second, to a committee consisting of Datamat's designee and Lufthansa Systems' Director Customer Relations; and (if the matter remains unresolved);
> >
> > 37.2.3 third, to a committee consisting of Datamat's designee and Lufthansa Systems' Managing Director for resolution by them, and (if the matter remains unresolved);
> >
> > 37.2.4 fourth, the dispute may be referred to arbitration as specified in Clause 36.3 [*sic*] hereto.

9 I pause to note that the reference to "clause 36.3" in cl 37.2.4 was a typographical error and actually referred to the arbitration clause in cl 37.3, the second part of the Dispute Resolution Mechanism. Clause 37.3 reads as follows:

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

The arbitration proceedings

10 Between 2 January 2008 and 17 April 2008, Lufthansa sent letters to IRCP demanding payment of outstanding sums from IRCP ("the Payment Dispute"). IRCP refused payment on several grounds, alleging that: (a) Lufthansa had demanded payment for invoices that were not included in the services specified by the S&P Agreement which IRCP was liable to pay for; (b) Lufthansa had failed to complete certain works and services under the Cooperation Agreement which resulted in Thai Airways and Datamat withholding the issuance of the Certificate of Acceptance, a precondition to the payment of invoices; and (c) Thai Airways had not remitted any payment in respect of the invoices which Lufthansa was seeking payment. These grounds were communicated to Lufthansa in a letter dated 8 October 2008. Numerous meetings were also held from March 2006 to July 2009 to address the Payment Dispute. Nothing happened till 2010.

11 On 24 February 2010, Lufthansa informed Datamat and IRCP that it was terminating the Cooperation Agreement and Supplemental Agreements No. 1 and 2 (collectively "the Supplemental Agreements"). On 13 May 2010, Lufthansa filed its Notice of Arbitration with the Singapore International Arbitration Centre (SIAC), pursuant to cl 37.3 of the Cooperation Agreement. In its Response to Arbitration dated 14 June 2010, IRCP objected to being joined to the arbitration on the ground that an arbitral tribunal would not have jurisdiction to resolve the Payment Dispute. IRCP argued that it was not a party to the arbitration agreement which was contained in the Cooperation Agreement and even if it were a party, Lufthansa had failed to comply with the preconditions for the commencement of arbitration proceedings contained in cl 37.2. Notwithstanding these objections, Lufthansa and IRCP each proceeded to appoint an arbitrator pursuant to cl 37.3, and the two party-appointed arbitrators in turn appointed a third arbitrator. Datamat informed SIAC that it was undergoing a business rehabilitation petition in Thailand, and it did not participate in the arbitration proceedings.

12 The Tribunal dismissed IRCP's objections on jurisdiction. In its decision dated 1 June 2012, the Tribunal held that the Cooperation Agreement and the Supplemental Agreements were to be treated as one composite agreement between Lufthansa, Datamat and IRCP. Accordingly, the arbitration agreement found in cl 37.3 applied to the Supplemental Agreements, which IRCP was indisputably a party to. On whether the preconditions to the commencement of the arbitration proceedings had been fulfilled, the Tribunal held that cl 37.2 was too uncertain to be enforceable. There were therefore no preconditions which barred the commencement of the arbitration proceedings.

Present proceedings

13 Dissatisfied with the Tribunal's ruling, IRCP commenced the present proceedings Originating Summons Number 636 of 2012 ("OS 636/2012") on 29 June 2012 seeking, *inter alia*:

(a) a declaration that the Tribunal does not have jurisdiction to determine the dispute between Lufthansa and IRCP; and

(b) an order that the Tribunal's ruling on jurisdiction be set aside.

14 It is not disputed that IRCP is entitled to challenge the Tribunal's decision on jurisdiction pursuant to Art 16(3) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") read with s 10 of the IAA.

Plaintiff's case

15 IRCP canvassed the same line of arguments which it had made before the Tribunal, namely, that it was not a party to the Cooperation Agreement, and even if it were, the preconditions to the commencement of the arbitration proceedings were not satisfied.

16 On the first point, IRCP argued that the Cooperation Agreement and the Supplemental Agreements could not be read together as one composite agreement as the parties to the Cooperation Agreement were not the same as the parties to the subsequent Supplemental Agreements. Instead, IRCP characterised the present case as a "two-contract case" as it involved multiple agreements with different parties. Unlike the "single contract case", there must be an express reference in the subsequent contract to the arbitration agreement

in the first contract for the arbitration agreement to be binding in a "two-contract case". Emphasis was placed by IRCP on the fact that the parties never discussed the incorporation of the arbitration agreement found in the Cooperation Agreement when entering into the Supplemental Agreements.

17 On the second point, IRCP contended that the mediation procedure set out in cl 37.2 is clear and unambiguous, and is expressed in unqualified and mandatory terms. It states that before any dispute may be referred to arbitration, it must first be referred for resolution to a committee consisting of the Parties' Contact Persons or their appointed designates for their review and opinion, and if the matter is unresolved, to a committee consisting of Datamat's designee and Lufthansa Systems' Director Customer Relations. If the matter still remains unresolved, the dispute must be referred to a third committee consisting of Datamat's designee and Lufthansa Systems' Managing Director. IRCP alleged that as the dispute was never put before any of these committees for mediation, the preconditions to the commencement of the arbitration proceedings were not satisfied. The Tribunal therefore lacked jurisdiction to resolve the dispute.

Defendant's case

18 Lufthansa put up a straightforward case: IRCP is bound by the arbitration agreement as Lufthansa, Datamat and IRCP had intended the Supplemental Agreements to be an extension of the Cooperation Agreement. This intention is manifested in the preamble and cl 6 of Supplemental Agreement No. 1, and cll 1 and 8 of Supplemental Agreement No. 2. Lufthansa also submitted that the Supplemental Agreements cannot be read as standalone agreements. They would only make sense when read together with

the Cooperation Agreement. In short, Lufthansa adopted the finding of the Tribunal that the three agreements were in fact one composite agreement.

19 On whether the preconditions to the commencement of the arbitration proceedings had been satisfied, Lufthansa's primary case was that cl 37.2 was too vague and imprecise to be enforceable. The main thrust of its attack on cl 37.2 was that no particular procedure was prescribed for the parties to follow. Consequently, it was not possible to determine whether the preconditions were fulfilled.

20 Lufthansa's secondary case was that even if cl 37.2 was sufficiently certain and thus enforceable, Lufthansa had complied, in substance, with the conditions in cl 37.2. It pointed to the fact that there had been at least 24 meetings involving the three parties from March 2006 to July 2009 in an attempt to resolve the various disputes. These meetings involved various management personnel, including some from senior management. There had also been extensive correspondence between the parties on the disputed issues. Hence, the substance of the mediation procedure as envisaged in cl 37.2 had already taken place. Further negotiations would likely be futile and the Tribunal was right to have assumed jurisdiction.

Issues

21 The two main issues raised by the parties are:

(a) whether IRCP is bound by the Dispute Resolution Mechanism, in particular the arbitration agreement in cl 37.3; and

(b) if IRCP is bound by the Dispute Resolution Mechanism, whether the preconditions in cl 37.2 for the commencement of arbitration proceedings have been satisfied.

Decision

Whether IRCP is bound by the arbitration agreement

22 Whether IRCP is bound by the arbitration agreement in the Dispute Resolution Mechanism depends entirely on the parties' intentions, which are to be objectively ascertained.

Incorporation of Clause 37.3 into the Supplemental Agreements

23 Lufthansa's case is that the Supplemental Agreements should be construed as extensions of the Cooperation Agreement as this comports with the parties' intentions. Conversely, IRCP's position is that the Supplemental Agreements are separate and distinct from the Cooperation Agreement. There is, however, one common ground. Lufthansa and IRCP both accept that *if* the agreements are distinct and separate, clear and express words are required to incorporate cl 37.3 into the Supplemental Agreements. This follows from the established rule that clear and express reference to the arbitration agreement is required for its incorporation in a "two-contract case": *Star-Trans Far East Pte Ltd v Norske-Tech Ltd and others* [1996] 2 SLR(R) 196 ("*Star-Trans*"); *Sea Trade Maritime Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd (The "Athena") (No 2)* [2007] 1 Lloyd's Rep 280 ("*The Athena (No 2)*") at [81]; *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm) at [49].

24 The facts of *Star-Trans* are instructive. Star-Trans, a freight forwarder, had entered into a contract with Norske-Tech and Speditor. The purpose of the contract was for Star-Trans and Speditor to organise ocean carriage of plant and equipment from various parts of the world to a proposed construction site in Riau, Indonesia for Norse-Tech who had undertaken the construction project. There was an arbitration clause in this contract. Separately, another company, PT Riau, had furnished a performance guarantee to secure Norske-Tech's performance of its obligations under the contract. The performance guarantee bore the signatures of Star-Trans, Norske-Tech and PT Riau. Disputes later arose between Star-Trans, Norske-Tech and PT Riau, and Star-Trans commenced court proceedings. Norske-Tech and PT Riau applied for a stay of the court proceedings on the ground that Star-Trans had agreed to submit disputes between the parties to arbitration.

25 An issue which the court had to address was whether PT Riau was a party to the contract as a consequence of the performance guarantee. Clause 3 of the performance guarantee provided *inter alia* that "all the rights of Norske-Tech under the contract *may* be exercised by PT Riau ... and the rights of Norske-Tech under the contract *may at any time be assigned to PT Riau* [emphasis added by Star-Trans]". The Court of Appeal held (at [21]–[22]) that cl 3 was insufficient to bring PT Riau in as an additional party to the contract as cl 3 did not oblige PT Riau to assume all of Norse-Tech's liabilities; PT Riau had the liberty to choose which obligation it wished to discharge. There was no novation or express assignment of Norske-Tech's rights to PT Riau. The court further noted that Speditor never signed the performance guarantee and thus never agreed to PT Riau being added as a party to the contract. Unless PT Riau was a party to the contract, it could not invoke the arbitration agreement.

26 An alternative argument raised by Norske-Tech and PT Riau was that the arbitration agreement in the contract had been incorporated into the performance guarantee by cl 3. The Court of Appeal held (at [34]–[35]) that although the boundaries between the contract and the performance guarantee were not entirely clear, the performance guarantee was still a separate and distinct contractual undertaking *vis-à-vis* the contract. Hence, the use of general words such as "all rights" was not sufficiently clear to permit the incorporation of the arbitration clause by reference into the performance guarantee.

27 The views of Mr Robert Merkin in *Arbitration Law* (Lloyd's, 1991) at para 4.22, which were cited by the Court of Appeal in *Star-Trans*, are apposite:

> The approach taken by the courts is that the arbitration clause in the charterparty between owner and charterer *is not, in the absence of clear wording, to be incorporated* into the contract evidenced by the bill of lading as between owner and consignee. The rule is probably not confined to bills of lading cases, and it has been held in other contexts that *an arbitration clause in a contract between A and B is not to be incorporated by reference into a contract between B and C unless clear words of incorporation are used.*
>
> [emphasis added]

28 The policy behind requiring clear and express words of incorporation for an arbitration agreement was summarised by Sir John Megaw in *Aughton Ltd v MF Kent Services Ltd* (1991) 57 BLR 1 at 31–32:

> There are, in my opinion, three important inter-related factors peculiar to arbitration agreements. First, an arbitration agreement may preclude the parties to it from bringing a dispute before a court of law …
>
> Secondly, it has been laid down by statute (Arbitration Act 1950 s.32 as re-enacted in section 7(1)(e) of the Arbitration

> Act 1979) that an arbitration agreement has to be "a written agreement" …
>
> Thirdly, the status of a so-called "arbitration clause" included in a contract of any nature is different from other types of clauses because it constitutes a "self-contained contract collateral or ancillary to" the substantive contract.

29 Thus, the approach towards incorporating an arbitration clause in one contract into another is extremely strict. In fact, the court in *L&M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd* [2000] 2 SLR(R) 852 at [18] held that for an arbitration agreement in one contract to be incorporated into another, it must be brought to the attention of the other contracting party with a "red hand pointing to it", borrowing the phrase used by Lord Denning in *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163. In this regard, I note that Lufthansa has not advanced any argument along the lines that clear words of incorporation have been used in the Supplemental Agreements. Looking at the Supplemental Agreements, it is evident that there are no clear words which expressly refer to cl 37.3.

30 The only clause in Supplemental Agreement No. 1 which may be construed as a reference to cl 37.3 is cl 6. Clause 6 provides:

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

31 A similar clause in Supplemental Agreement No. 2, cl 8, states:

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

32 As the Court of Appeal in *Star-Trans* held, a general reference to "all rights" is insufficient to incorporate an arbitration agreement found in a separate contract. There are no clear words referring to cl 37.3. If I were to apply the strict rule that clear words are required to incorporate an arbitration

agreement (the "strict rule"), it must follow that cl 37.3 was not incorporated into the Supplemental Agreements.

Composite, or separate and distinct agreements

33 The question, however, is whether the strict rule is applicable in every circumstance, particularly in the present case. Lufthansa's case rests entirely on the proposition that because the Supplemental Agreements "have been made part of the Cooperation Agreement", cl 37.3 is therefore applicable to IRCP. Lufthansa argues that the parties intended the Cooperation Agreement and the Supplemental Agreements to be read as one composite agreement. In other words, the agreement between Lufthansa, Datamat and IRCP comprised the Cooperation Agreement *and* the Supplemental Agreements ("the Composite Agreement"). On this analysis, there is nothing to "incorporate" into the Supplemental Agreements. Clause 37.3 binds IRCP because it is an integral part of the Composite Agreement and all three are parties to the Composite Agreement.

34 Several instruments made to effect one object may be construed as one instrument and read together: *Chitty on Contracts* vol 1 (Sweet & Maxwell, 30th Ed, 2008) ("*Chitty*") at para 12-067. Documents executed at different times may be regarded as part of the same agreement if the documents in substance represent a single transaction between the parties. Although it may be possible for parties to hive off parts of their arrangements into separate and distinct contracts (see *Tootal Clothing Ltd v Guinea Properties Ltd Management Ltd* [1992] EGLR 80), the court should be wary of artificially dividing what is in truth a composite transaction: *Grossman v Hooper* [2001] EGLR 82.

35 In *Smith v Chadwick* (1882) 20 Ch D 27, Jessel MR said (at 62–63):

> ... when documents are actually contemporaneous, that is two deeds executed at the same moment, ... or within so short an interval that having regard to the nature of the transaction the Court comes to the conclusion that the series of deeds represents a single transaction between the *same parties*, it is then that they are all treated as one deed; and of course, one deed between the *same parties* may be read to show the meaning of a sentence and be equally read, although not contained in one deed but in several parchments, if all the parchments together in the view of the Court make up one document for this purpose.
>
> [emphasis added]

36 In the present case however, I have to consider the fact that the parties to the Cooperation Agreement and the Supplemental Agreements are not the same. IRCP is not a party to the Cooperation Agreement. For this reason, I do not find Lufthansa's reliance on *Emmott v Michael Wilson (No 2)* [2009] EWHC 1 (Comm) ("*Emmott*") to be of assistance to its position, notwithstanding Lufthansa's position that the difference in identity of the parties is "irrelevant". In *Emmott*, the parties, Mr Emmott and Michael Wilson Partners Limited ("MWP") entered into an agreement in 2001 to operate a quasi-partnership to provide legal services in Kazakhstan ("the 2001 Agreement"). The 2001 Agreement provided for disputes to be resolved by arbitration in London. In 2005, Mr Emmott, MWP, and Mr Wilson, who was a director and shareholder of MWP, agreed to transfer shares in another company to Mr Emmott as payment for work done by him ("the 2005 Agreement"). The 2005 Agreement did not contain an arbitration clause. Disputes then arose with regard to the transfer of those shares and the court had to deal with a preliminary issue as to whether the arbitral tribunal had jurisdiction to deal with the 2005 Agreement. MWP tried to argue that the dispute was not subject to arbitration because it did not fall within the 2005

Agreement. This was rejected by Teare J, who held that the 2001 Agreement was part of the background factual matrix which was relevant to the construction of the 2005 Agreement. He referred (at [36]) to *Fiona Trust v Privalov* [2008] 1 Lloyd's Rep 254 ("*Fiona Trust*"), where the now oft-cited presumption was enunciated by Lord Hoffman (at [13]):

> In my opinion the construction of an arbitration clause should start from the *assumption* that the parties, as rational businessmen, are likely to have intended any dispute arising out of the *relationship* into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption *unless* the language makes it clear that certain questions were intended to be excluded from the arbitrators' jurisdiction.
>
> [emphasis added]

Applying this presumption, Teare J held that disputes under the 2005 Agreement were likely to have been intended to be determined by the same arbitral tribunal as provided for in the arbitration clause in the 2001 Agreement.

37 *Emmott* does not assist Lufthansa for two reasons. First, the party which was resisting arbitration—MWP—was itself a party to the 2001 Agreement, which contained the arbitration agreement. This fact alone renders *Emmott* distinguishable from the present case. IRCP, which is seeking to resist arbitration, was not a party to the Cooperation Agreement which contained the arbitration agreement and Dispute Resolution Mechanism. Second, and more significantly, the critical issue in *Emmott* was whether the dispute over the transfer of shares which arose out of the 2005 Agreement fell within the scope of the arbitration agreement in the 2001 Agreement. That was why the *Fiona Trust* presumption was applied. The issue in *Emmott* was effectively a question of the scope of the disputes covered under the arbitration agreement.

The same approach cannot be applied to the present case. IRCP's objection is not that the scope of cl 37.2 does not extend to the Supplemental Agreements; its objection is that it did not even agree to cl 37.2 as it was not even a party to the Cooperation Agreement.

38 Likewise, the Court of Appeal case of *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 does not advance Lufthansa's case. In that case, the appellants and the respondent entered into a shares sale and purchase agreement ("SPA") which contained a clause providing for disputes to be resolved by arbitration. Crucially, the same parties subsequently entered into four further supplemental agreements. Each supplemental agreement was expressed to be supplemental to the SPA. A dispute arose as to whether a payment arrangement under the fourth supplemental agreement was subject to the arbitration clause in the SPA. The Court of Appeal held (at [67]) that it was, on the basis that the fourth supplemental agreement "could not exist independently without the SPA; nor would it make sense on its own. Like the first three supplemental agreements, its purpose was to supplement and/or modify certain terms of the SPA." The dispute therefore arose in connection with the SPA. Unlike the present case, the Court of Appeal was not concerned with a situation where a non-party to the SPA became a party to the four supplemental agreements. Indeed, it specifically highlighted (at [7]) that the appellants and respondent "were the only parties to the SPA and the four supplemental agreements". In that regard, there was no difficulty in construing that the intention to be bound by the arbitration clause in the SPA extended to the four supplemental agreements.

39 Counsel for IRCP, Mr Subramanian s/o Ayasamy Pillai ("Mr Pillai"), latched onto the difference in the identity of the parties in his submissions. He

drew attention to the fact that in the authorities which considered several agreements as one composite agreement, the parties to the various agreements were the same throughout: see *Faghirzadeh v Rudolf Wolff (SffA) (Pty) Ltd* [1977] 1 Lloyd's Rep 630; and *Fletamentos Maritimos SA v Effjohn International BV* [1996] 2 Lloyd's Rep 304.

40 Mr Pillai also referred to *Coop International Pte Ltd v Ebel SA* [1998] 1 SLR(R) 615 ("*Coop*"), a previous decision of mine which appears to support IRCP's position. Although the propositions of law stated in *Coop* are relevant, the facts there were very different. I am not persuaded that *Coop* is of much assistance to IRCP. In that case, the parties had entered into a distributorship agreement which contained an arbitration clause. Subsequently, the parties terminated the distributorship agreement by entering into a termination agreement. There was no arbitration clause in this new termination agreement. They then entered into a third agreement, a settlement agreement, sometime later. A dispute arose as to the payment of sums under the settlement agreement, and Coop commenced proceedings for the disputed sum in the Singapore courts. Ebel applied for a stay of proceedings on the basis of the arbitration agreement in the distributorship agreement. Coop argued that the dispute did not arise out of the distributorship agreement which had been terminated. Instead, the parties' respective rights were now governed by the settlement agreement. Save for one development, I regard my observations then to be equally applicable now (at [26], and [30]–[31]):

> [26] However, if the *parties subsequently enter a new agreement or a series of new agreements which do not have any arbitration clauses, and the dispute concerns these new agreements and not the original distributorship agreement, it becomes much less clear (a) whether the dispute in fact has any connection at all with the original agreement; and (b) whether the arbitration clause contained in the original agreement is applicable at all to the later agreements.*

> …
>
> [30] It is therefore *a question of construction whether the new agreement is merely supplemental to or a variation of the first agreement, or it is one which is wholly separate and independent of the first agreement. Whether an arbitration clause present in one agreement could be construed to cover both agreements is also another question of construction.*
>
> [31] *Where two agreements can be regarded substantially as one agreement rather than two separate agreements, then it is likely that the arbitration clause in one agreement would govern disputes arising out of the other agreement. However, if in reality, the two agreements are distinct and separate agreements which cannot be viewed properly as one agreement with varied or additional terms, it would be much less likely for an arbitration clause in one agreement to be construed as having been imported or incorporated into the other agreement without there being some appropriate words in either agreement indicating that there was such an intention by the parties to have it construed in that way.* There is no presumption that the parties, after having agreed to refer to arbitration disputes arising out of one agreement must necessarily have agreed also to refer disputes in all subsequent agreements to arbitration.
>
> [emphasis added]

41 An important development which has occurred since I decided *Coop* is the presumption in *Fiona Trust* that in the absence of clear language which illuminates the parties' contrary objective intentions, rational businessmen can be assumed to have intended to resolve disputes arising from their *relationship* through the same dispute resolution mechanism. I accept this general proposition, but I find that it has no bearing on the present case. The issue before me is not one of the scope of cl 37.3, but whether IRCP has agreed to be bound by it.

42 Coming back to the decision in *Coop*, I found that the settlement agreement was not a variation of the distributorship agreement particularly because it did not make any sense to vary or supplement an agreement which

had been terminated. At the time the settlement agreement was entered into, it was clear that the parties considered the distributorship agreement "dead". I went on and noted that if the parties had wanted disputes arising under the settlement agreement to be decided by arbitration, the simplest thing to do was to include an arbitration clause as they had done for the distributorship agreement. I held that the absence of a new arbitration clause or any reference to the arbitration clause in the distributorship agreement was an indication that the parties did not intend to resolve disputes under the settlement agreement by arbitration.

43 The first and most obvious difference between *Coop* and the present situation is that the Cooperation Agreement in this case was not terminated, unlike the distributorship agreement in *Coop*. Lufthansa, Datamat and IRCP had plainly not contemplated an entirely new agreement to govern their respective rights and obligations. Second, the Payment Dispute is not one which arises entirely under the Supplemental Agreements, independent from the Cooperation Agreement. Whether Lufthansa is entitled to payments from IRCP is connected to both the Supplemental Agreements as well as the Cooperation Agreement. The fact that there was no arbitration clause or a specific reference to cl 37.3 in the Supplemental Agreements is not conclusive. It begs the question whether by entering into the Supplemental Agreements and having regard to the factual matrix where the Supplemental Agreements are not only supplemental to but are annexed to and form an integral part of the Cooperation Agreement, the three parties had intended the terms of the Cooperation Agreement, and in particular the Dispute Resolution Mechanism, to be binding on all three parties.

44 In this regard, I found the Court of Appeal's decision in *Astrata (Singapore) Pte Ltd v Portcullis Escrow Pte Ltd and another and other matters* [2011] 3 SLR 386 ("*Astrata*") to be of some relevance. The facts of *Astrata* are complex. Astrata had entered into a supply agreement with Tridex to develop and supply an electronic plate system to Tridex. Pursuant to the supply agreement, Astrata, Tridex and a third entity, PEPL, entered into an escrow agreement. Under this escrow agreement, PEPL was to hold in escrow certain property. PEPL was obliged to deliver the escrow property to Tridex if a stipulated triggering event occurred. The supply agreement contained an arbitration clause while the escrow agreement contained a non-exclusive jurisdiction clause in favour of the Singapore courts. Subsequently, Astrata's holding company underwent reorganisation in the United States pursuant to Chapter 11 of Title 11 of the United States Code ("Chapter 11 reorganisation") and this prompted Tridex to terminate the supply agreement on the ground that Astrata had breached its obligations under the same. Tridex also wrote to PEPL on the same day stating that it was invoking its rights under the escrow agreement as Astrata's holding company's Chapter 11 reorganisation constituted a stipulated triggering event. Astrata disputed this and instructed PEPL not to release the escrow property to Tridex.

45 PEPL sought a declaration from the Singapore court as to whether any triggering event had occurred and Astrata applied to stay the proceedings on the ground that its dispute with Tridex on whether there was a triggering event was a matter for arbitration. Astrata's case was that the arbitration clause in the supply agreement covered any bilaterial dispute between Astrata and Tridex in relation to the escrow property. The non-exclusive jurisdiction clause in the escrow agreement only covered trilateral disputes between Astrata, Tridex and PEPL. Alternatively, the non-exclusive jurisdiction clause

should be construed as an agreement that parties may seek *curial* assistance from the Singapore courts. Tridex's position was that the dispute over escrow property had been carved out from the supply agreement and was to be dealt with exclusively under the non-exclusive jurisdiction clause in the escrow agreement.

46 The Court of Appeal agreed with Tridex. It observed that the logical implication of Astrata's argument was that a dispute with *only* Tridex over whether a triggering event had taken place under the escrow agreement would be determined by arbitration, but the same dispute with *only* PEPL would be determined by the Singapore court. This, the court held (at [28]–[29]), was not rational. Further, the entire agreement clause in the subsequent escrow agreement suggested to the court that the escrow agreement and supply agreement were intended to apply to their respective spheres of issues. It therefore held that the dispute over whether a trigger event had occurred was a matter under the escrow agreement and on that basis, the non-exclusive jurisdiction agreement, not the arbitration agreement, applied.

47 *Astrata* is helpful to a certain extent because it also involves the interpretation of a subsequent agreement entered into by two parties to a prior agreement, and a new third party. It demonstrates that the two original contracting parties may agree to a new method of dispute resolution for a specific dispute which differs from the dispute resolution mechanism under the prior agreement. Although *Astrata* illustrates how the court may infer the parties' objective intentions when a third party enters into an agreement with two original contracting parties, the facts of *Astrata* are nevertheless different from the present case. Unlike *Astrata*, the Supplemental Agreements do not contain an independent, and more importantly, different dispute resolution

mechanism. Second, the escrow agreement in *Astrata*, which was entered into more than six months after the supply agreement, contained an entire agreement clause which is not present in the Supplemental Agreements before me. By agreeing subsequently to the entire agreement clause, the parties in *Astrata*, and in particular Astrata and Tridex, had evinced their intention that the matters under the escrow agreement were to be independent from the supply agreement. On the contrary, both Supplemental Agreements clearly stipulate that the Supplemental Agreements are to be "annexed to and made a part of the [Cooperation Agreement]".

48 In the end, I found the approaches taken by both parties to be of little help in addressing the one true issue: what were Lufthansa, Datamat and IRCP's common intentions, if any, when objectively ascertained, as to the applicability of the Dispute Resolution Mechanism to resolve their disputes (be they bilateral or trilateral in nature, which of course cannot be predicted) at the time when all of them entered into the Supplemental Agreements? An assertion that the Dispute Resolution Mechanism was incorporated into the Supplemental Agreements or the various agreements between the parties were in essence one Composite Agreement, are two ways of saying the same thing *viz* that the three parties, from an objective perspective, intended to be bound by the Dispute Resolution Mechanism. Be it incorporation or construction, the court is always seeking to ascertain the parties' objective intentions: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [125].

49 In *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2007] 1 QB 886, the Government of Lithuania ("Lithuania") signed an oil exploration joint venture agreement together with the plaintiff,

Svenska, and the other defendant, Geonafta. Lithuania, however, was not expressed to be a party to the joint venture agreement, even though some of the terms of the agreement dealt with the rights and obligations of the Lithuania. However, over the signatures of the representatives signing on behalf of Lithuania was a rubric in the follow terms: "*[t]he Government of Lithuania hereby approves the above agreement and acknowledges itself to be legally and contractually bound as if the Government were a signatory to the Agreement*." The joint venture agreement also contained an arbitration agreement. The joint venture agreement was further expressed to be governed by the laws of Lithuania, supplemented where required by rules of international business activities generally accepted in the petroleum industry so long as they did not contradict the laws of Lithuania. The parties accepted (see [24]) that under Lithuanian law the court had to ascertain the parties' real intentions, *ie* their common intentions, by reference not only to the language of the document in which their agreement was expressed but also by reference to such other evidence as might be of assistance, including pre-contractual negotiations and post-contractual conduct as well as the surrounding circumstances, existing usages and any communications between them. The exercise was essentially objective in nature.

50 A dispute later arose and Svenska brought claims in an arbitration in Denmark against Lithuania and succeeded. Lithuania resisted the enforcement of the award in England, arguing that it was not a party to the arbitration agreement. Lithuania stressed that it was not named as a party to the joint venture agreement. The English Court of Appeal rejected this argument. Moore-Bick LJ held (at [26]–[28]) that whether Lithuania "signed" the joint venture agreement or "became a party" to it was "immaterial". What mattered was whether by signing on the joint venture agreement with the attached

explanation of its purpose in so doing, Lithuania intended to undertake legally binding obligations towards Svenska, and this was "essentially a question of construction".

51 I fully concur with Moore-Bick LJ's general approach which focuses on the ascertainment of the parties' objective intentions. The use of legal constructs such as "one composite agreement" or "incorporation" may be helpful in most cases, but it is not dispositive in the present case. I will therefore start from the first principles of contractual interpretation.

Parties' objective intention

The modern contextual approach to interpretation

52 The purpose of interpretation is to give effect to the intention of the parties objectively ascertained. This objective ascertainment of the parties' intentions is the cornerstone of the theory of contract and permeates our entire approach to contractual interpretation: *Zurich Insurance* at [125]. In *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, Lord Hoffmann restated the principles of contractual interpretation (at 912–913):

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in

which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v Salen Rederierna A.B.* [1985] A.C. 191, 201:

> "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

53 This modern contextual approach to interpretation was held by the Court of Appeal in the landmark decision of *Zurich Insurance* (at [109], [114] and [132(c)]) as representing the state of the law in Singapore, though a clear

and obvious context is required to justify the court's adoption of a different interpretation from that suggested by the plain language of the contract: *Zurich Insurance* at [129]. It is important to remember that the contextual approach is not a usurpation of the plain-meaning rule in interpretation. There is no gainsaying that the language in the agreement is an important starting point: *Re Sigma Finance Corporation (in administrative receivership)* [2008] EWCA Civ 1303 at [98]. It may even be paramount in certain instances: *Re Sigma Finance Corporation (in administrative receivership)* [2009] UKSC 2 ("*Re Sigma Finance (SC)*)" at [37]. However, as Professor Catherine Mitchell explained in her book, *Interpretation of Contracts: Current controversies in law* (Routledge-Cavendish, 2007) (cited with approval in *Zurich Insurance* at [61]), the plain meaning of the language alone is insufficient (at p 60):

> The significance of Lord Hoffmann's speech lies in its recognition that all understanding relies upon context to a greater or lesser extent, and that contractual interpretation is no different. The 'reasonable person', in deciphering communicative utterances, utilises all necessary background knowledge to access meaning. *Thus a plain meaning or literal approach is not an alternative to contextual interpretation, but can only be understood as operating within [the] contextual method.*
>
> [emphasis added]

54 Professor Mitchell's observation of the interaction between the plain meaning rule and reference to the background context is illuminating. Lord Nicholls, writing extra-judicially in "My Kingdom for a Horse: The Meaning of Words" (2005) 121 LQR 577, echoed the same point (at 579):

> *When considered in isolation words normally bear the meanings attributed to them in dictionaries. But when used as a medium of communication words do not speak for themselves. They have to be interpreted.* Interpretation is the process whereby the hearer seeks to identify the idea the speaker sought to convey by the words he used. ***In order to do this, it is always necessary to know the context in which the***

> ***words were being used***. The phrase "eats shoots and leaves" has a different meaning depending on whether the context is the eating habits of pandas or the lifestyle of Wild West outlaws.
>
> [emphasis added in italics and bold italics]

55 In Singapore, the contextual approach was also helpfully elaborated upon by V K Rajah JA, writing extra-judicially after *Zurich Insurance* (V K Rajah, "Redrawing Boundaries of Contractual Interpretation" (2012) 22 SAcLJ 513 at [16]):

> It is now better appreciated that words, even in the hands of skilled practitioners, are not always capable of transmitting the precise meaning which their authors intended. In order to ascertain the precise meaning of words, resort must be had to the exact context which they were used. An important consequence of this insight is the rejection of textual ambiguity as a condition for resorting to contextual aids – *the process of interpreting the text is necessarily incomplete until the entire relevant context has been considered. The so-called plain meaning rule has been abandoned in favour of a commonsense inference, which may be confirmed or displaced by the context, that words are used in their natural, ordinary or common signification. … But, to emphasise, we can only be sure that the meaning of a document read alone is the meaning the parties truly intended if we consider all the objective circumstances, and, once again, the exercise might reveal that the words used were unequal to express the parties' true intention.* As Lord Hoffman astutely pointed out, we must not "confuse the meaning of words with the question of what meaning the use of the words was intended to convey".
>
> [emphasis added]

56 It is trite law that the court does not inquire into the parties' subjective states of mind: *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 at [8]. Instead, the courts are concerned with the parties' intentions as objectively ascertained from the agreement and the background matrix of facts known to the parties which would affect the way a reasonable person would understand the language used in the agreement.

57 The final point worth highlighting is the Court of Appeal's endorsement in *Zurich Insurance* (at [131]) of Professor McMeel's summary of principles and techniques of contractual interpretation in his treatise, *The Construction of Contracts: Interpretation, Implication and Rectification* (OUP, 2007) at paras 1.124–1.133. The principles endorsed include:

> *The holistic or 'whole contract' approach*
>
> Thirdly, the exercise is one based on the *whole contract* or an *holistic approach*. Courts are not excessively focused upon a particular word, phrase, sentence, or clause. Rather the emphasis is on the document or utterance as a whole.
>
> *The contextual dimension*
>
> Fourthly, the exercise in construction is informed by the *surrounding circumstances or external context*. Modern judges are prepared to look beyond the four corners of a document, or the bare words of an utterance. It is permissible to have regard to the *legal, regulatory, and factual matrix* which constitutes the background in which the document was drafted or the utterance was made.
>
> *Business purpose*
>
> Fifthly, within this framework due consideration is given to the *commercial purpose* of the transaction or provision. The courts have regard to the overall purpose of the parties with respect to a particular transaction, or more narrowly the reason why a particular obligation was undertaken.
>
> *Avoiding unreasonable results*
>
> Eighthly, a construction which leads to very unreasonable results is to be avoided unless it is required by clear words and there is no other tenable construction.
>
> [emphasis in original]

Applying the contextual approach to the Supplemental Agreements

(I) OBJECT AND PURPOSE OF THE SUPPLEMENTAL AGREEMENTS

58 Before considering the plain language in the Supplemental Agreements, it is vital to understand the context which influenced the language used.

59 Supplemental Agreement No. 1 was entered into as a result of Lufthansa's concern that Datamat was unable to pay for works and services provided by Lufthansa under the Cooperation Agreement. IRCP was brought into the transaction by Datamat to satisfy the latter's payment obligations to Lufthansa under the Cooperation Agreement. IRCP would also provide a letter of credit in favour of Lufthansa which Lufthansa may draw upon if payments were not made. However, this did not resolve the payment issues. Lufthansa told Datamat and IRCP that it would cease work unless a better arrangement for ensuring payment was arrived at. This culminated in Supplemental Agreement No. 2, which provided, *inter alia*, that payments to Lufthansa by IRCP would now be deducted directly from IRCP's SCB account. To enforce the direct deduction, IRCP would execute a Payment Instruction and Authorisation letter to SCB.

60 Evidently, the object and purpose of the Supplemental Agreements was to enforce Lufthansa's right to payments under the Cooperation Agreement. The Supplemental Agreements transferred Datamat's payment obligations under the Cooperation Agreement to IRCP. This is borne out by cll 1 and 3 in Supplemental Agreement No. 1:

> 1. Lufthansa Systems *shall* issue invoices for any Services and/or Deliverables *provided under to [sic] [Cooperation] Agreement* in the name of and send such

> invoices to *International Research Corporation Public Company Limited* …
>
> …
>
> 3. *International Research Corporation Public Company Limited ("IRCP") agrees* to make payment of such invoices issued pursuant to clause 1 above *in accordance with the terms of the [Cooperation] Agreement*, and to provide the letter of credit in favour of Lufthansa Systems … *In case any of such invoices are not duly paid, Lufthansa Systems may draw the amounts under the said letter of credit* in accordance with their terms.
>
> [emphasis added]

61 The relevant clauses in Supplemental Agreement No. 2 likewise show that all three parties understood that Datamat's payment obligations under the Cooperation Agreement were now to be borne by IRCP:

> 2. Payments due and payable to Lufthansa Systems as of the date hereof … *shall be paid by IRCP to Lufthansa* …
>
> …
>
> 3. All remaining payments payable to Lufthansa Systems shall be paid to Lufthansa Systems *directly from the bank account of IRCP*…
>
> …
>
> 7. The parties agree that for the avoidance of doubt, *the obligations of IRCP to make payment to Lufthansa Systems as referred to in clause 3 of the Supplemental No. 1 shall only be limited to payment due and payable to Lufthansa Systems* under the MRO Project with Thai Airways International PLC as prescribed in Statement of Work No. 1 SAP Implementation Project SAP R/3 IS A&D dated 11 March 2005 *between Lufthansa Systems and Datamat*.
>
> [emphasis added]

62 From these clauses in the Supplemental Agreements, it is clear that IRCP's payment obligations to Lufthansa are inextricably tied to Datamat's obligations under the Cooperation Agreement. A dispute over an invoice issued under the Cooperation Agreement would invariably affect IRCP's

payment obligations under the Supplemental Agreements. IRCP's payment obligations are not free-standing and unconnected to the terms of the Cooperation Agreement. After all, the object and purpose of the Supplemental Agreements was to ensure that Lufthansa would be paid for its work and services done under the Cooperation Agreement. The close association between the Supplemental Agreements and the Cooperation Agreement is further reflected in the preambles to both Supplemental Agreements. The preamble to Supplemental Agreement No. 1 and cl 1 of Supplemental Agreement No. 2 both provide that the respective Supplemental Agreements are "annexed to and made a part of" the Cooperation Agreement, and in the event of inconsistency, the terms in the Supplemental Agreements shall prevail over those in the Cooperation Agreement. Thus, there is no doubt that the Supplemental Agreements can only be understood in connection with the Cooperation Agreement. They serve to modify the original payment obligations and mode of payment under the Cooperation Agreement with the participation of IRCP in the amended payment framework within the Cooperation Agreement. Their titles, "Supplemental Agreements", mean precisely what they say—agreements which are to be supplemental to the main agreement *viz* the Cooperation Agreement.

(II) PLAIN LANGUAGE IN THE SUPPLEMENTAL AGREEMENTS

63 With the background context in mind, I turn now to the language used in the Supplemental Agreements. The key aspects of the Supplemental Agreements which may shed light on the parties' expressed intentions are:

> Supplemental Agreement No. 1
>
> This Supplemental Agreement No. 1 (the "Supplemental Agreement") is hereby annexed to and made a part of the Agreement specified above. In the event that the provisions of this Supplemental Agreement contradict or are inconsistent

> with the provisions of the Agreement, the provisions of this Supplemental Agreement shall prevail and govern.
>
> …
>
> 5. Lufthansa and Datamat agree that IRCP shall have no other obligations than those provided in this Supplemental Agreement.
>
> 6. All other provisions of the Agreement shall remain effective and enforceable.
>
> Supplemental Agreement No. 2
>
> Whereas on May 2, 2005, Datamat and Lufthansa Systems have entered into the Supplemental Agreement (the "Supplemental Agreement No. 1"), which has been acknowledged and agreed to by International Research Corporation Public Company Limited ("IRCP"); and
>
> 1. This Supplemental Agreement No. 2 is hereby annexed to and made a part of the Agreement specified above. …

64 Mr Pillai relied on cl 5 of Supplemental Agreement No. 1 to support his argument that the parties did not intend that IRCP was to be bound by the Dispute Resolution Mechanism. Mr Pillai proffered a plain reading of cl 5. IRCP was only obliged to make payments in accordance with the relevant provisions relating to payments in the Supplemental Agreements. Through cl 5, the parties expressly intended to limit IRCP's obligations to those in the Supplemental Agreements. There was no intention for IRCP to be bound by any other obligation in the Cooperation Agreement, not least one as onerous as the Dispute Resolution Mechanism. Counsel for Lufthansa, Mr Dhillon Dinesh Singh ("Mr Singh"), responded by referring to cl 6 of Supplemental Agreement No. 1, as well as the preamble of Supplemental Agreement No. 1 and cl 1 of Supplemental Agreement No. 2. He argued that these clauses manifested the parties' unequivocal intention for the Supplemental

Agreements "to be governed by and made part of the Cooperation Agreement". Mr Singh did not address cl 5 specifically.

65 At first blush, Mr Pillai's construction of cl 5 is attractive. The plain reading of cl 5 does lead to the conclusion that the parties only intended that IRCP was to be bound by one major obligation *viz* the obligation to pay Lufthansa sums payable under the Cooperation Agreement. However, this must be seen in the context in which the Supplemental Agreements were entered into. As Rajah JA observed in "Redrawing the Boundaries of Contractual Interpretation", "the process of interpreting the text is necessarily incomplete until the entire relevant context has been considered": see [55] above.

66 Bearing in mind the object and purpose of the Supplemental Agreements, I do not accept Mr Pillai's construction of cl 5. I agree that cl 5 was intended to delineate IRCP's limited role as a "payment conduit". However, it must be remembered that apart from its payment obligations to Lufthansa, Datamat had other obligations under the Cooperation Agreement. Hence, there was a strong commercial impetus for IRCP to want to ensure that its substantive obligations—and by extension its liability—to both Lufthansa and Datamat were restricted. Clause 5 was inserted precisely to erase any doubts in the Supplemental Agreements as to IRCP's limited role. It was *not* a reflection of the parties' objective intention that the Dispute Resolution Mechanism would only bind Lufthansa and Datamat, but not IRCP.

67 A reading of cl 5 in its proper context does not justify a conclusion that the parties did not intend for IRCP to be bound by the Dispute Resolution Mechanism. For completeness, I did not find cl 6 to be of any help to

Lufthansa's position either. Clause 6 simply provides "[a]ll other provisions of the [Cooperation] Agreement shall remain effective and enforceable." It does not state against whom the provisions in the Cooperation Agreement shall remain effective and enforceable. On its own, cl 6 does not shed any light on the parties' objective intentions with respect to the Dispute Resolution Mechanism.

68 The remaining question therefore is this: when the parties used the phrase that Supplemental Agreement No. 1 "is hereby annexed to and made a part of the [Cooperation] Agreement", what does this phrase mean and what was it intended to achieve?

(III) CONTEXTUAL INTERPRETATION

69 In my view, the proper contextual interpretation, which gives adequate regard to the plain language of the Supplemental Agreements *and* its background context, yields the conclusion that the parties had intended the same Dispute Resolution Mechanism in the Cooperation Agreement to bind all three parties to the Supplemental Agreements.

70 First, the Supplemental Agreements were entered into as a consequence of Datamat's non-performance of its payment obligations to Lufthansa for work and services done under the Cooperation Agreement. Supplemental Agreement No. 1 and Supplemental Agreement No. 2 were literally intended to supplement Datamat and IRCP's respective shortcomings in the performance of their payment obligations to Lufthansa. All three parties were fully aware of this context.

71 Second, there is no denying the interdependence between the obligations in the Supplemental Agreements and the obligations in the Cooperation Agreement. The former obligations were premised on and were an extension of the latter. Thus, the language chosen by the parties to describe the purpose and effect of the Supplemental Agreements, namely, that the Supplemental Agreements were "annexed to and made a part of" the Cooperation Agreement, makes complete sense. The three parties had agreed to make the Supplemental Agreements an integral part of the Cooperation Agreement, with the appropriate terms as modified or varied by the Supplemental Agreements. Thus the three agreements were intended by the parties to function essentially as one agreement and should be read as a whole.

72 Third, IRCP does not dispute that it was aware of the terms of the Cooperation Agreement when it entered into the Supplemental Agreements. Indeed, given the background events leading up to the Supplemental Agreements, in particular the disputes over the payments due from Datamat to Lufthansa under the Cooperation Agreement, IRCP must have been aware, when entering into the Supplemental Agreements, of both the terms of the Cooperation Agreement and the reasons for the amendments made to the payment obligations and mode of payment in the Supplemental Agreements. Furthermore, on top of the preamble which makes explicit reference to the Cooperation Agreement, IRCP was obliged under cl 3 of Supplemental Agreement No. 1 to pay Lufthansa in accordance with the Cooperation Agreement. Under these circumstances, IRCP must have been fully aware of the terms of the Cooperation Agreement, including the Dispute Resolution Mechanism adopted therein. Tellingly, there is no suggestion by IRCP to the contrary.

73 Fourth, if a similar dispute over payment had been between Lufthansa and Datamat only, there would be no allegation that the dispute would not be subject to the Dispute Resolution Mechanism. This is so whether the dispute is characterised as one arising under the Cooperation Agreement, or one which arises under the Supplemental Agreements. Thus, such a dispute between Lufthansa and Datamat may ultimately be referred to arbitration in accordance with cl 37.3. Against this backdrop, it must have been within Lufthansa, Datamat and IRCP's contemplation that a dispute over payment between either Lufthansa or IRCP, Datamat or IRCP, or all three parties, would be resolved by the dispute resolution method already agreed to by Lufthansa and Datamat. It makes little commercial sense for Lufthansa, Datamat and IRCP to have a payment dispute between Lufthansa and Datamat made subject to the Dispute Resolution Mechanism, but for that same dispute involving Lufthansa and IRCP, Datamat and IRCP, or all three of them, to be made subject to court proceedings. Having different dispute resolution mechanisms—the applicability of which depends on the identity of the parties—to resolve the same issue in dispute is not only commercially impracticable, but may also yield unreasonable results. Such an arrangement is necessarily more expensive since the parties may be forced to resolve the same dispute in different fora. It may also give rise to inconsistent results, potentially leaving parties uncertain as to their rights and obligations *vis-à-vis* the other two parties in the tripartite relationship.

74 It bears repeating that courts must have regard to the commercial purpose of the contract in the construction of contractual terms: *Yamashita Tetsuo v See Hup Seng Ltd* [2009] 2 SLR(R) 265 at [64]. There can be no serious objections to the court's preference for a more commercially sensible

interpretation. As Lord Steyn justified in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 771:

> In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.

75 A High Court decision, *Econ Piling Pte Ltd v NCC International AB* [2007] SGHC 17 ("*Econ Piling*"), fortifies my conclusion that a contextual interpretation of the Supplemental Agreements entails a finding that the parties must have intended for a common dispute resolution mechanism to govern all their disputes arising out of the Cooperation Agreement read with the Supplemental Agreements, which had been made an integral part of the former. In *Econ Piling*, the two parties had entered into a joint venture agreement which contained, *inter alia*, an arbitration agreement. Less than a year later, Econ Piling Pte Ltd ("Econ") faced financial difficulties and the two parties then entered into a variation agreement which contained an exclusive jurisdiction agreement in favour of the Singapore courts. A dispute subsequently arose and the issue before the court was which of the two dispute resolution clauses was operative.

76 After deciding that the *purpose* of the variation agreement was to "reconstitute, in very significant ways, the commercial relationship between the parties" following Econ's financial woes, Menon JC (as he then was) held (at [16]–[17]):

> [16] … [I]t is counterintuitive for two contracts that are meant to be read together to have different dispute resolution

> regimes. Therefore, ***unless there is a clear and express indication to the contrary***, it may usually be assumed that parties to two closely related agreements involving the same parties and concerning the same subject matter would not have intended to refer only disputes arising under one contract to court, but not those arising under the second contract. In this respect, I refer to the decision of Tay Yong Kwang J in *Mancon (BVI) Investment Holding v Heng Holdings SEA* [2000] 3 SLR 220 where he noted as follows at [30]:
>
> > ***If two contractual documents had to be read together, it would be totally illogical to have the arbitration clause apply to one but not the other unless that was explicitly agreed upon*** …
>
> [17] In my judgment, this is correct. A different approach would result in the ***wholly uncommercial position that some disputes under what is in substance a composite agreement between the parties, are to be referred to arbitration while others are to be resolved in court***. This difficulty becomes especially acute, even impossible, in situations such as the present where a subsequent agreement varies an earlier agreement, and where it is therefore conceivable, even likely, that ***many disputes might straddle both contracts***.
>
> [emphasis in original in italics; emphasis added in bold italics]

77 Consequently, Menon JC held that the exclusive jurisdiction agreement in the variation agreement applied to all disputes arising under both the joint venture agreement and the variation agreement. I am cognisant that the parties in the two agreements in *Econ Piling* were identical, and that unlike the present case, there was a dispute resolution mechanism in the latter agreement in *Econ Piling*. Notwithstanding, it is noteworthy that the approach of Menon JC was to ascertain the parties' intention in light of the context in which the variation agreement was entered into. He, too, recognised that in the absence of clear language, the consequence of having different dispute resolution mechanisms governing the same disputed issue would not make commercial sense at all. That is precisely the situation which will result if the Dispute Resolution Mechanism does not similarly bind IRCP. Such an outcome is

certainly not one which the parties could reasonably have intended when entering into the Supplemental Agreements.

78 For the reasons given above, the notion that the applicable dispute resolution mechanism depends on which parties are disputing the issue simply does not accord with commercial sense. Indeed, such a notion is not just commercially insensible, but in the words of the Court of Appeal in *Astrata*, not rational. On the whole, I find that by using language which stressed that the Supplemental Agreements were annexed to and made a part of the Cooperation Agreement, the parties' objective intention, at least in respect of the Dispute Resolution Mechanism, was for the latter to be binding on all three parties to the Supplemental Agreements. That is the only commercially sensible and rational conclusion and there is no language in the Supplemental Agreements nor in the Dispute Resolution Mechanism which opposes this.

79 In fact, I can see no undue stretching of the natural meaning of the operative words in the arbitration agreement found in cl 37.3 that "[a]ll disputes arising out of this Cooperation Agreement, ... shall be finally settled by arbitration ...". Those words can be read consistently to apply to disputes arising under any subsequent agreements made "supplemental" to the Cooperation Agreement itself. In other words, the ambit of the arbitration clause as worded may reasonably be construed to apply to disputes arising out of any subsequent Supplemental Agreements that are mandated by the parties to be treated as part and parcel of the Cooperation Agreement by virtue of the words "*annexed to and made a part of*" the Cooperation Agreement. This is unlike those cases where the arbitration clause in a charter party is expressly stated to govern the settlement of disputes arising only out of the charter party, but a bill of lading through general words of incorporation purports to

incorporate that arbitration clause to govern disputes arising not out of the charter party, but out of the bill of lading itself. Understandably, it will be difficult in these cases, where no distinct and specific words of incorporation of the arbitration clause exist, to construe a bill of lading as an agreement that is supplemental to the charter party, such that both can be regarded substantively as one charter party contract to enable that arbitration clause to apply without any change to its wording. By contrast, in the present case, the arbitration clause in the Cooperation Agreement is not being made to apply beyond its expressed scope of application when applied to disputes arising out of the provisions in the Supplemental Agreements. The arbitration clause as worded can still be read sensibly without any need for modification.

80 There will no doubt be some query whether my conclusion entails reading into the words of the Supplemental Agreements an intention which is not apparent on its face. While I am aware that the contextual approach to interpretation is not a *carte blanche* for "creative interpretation" (*Master Marine AS v Labroy Offhsore Ltd and others* [2012] 3 SLR 125 at [42]), interpretation of express words in a manner that would either frustrate the commercial purpose behind the agreement or make no commercial sense for the contracting parties should be avoided, unless there is some special reason for doing so. As Lord Collins in *Re Sigma Finance (SC)* observed (at [35]):

> In complex documents of the kind in issue there are bound to be ambiguities, infelicities and inconsistencies. *An over-literal interpretation of one provision without regard to the whole may distort or frustrate the commercial purpose.*
>
> [emphasis added]

81 An overly literal interpretation which distorts or frustrates the commercial purpose of the contract is most unlikely to be the agreed

contractual position intended or meant by the parties as understood by a reasonable person circumstanced in the same position as the actual parties. To borrow the words of Lord Hoffmann again, this time in *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] 3 WLR 267 (at [25]–[26]):

> 25 What is clear from these cases is that there is *not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear what a reasonable person would have understood the parties to have meant.*
>
> 26 … Giving this meaning to the provision about C & I does not in any way weaken or affect the argument for interpreting the rest of the definition in a way which gives ARP a rational meaning. To say, as Rimer LJ said [2008] 2 All ER (Comm) 387, para 185, that it requires "rewriting" or that it "distorts the meaning and arithmetic of the definition" is only to say that it requires one to conclude that something has gone wrong with the language—not, in this case, with the meaning of words, but with the syntactical arrangement of those words. *If however the context drives one to the conclusion that this must have happened, it is no answer that the interpretation does not reflect what the words would conventionally have understood to mean.*
>
> [emphasis added]

Practical ramifications

82 I am acutely aware of the potential practical ramifications of the approach that I have taken. The strict rule mentioned earlier (at [26]–[32]) that express words are required to incorporate an arbitration agreement into another may be undermined by my approach. There may also be concerns of certainty. However, one cannot look at the strict rule for incorporation of arbitration agreements without considering the underlying rationale for the rule. Whether an arbitration agreement is incorporated is effectively a function of the parties' intentions objectively ascertained. If specific words are used, it

simply means that the parties' intentions are unambiguously expressed: see *Concordia Agritrading Pte Ltd v Cornelder Hoogewerff (Singapore) Pte Ltd* [1999] 3 SLR(R) 618 at [16]. The absence of specific words, however, should not be conclusive evidence that the parties did not intend to be bound by the arbitration agreement contained in a different contract, even though it usually is a strong indicator that the parties did not intend to be bound by arbitration. As David Joseph QC explained in his treatise, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2nd Ed, 2010) at para 5.15:

> Where, however, a party seeks to incorporate the terms of one contract between different parties into another … general words of incorporation *will not ordinarily* be sufficient to incorporate the dispute resolution provision. The English courts justify the distinction primarily for reasons of commercial certainty. It is also possible to arrive at the same conclusion applying principles of separability. *Whilst in each case it is a question of construction of the parties' intentions, as a general rule* in order to incorporate the dispute resolution mechanism, specific reference to the jurisdiction or arbitration agreement is required. … *In most cases, however, the result will be the same* because without express reference, it will not be possible to demonstrate that the parties intended to incorporate the separate and ancillary jurisdiction clause contained in the incorporated contract.
>
> [emphasis added]

83 Fundamentally, determining whether an arbitration agreement contained in one contract binds the parties to another contract is an objective inquiry into the parties' intentions. This was recognised by Langley J in *The Athena (No 2)* at [66]–[68], albeit understandably tentatively given that the House of Lords had endorsed the strict rule in *Thomas (T W & Co) Ltd v Portsea Steamship Co Ltd* [1912] AC 1. The holding of Clarke J in *Africa Express Line Ltd v Socofi SA and another* [2010] 2 Lloyd's Rep 181 at [30]–[31] is directly on point:

30. Where the terms of a wholly separate contract are incorporated, different considerations apply. A bill of lading which incorporates all the conditions of a specified charterparty will not usually incorporate a charterparty arbitration clause, in the absence of express wording to that effect. By analogy with the incorporation of arbitration clauses into bills of lading from charterparties, the law adopts "a fairly strict approach" — *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] Lloyd's Rep IR 127, page 141 at para 48 (Aikens J), affirmed [2006] 2 Lloyd's Rep 475 — to the incorporation of jurisdiction clauses from an insurance (or reinsurance) contract into another reinsurance contract. Only those terms directly germane to the parties' agreement are carried over. The *presumption* is that these usually exclude a jurisdiction clause. In that case a provision in the excess reinsurance slip that it was "to follow all terms and conditions of the primary policy together with riders and amendments thereto covering the identical subject matter and risk" was held to be inapt to incorporate a Mauritius jurisdiction clause in the primary reinsurance.

31. *It is, however, necessary, always to remember that the ultimate issue is what objectively did the parties intend:* see *Dornoch* at first instance, para 48. In the Court of Appeal in that case Tuckley LJ said this [2006] 2 Lloyd's Rep 475, page 481:

> 27. There are many cases in which the courts have to decide whether terms from one contract have been incorporated in another. A number of these cases concern the incorporation of terms from a direct insurance into a reinsurance. But no hard and fast rules emerge from these cases as one would expect. *The question in each case is one of construction: did the parties to the contract in which the general words of incorporation appear intend that their contract should include the particular term from the other contract referred to?* It may be, as Mr Kealey submits, that the courts will answer this question in favour of incorporation more readily in some categories of cases in than in others, but that is not more than saying that contractual context and the words used are all important. As choice of law and jurisdiction clauses are important, clear words of incorporation are required. In the insurance context where the *contracts concerned are back-to-back and cover the same subject matter and interest incorporation is more likely to have been intended than where the contracts are not so closely connected.*

> [emphasis added]

84 I do not see the strict rule as circumscribing the court's power to give effect to the parties' true intentions objectively ascertained. Indeed, the court is permitted, even obliged, to distil the parties' objective intentions, having regard to the relevant contextual circumstances. In each case, the court must construe the language of the contract using the modern contextual approach to interpretation and ask itself whether a consensus on the applicability of the arbitration agreement is clearly and precisely demonstrated: see *AIG Europe SA v QBE International Insurance Ltd* [2001] 2 Lloyd's Rep 268 at [26]. Nevertheless, for the avoidance of doubt, the strict rule still retains its utility. It will and should apply in the majority of circumstances. In most cases, whether the parties can be said to have intended that an arbitration agreement in a separate agreement applies to a dispute arising from a supplemental agreement depends on whether express reference was made to that arbitration agreement. It is generally difficult to demonstrate that the parties intended to incorporate the arbitration agreement contained in the separate agreement in the absence of clear words.

85 Turning finally to the concern of uncertainty, there is undoubtedly a strong policy justification to uphold the strict rule, particularly from the perspective of third parties. This was explained by Bingham LJ in *The Federal Bulker* [1989] 1 Lloyd's Rep 103 at 105:

> Generally speaking, the English law of contract has taken a benevolent view of the use of general words to incorporate by reference standard terms to be found elsewhere. But in the present field a different, and stricter, rule has developed, especially where the incorporation of arbitration clauses is concerned. *The reason no doubt is that a bill of lading is a negotiable commercial instrument and may come into the hands of a foreign party with no knowledge and no ready means of knowledge of the terms of the charter-party.* The cases show

> that a strict test of incorporation having, for better or worse, been laid down, the Courts have in general defended this rule with some tenacity in the interests of commercial certainty. If commercial parties do not like the English rule, they can meet the difficulty by spelling out the arbitration provision in the bill of lading and not relying on general words to achieve incorporation.
>
> [emphasis added]

86 Nevertheless, the underlying rationale for the strict rule ostensibly loses much of its force if the third party contracted with knowledge of the arbitration agreement, as in the present case. As the cornerstone of contractual interpretation, the search for parties' objective intentions should not be surrendered simply because of *potential* uncertainty. The concern over uncertainty, whilst legitimate, should not be overstated. In this regard, Rajah JA's perceptive observation in "Redrawing Boundaries of Contractual Interpretation" (at [39]) is apt:

> From my experience, the fear of floodgates and uncertainty has been greatly overstated. The court in most cases will be able to decide that the written contract and the broad background militate so strongly in favour of one interpretation that a rival interpretation said to be founded on the broader context can be rejected summarily. And, in the exceptional cases where there is a deluge of allegedly relevant documents, why should the court be thereby deterred from its search for the true agreement between the parties? *The administration of justice should not meekly bow down to the considerations of convenience*. … I should add that the courts in Singapore are both ready and willing to respond robustly to parties' attempts to inundate them with irrelevant evidence.
>
> [emphasis added]

Operation of the Dispute Resolution Mechanism

87 There is one last point which neither party has raised, but is relevant. The Dispute Resolution Mechanism in the Cooperation Agreement is worded in such a way that it would not be possible to apply to IRCP if interpreted

literally. For instance, the mediation procedure in cl 37.2 expressly refers to committees comprising personnel from Lufthansa and Datamat only. It does not contemplate personnel from IRCP forming part of the committees. Similarly, the arbitration agreement in cl 37.3 provides that "each of the Parties has the right to appoint one (1) arbitrator", and the two party-appointed arbitrators will in turn appoint the third arbitrator. Clause 1.13 defines "Parties" as the parties to the Cooperation Agreement, while cl 2.1 states that the Cooperation Agreement was entered into between Lufthansa and Datamat. Thus, on a strict interpretation of cl 37.2 read with cll 1.13 and 2.1, Lufthansa and Datamat are the only Parties to the Cooperation Agreement and only the two of them have a right to appoint an arbitrator. IRCP does not have any corresponding right. The Tribunal dealt with this by referring to Rule 8 of the SIAC Rules which provides that where there are more than two parties in the arbitration, the parties may agree on the procedure for appointment of arbitrators. The Tribunal noted that the appointment procedure in the present case had been confirmed by the Chairman whose decision is not subject to appeal. Moreover, IRCP had not objected to the appointment procedure.

88 At this juncture, I pause to clarify that IRCP has not contended that cll 37.2 and 37.3 are unworkable either in a tripartite or bilateral context. There is therefore strictly no need for me to decide on this point. Nevertheless, for completeness, I am inclined to the view that cll 37.2 and 37.3, when construed in light of the parties' objective intention that IRCP is bound by the Dispute Resolution Mechanism, can operate in both a bilateral and trilateral context. In a trilateral dispute, the Tribunal's reference to the SIAC Rules in its construction of cl 37.3 is reasonable, and gives effect to the parties' intention that all disputes involving any or all of the three parties to the Supplemental Agreement shall be resolved in accordance with the Dispute Resolution

Mechanism. If the dispute were bilateral, the two parties would appoint their own arbitrator who would then jointly appoint the third arbitrator.

89 The literal wording of the mediation procedure in cl 37.2 may also be overcome by construction. The substance of cl 37.2 is to bring together personnel from various tiers of management from each party to mediate an amicable resolution of the dispute. This underlying rationale can be easily applied to IRCP. A two-party dispute involving IRCP and Lufthansa, for instance, shall first be referred to a committee comprising the relevant personnel from IRCP and Lufthansa. A dispute involving all three parties shall be referred to a committee comprising the relevant personnel from all three parties. This construction of cl 37.2, taking into account the contractual re-arrangements arising from the Supplemental Agreements that followed, coheres with the intention of the parties to resolve all their disputes in accordance with the Dispute Resolution Mechanism.

Whether the preconditions for the commencement of arbitration in Clause 37.2 have been satisfied

Enforceability of Clause 37.2

90 Clause 37.3 provides that the parties shall commence arbitration if the disputes "cannot be settled by mediation pursuant to Clause 37.2". Although cl 37.3 refers to the procedure in cl 37.2 as a mediation, the parties appear to have used the term mediation and negotiation interchangeably to describe the procedure cl 37.2. As nothing turns on whether the procedure in cl 37.2 is in fact a procedure setting out negotiation and not mediation or *vice versa*, I shall for convenience retain the nomenclature in cl 37.3 and simply refer to the procedure in cl 37.2 as "the mediation procedure".

91 Mr Pillai argued that cl 37.2 is clear and unambiguous. The Tribunal was therefore wrong to hold that cl 37.2 was too uncertain to be enforceable. Mr Singh's response was that the principles of law governing agreements to negotiate or mediate are clear: a bare agreement to negotiate or mediate is unenforceable. In support of his argument, Mr Singh cited the House of Lords decision in *Walford v Miles* [1992] 2 AC 128 ("*Walford*"). In *Walford*, the buyers and sellers of a company entered into an oral agreement under which the sellers agreed to deal with the buyers exclusively and to terminate any negotiations between them and any other competing buyer. The sellers subsequently decided not to proceed with their negotiations with the buyers and eventually sold the company to another party. The buyers sued for breach of the oral agreement. The sellers' defence was that the parties were still in negotiations and the oral agreement was an agreement to negotiate in good faith. The House of Lords held that the oral agreement was unenforceable. It observed (at 138) that an agreement to negotiate in good faith was unworkable in practice because while negotiations were in existence, either party was entitled to withdraw from those negotiations at any time and for any reason. Such an agreement was uncertain and had no legal content.

92 *Walford* must now be read in light of *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] SGCA 48 ("*Toshin*"), a very recent decision of the Singapore Court of Appeal. One of the issues in *Toshin* was whether an express term in a contract which obliges the parties to endeavour, in good faith, to agree on a new rent was valid and enforceable. The court answered this issue in the affirmative. It distinguished *Walford* on the basis that the oral agreement in the latter was a standalone agreement; there was no other overarching contractual framework which governed the parties' relationship. The agreement to negotiate in *Toshin*

was part of a Rent Review Mechanism which was in turn part of the Lease Agreement which the parties had entered into. The Court of Appeal's holding and observations are directly on point and merits quotation *in extenso* (at [39]–[40]):

> [39] In particular, when, as part of a wider existing contractual framework, there is a clause obliging the parties to negotiate certain contractual modalities in good faith, such negotiations need not necessarily be adversarial and hostile, but call instead for a consensual approach to resolve the identified matters as part of the performance of the broader existing agreement. This is also part of the wider contractual duty to co-operate to implement the contract. …
>
> [40] In our view, there is no good reason why an express agreement between contracting parties that they must negotiate in good faith should not be upheld. First, such an agreement is valid because it is not contrary to public policy. Parties are free to contract unless prohibited by law. *Indeed, we think that such "negotiate in good faith" clauses are in the public interest as they promote the consensual disposition of any potential disputes.* We note, for instance, that it is fairly common practice for Asian businesses to include similar clauses in their commercial contracts. As Assoc Prof Philip J McConnaughay has insightfully observed in "Rethinking the Role of Law and Contracts in East-West Commercial Relationships" (2000-2001) 41 Va J Int'l L 427 at pp 448–449:
>
> > A core term of many Asian commercial contracts – the "friendly negotiations" or "confer in good faith" clause – captures the essence of contractual obligation in the Asian tradition. Such clauses typically recite that, if differences or disputes arise during the course of the contractual relationship, the parties will discuss and resolve the matter amicably. The Western view of such clauses is that they impose no real obligation at all; at most, they represent a mechanism for making unenforceable requests for novation, or perhaps an initial formality in a multiple-step dispute resolution process culminating eventually in compulsory adjudication intended to enforce precise contractual terms. But these views presuppose a Western understanding of the contract itself, which is not shared in Asia. *From a traditional Asian perspective, a "confer in good faith" or "friendly negotiation" clause represents an executory contractual promise no less*

> *substantive in content than a price, payment, or delivery term. It embodies and expresses the traditional Asian supposition that the written contract is tentative rather than final, unfolding rather than static, a source of guidance rather than determinative, and subordinate to other values – such as preserving the relationship, avoiding disputes, and reciprocating accommodations – that may control far more than the written contract itself how a commercial relationship adjusts to future contingencies*. ***Characterizing a "confer in good faith" or "friendly negotiation" clause as a "dispute resolution" clause tempts a misapprehension of this essential nature, for no "dispute" exists if all of the parties to the contract share an Asian understanding of its evolving and responsive (through good faith conferences and friendly negotiations) nature***. [*emphasis in italics and bold italics original*]
>
> We think that the "friendly negotiations" and "confer in good faith" clauses highlighted in the above quotation are consistent with our cultural value of promoting consensus whenever possible. *Clearly, it is in the wider public interest in Singapore as well to promote such an approach towards resolving differences*.
>
> [emphasis in original]

93 The Court of Appeal also opined (at [43]) that in principle, "there is no difference between an agreement to negotiate in good faith and an agreement to submit a dispute to mediation", and that "[e]ven though agreement cannot be guaranteed, it does not mean that the parties concerned should not try as far as reasonably possible to reach an agreement". Highlighting the approach which should be taken towards negotiation and mediation dispute resolution clauses, the Court of Appeal stated (at [45]):

> *The choice made by contracting parties, especially when they are commercial entities, on how they want to resolve potential differences between them should be respected*. Our courts should not be overly concerned about the inability of the law to compel parties to negotiate in good faith in order to reach a mutually-acceptable outcome. As mentioned earlier (at [40]) above, "negotiate in good faith" agreements do serve a useful commercial purpose in seeking to promote consensus and

> conciliation in lieu of adversarial dispute resolution. These are values that our legal system should promote.
>
> [emphasis in original]

Given the Court of Appeal's attitude towards mediation clauses, any doubts about an obligation to negotiate in good faith under a multi-tiered dispute resolution clause should be laid to rest. If an obligation to negotiate in good faith which is part of a broader contractual framework such as a rent review mechanism under a lease agreement is enforceable, the obligation to refer a dispute to various specifically constituted panels pursuant to cl 37.2 should also be enforceable. They are, after all, essential steps stipulated in the Dispute Resolution Mechanism and expressly made condition precedents to resolution of a dispute by arbitration.

94 In any event, I disagree that the mediation procedure in cl 37.2 is uncertain. Mr Singh submitted that *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 1 SLR(R) 23 ("*Insigma (HC)*") is instructive. The relevant dispute resolution clause in *Insigma (HC)* states:

> Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to executive representatives of the Parties for settlement through friendly consultations between the Parties. In case no agreement can be reached through consultation within 40 days from either Party's notice to the other for commencement of such consultations, the dispute may be submitted to arbitration for settlement by either Party. Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English. …

95 Prakash J opined (*Insigma (HC)* at [50]), albeit *obiter*, that the clause was unenforceable because it was vague and subjective, "especially in relation

to the meaning of the words 'friendly' and 'consultations'". Arguably, the phrase "friendly consultations" does lend itself to some uncertainty as to the nature of the exercise and the extent of the parties' obligations. Prakash J was thus understandably concerned that such an exercise was not of a mandatory character. The significance of the mandatory character of a dispute resolution procedure was highlighted by Colman J in *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] CLC 1319 ("*Cable & Wireless*"), which Prakash J had taken note of (also at [50]). Colman J cautioned (at 1327):

> Before leaving this point of construction, I would wish to add that contractual references to ADR [Alternative Dispute Resolution] which did not include provision for an identifiable procedure would not necessarily fail to be enforceable by reason of uncertainty. *An important consideration would be whether the obligation to mediate was expressed in unqualified and mandatory terms* or whether, as is the case with the standard form of ADR orders in this court, the duty to mediate was expressed in qualified terms: 'shall take such serious steps as they may be advised'. The wording of each reference will have to be examined with these considerations in mind. In principle, however, *where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find.*
>
> [emphasis added]

96 Colman J held that the relevant clause was enforceable because it did not merely require an attempt in good faith to achieve resolution of a dispute. The parties were *obliged* to participate in a procedure as recommended to the parties by the Centre for Dispute Resolution. Reference to the Centre for Dispute Resolution and participation in its recommended procedure were, in Colman J's view, sufficient indicia of certainty as the court may look at these indicia to determine if the clause was complied with.

97 Likewise, the mechanism in cl 37.2 stipulates that "[a]ny dispute between the Parties ... *shall be referred*" [emphasis added] to the various

committees described in cll 37.2.1, 37.2.2 and 37.2.3. Essentially, if the dispute is not resolved by the first committee constituted under cl 37.2.1, it *shall* be referred to the second committee prescribed in cl 37.2.2. If that fails to result in a resolution, the dispute *shall* then be referred to the third committee formed pursuant to cl 37.2.3. A court looking at the conduct of the parties can easily discern if the entire mediation procedure in cl 37.2 was complied with or not. Not only is there an unqualified reference to mediation through the respective committees, the process is clear and defined. There is nothing uncertain about the mediation procedure in cl 37.2.

Consequences of failure to comply with Clause 37.2

98 Mr Pillai argued that cl 37.2 is not only enforceable, it is a condition precedent to cl 37.3, a breach of which precludes the Tribunal from asserting jurisdiction. Mr Singh did not engage on the characterisation of cl 37.2 as a condition precedent. He instead contended that the appropriate recourse to a breach of cl 37.2 is to adjourn the arbitration proceedings pending compliance with cl 37.2.

99 There are in fact two distinct and separate questions. First, is cl 37.2 a condition precedent to the commencement of arbitration? Second, if cl 37.2. is a condition precedent and it has been breached, what is the appropriate relief for such a breach?

100 Both parties seem to have proceeded on the footing that cl 37.2 operates as a condition precedent to the commencement of arbitration. Neither party advanced any argument that the arbitration agreement in cl 37.3 is an *independent* obligation that is *not* parasitic on compliance with cl 37.2. I shall therefore proceed on the same footing. Suffice to say, as cl 37.2 was drafted in

a mandatory fashion and cl 37.3 provides that all disputes "which *cannot be settled by mediation* pursuant to cl 37.2 [emphasis added]" shall be settled by arbitration, I would have independently concluded that cl 37.2 was a condition precedent to the commencement of arbitration.

101 I now consider the effect of a breach of cl 37.2 *qua* a condition precedent. Where an agreement is subject to a condition precedent, there is, before the occurrence of the condition, no duty on either party to render the principal performance under the agreement: *Chitty* at para 2-150. A dispute resolution clause, which may be multi-tiered in nature, should be construed like any other commercial agreement: *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 ("*Insigma (CA)*") at [30]. Therefore, until the condition precedent to the commencement of arbitration is fulfilled, neither party to the arbitration agreement is obliged to participate in the arbitration. In the same vein, an arbitral tribunal would not have jurisdiction before the condition precedent is fulfilled: see *Smith v Martin* [1925] 1 KB 745.

102 Mr Singh contended that should the court find that cl 37.2 was not complied with, the appropriate course of action is an order directing the adjournment of the arbitration proceedings until the parties have attempted the mediation procedure in cl 37.2. In support of his argument, Mr Singh referred to *Cable & Wireless* where Coleman J, after holding that the ADR conditions were enforceable, held (at 1328) that the appropriate course to adopt was for the hearing of the court proceedings "to be adjourned until after the parties have referred all their outstanding disputes to ADR".

103 However, the facts of *Cable & Wireless* are different from the present case. The issue in *Cable & Wireless* was whether the *court* should exercise *its* jurisdiction to hear the action. Naturally, the court has the power to stay *its own proceedings* in favour of the ADR procedure. In contrast, the present case concerns the jurisdiction of the Tribunal, not the court. In the first place, Mr Singh has not cited any authority which suggests that the court has the power to grant a stay or order an adjournment of the arbitration, and that such power should be exercised in the present circumstances. Second, if the parties consented to arbitration *only* on the condition that the parties must first attempt mediation, the Tribunal does not have jurisdiction until mediation has been attempted. A similar dispute resolution clause which provided that mediation was a condition precedent to the commencement of arbitration was present on the facts of *HIM Portland LLC v Devito Builders Inc*. 317 F 3d 41 (1st Cir, 2003). The United States Court of Appeals declined to compel the defendant to arbitrate their dispute on the ground that mediation had not yet taken place. It emphasised that the provisions of the contract had stated in the plainest possible language that mediation was a condition precedent to arbitration, and concluded (at 44) that "there is no doubt that the parties intended that the duty to arbitrate would not ripen until after the condition precedent of mediation had been satisfied". I agree with this analysis.

104 That the failure to perform a condition precedent on which an arbitration agreement is hinged is a defect going to the jurisdiction of an arbitral tribunal is also echoed by commentators: see Lye Kah Cheong, "Agreements to Mediate: The Impact of *Cable & Wireless plc v IBM United Kingdom Ltd*" (2004) 16 SAcLJ 530 at [34]–[40]. Gary Born, for instance, noted in his treatise *International Commercial Arbitration* vol 1 (Kluwer,

2009) at pp 842–843 that courts have been known to require compliance with preconditions to arbitration:

> … Where dispute resolution provisions do not state that negotiation or mediation is a condition precedent to arbitration, courts are particularly likely to refuse to strictly enforce notice requirements.
>
> ***On the other hand, if dispute resolution clauses expressly provide that negotiations or other procedural steps are a condition precedent to arbitration, courts sometimes require compliance with those provisions***. There is arbitral authority to the same effect. *Thus, where a contract contained a "mandatory negotiation" clause and the plaintiff commenced an arbitration before any negotiations could take place, the court annulled the subsequent award on the grounds the "the parties were required to participate in the mandatory negotiation sessions prior to the arbitration." [White v Kampner 641 A 2d 1381 at 1387 (Conn, 1994)] In another case [De Valk Lincoln Mercury, Inc v Ford Motor Co 811 F 2d 326 at 336], the court held that "the mediation clause here states that it is a condition precedent to any litigation … and the mediation clause demands strict compliance with its requirement[s]."*
>
> [emphasis added in italics and bold italics]

105 Assuming *arguendo*, even if Mr Singh is correct that further negotiations between Lufthansa and IRCP would not resolve the dispute, the court has no basis to order IRCP to comply with the arbitration proceedings if the Tribunal's jurisdiction has yet to crystallise as a result of the non-performance of the conditions precedent in cl 37.2. Ordering a stay also does not assist Mr Singh's position. A stay may result in the abeyance of the arbitration proceedings, but it is nevertheless tantamount to a recognition of the Tribunal's jurisdiction when it has none prior to fulfilment of the conditions precedent.

106 Therefore, since cl 37.2 is a condition precedent (see [100] above), if I find that cl 37.2 has not been complied with, the Tribunal does not have jurisdiction to resolve the dispute.

Whether Clause 37.2 was complied with

107 It follows that the critical question is whether cl 37.2 has been complied with. Once again, because both parties proceeded on the assumption that cl 37.2 could be read to encompass IRCP's involvement, I will proceed on the same basis. In any event, I would have construed the entire Dispute Resolution Mechanism in cl 37, including cl 37.2, to be applicable to a dispute arising out of the terms in the Cooperation Agreement that were amended by the Supplemental Agreements signed by all three parties. Hence, disputes involving IRCP shall be referred to a committee formed with the additional participation of the relevant personnel from IRCP, even though cl 37.2 does not explicitly mention IRCP (see [89] above).

108 Mr Singh submitted that Lufthansa had complied "in substance" with the mediation procedure in cl 37.2. He referred to the fact that Lufthansa, Datamat and IRCP had, since March 2006 and July 2009, conducted at least 24 meetings in a bid to resolve the dispute arising under the Cooperation Agreement. These meetings had involved various personnel, including senior management. Mr Pillai did not dispute that such meetings had taken place, but explained that these meetings were not convened for the purpose of resolving this dispute. The meetings were for other purposes. As such, the mediation procedure in cl 37.2 had not yet been complied with.

109 I do not understand Mr Pillai to be arguing that a meeting between personnel from Lufthansa, Datamat and IRCP must be labelled specifically by the parties as a meeting for the purpose of cl 37.2 for the meeting to fulfil the requirements of cl 37.2. Indeed, this would be taking a far too literal interpretation of cl 37.2. The object of the mediation procedure is for a series of discussions between personnel of various ranks from the disputing parties.

Even if other matters were discussed at those meetings, as long as the dispute in question was addressed, the meeting would satisfy the requirements contained in cl 37.2.

110 Based on the affidavit evidence available to me, there appear to have been several meetings to resolve the Payment Dispute. Lufthansa has produced a table showing at least seven meetings which it had with IRCP in Bangkok between February 2007 and July 2009. Mr Sawangsamud, IRCP's director, was present in all seven meetings. Mr Kather, the General Counsel for Lufthansa, who was at most of those meetings, attested that the Payment Dispute was on the agenda at these meetings. I note that a representative from Datamat was also present at three of these meetings. Although I accept that there is some uncertainty over the precise contents of those meetings, I have not seen any evidence from IRCP that the Payment Dispute was never discussed or sought to be resolved at these meetings. IRCP's allegation that these meetings "were held for the purpose of discussing Lufthansa's uncompleted works in the EDP System Project" was unsubstantiated. On balance, I am persuaded that there were several rounds of high-level meetings between Lufthansa, Datamat and IRCP to resolve the Payment Dispute. The parties have had their attempts at negotiations and in that respect, the object of cl 37.2 has been met. The condition precedents to the commencement of the arbitration proceedings were therefore satisfied. Consequently, the Tribunal has jurisdiction to resolve the dispute.

Concluding observation

111 I note that IRCP is seeking, *inter alia*, an order to set aside the arbitral tribunal's preliminary ruling that it had jurisdiction. However, I am apprehensive as to whether a setting aside order is the proper order to ask for

and whether the court can make such an order. In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, a question arose as to whether an arbitral tribunal's finding of negative jurisdiction may be set aside pursuant to s 24 of the IAA read with Art 34 of the Model Law. Adjunct Associate Professor Lawrence Boo, who was appointed as *amicus curiae*, expressed the following views (at [65]):

> (a) [T]hat, on its face, the definition of an *"award" under s 2(1) of the Act only includes decisions that deal with the "substance of the dispute"*: ***a decision of a tribunal on a preliminary question such as jurisdiction would not dispose of the "substance of the dispute", and, hence, would not be an "award" for the purposes of the Act***;
>
> (b) that s 19A(2) of the Act was meant to clarify the power of a tribunal to make awards on different matters and at different stages of the arbitration and was never intended to widen the definition in s 2(1) of the Act; and
>
> (c) that Art 16(3) of the Model Law ***does not admit a pure ruling on the preliminary question of jurisdiction as an "award"***.
>
> [emphasis added in italics and bold italics]

112 Professor Boo's opinions were accepted by the Court of Appeal in *PT Asuransi* (at [66]). Therefore, it would seem that an arbitral tribunal's ruling on jurisdiction—positive or negative—is not a decision on the substance of the dispute, and cannot be characterised as an award. Mr Chan Leng Sun SC, made the same observation in his monograph, *Singapore Law on Arbitral Awards* (Academy, 2011) at para 2.23, that an arbitral tribunal's ruling on jurisdiction should be described as a ruling or decision and not as an award.

113 As the IAA read with the Model Law only provides for the setting aside of *awards*, there appears to be a lacuna where an application has been made under s 10 of the IAA to challenge an arbitral tribunal's preliminary ruling on jurisdiction, such as in the present case. On a strict reading of *PT*

Asuransi, while a party who is dissatisfied with the arbitral tribunal's preliminary ruling on jurisdiction is permitted to apply to the Singapore court under s 10 to have the Singapore court decide the matter, the court may be precluded from setting aside the ruling on jurisdiction under s 24 read with Art 34 on the ground that the ruling on jurisdiction is not an award for the purposes of the IAA. This lacuna is further compounded by the fact that s 10 is silent on the reliefs which the court may order should the court decide that the arbitral tribunal has no jurisdiction. Notwithstanding this peculiarity, on a practical level, it would be very unusual for an arbitral tribunal—or indeed a party to the arbitration—to continue with a Singapore-seated arbitration where a Singapore court has decided that the same arbitral tribunal lacks jurisdiction, albeit without setting aside the arbitral tribunal's preliminary ruling that it has jurisdiction.

114 As Lufthansa did not object to the relief of setting aside sought by IRCP and no arguments were canvassed on this point, I will not express any view on whether an order to set aside the arbitral tribunal's positive ruling on its jurisdiction is properly within the power of the court to give. In any event, since I am of the view that the Tribunal has jurisdiction, there is no need to consider if its positive ruling on jurisdiction should be set aside.

Conclusion

115 For the foregoing reasons, IRCP's application is dismissed. Subject to the parties writing to the court within seven days to be heard on costs, I further order that the costs of Lufthansa are to be taxed if not agreed.

Chan Seng Onn
Judge

Subramanian Pillai and Jasmin Yek (Colin Ng & Partners LLP) for the plaintiff;
Dhillon Dinesh Singh, Tan Xeauwei, Joel Lim and Teh Shi Ying (Allen & Gledhill LLP) for the first defendant.
