EXXA Network Pte Ltd *v* SQ2 Fintech Pte Ltd

[2021] SGHCR 9

Case Number	: Suit No 142 of 2021 (Summons No 3874 of 2021)
Decision Date	: 26 November 2021
Tribunal/Court	: General Division of the High Court
Coram	: Justin Yeo AR
Counsel Name(s)	: Mr Walter Silvester, Mr Gilbert Chng and Mr Tan Hoe Shuen (M/s Silvester Legal LLC) for the Plaintiff. Mr Kelvin Poon and Mr Timothy Ang (M/s Rajah & Tann Singapore LLP) for the Defendant.
Parties	: EXXA Network Pte Ltd — SQ2 Fintech Pte Ltd

Arbitration – Agreement – Scope

Arbitration – Stay of Court Proceedings

26 November 2021

Justin Yeo AR:

1 This judgment concerns an application to stay court proceedings in favour of mediation and arbitration, pursuant to s 8 of the Mediation Act 2017 (Act 1 of 2017) ("Mediation Act") and s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("Arbitration Act"). I grant the stay for the reasons elaborated upon in this judgment.

Background Facts

2 The Plaintiff, EXXA Network Pte Ltd ("the Plaintiff"), is in the business of information technology and computer service activities. The Defendant, SQ2 Fintech Pte Ltd ("the Defendant"), provides credit card and cryptocurrency services, and also develops fintech applications.

The Superwallet Platform Quote

3 In 2019, the Plaintiff sought the Defendant's services to construct a platform for cryptocurrency trading (called the "Superwallet Platform") with an artificial intelligence trading bot (called "DEVO+") (collectively, "the Project"). On 20 April 2019, the Defendant sent to the Plaintiff a quote setting out the framework for the development of the Superwallet Platform and DEVO+. The parties referred to this as the "Superwallet Platform Quote" ("SPQ"). There is no need to go into detail on the clauses of the SPQ, save to observe that (a) the preamble to the SPQ states that "a detail[ed] software development agreement will be prepared after the acceptance of this quotation"; and (b) the SPQ does not contain any jurisdiction or dispute resolution clause.

The Shareholders' Agreement

4 The Plaintiff, the Defendant and the then-shareholders of the Plaintiff subsequently entered into a "Founders Shareholders' Agreement" dated 12 August 2019 ("SHA"). Of particular relevance for present purposes is that the SHA referred to the SPQ, or the subject matter of the SPQ, in three main ways:

(a) First, the term "Business Plan" in the SHA was defined in Clause 1.1 of the SHA as a reference to the business road map of the Plaintiff that "includes the execution, development of

the *IP Assets* by [the Defendant] for the purpose of the Business…" (emphasis added). The term "IP Assets", in turn, was defined to include "… the mobile *Superwallet blockchain platform*, utilising the [Defendant's] *AI Trading Robot* as one of the product offering, such *AI Trading Robot* refers to the proprietary crypto-trading engine that [the Defendant] owns and provides as a service. The IP Assets would also include [the Defendant's] contribution to such technology infrastructure… necessary for the Business, such contribution as more particularly known as [*the SPQ*] …" (emphases added). Reference is clearly made to the Superwallet Platform and DEVO+, which were the subject matter of the SPQ.

(b) Second, Clause 13.2 of the SHA provided for each party's further covenants and undertakings. The Defendant is stated as being responsible for "developing and providing to the [Plaintiff] the IP Assets, utilising the [Defendant's] AI Trading Robot as one of [the Defendant's] product offering, a proprietary crypto-trading engine that [the Defendant] owns and provides as a service."

(c) Third, the Defendant provided a warranty in Clause 15.2(c) of the SHA that the performance of the Defendant's obligations "do not and shall not infringe upon or misappropriate the intellectual property rights of any third party". This expressly reverses the previous position taken under Clause 5.2 of the SPQ, where it was expressly provided that the Defendant made *no* warranty against infringement of intellectual property rights of a third party. The relevance of this point is mentioned at [14(b)] below.

5 Three other aspects of the SHA are relevant to the present application:

(a) First, Clause 16.3 of the SHA, which relates to the termination of the SHA, provides that:

> If any Shareholder shall transfer the entirety of its Shares, it shall be released from its obligations under this Agreement but if at that time there are two or more Shareholders bound by the provisions of this Agreement, this Agreement shall continue in full force and effect as between such continuing Shareholders until the dissolution of the Company or otherwise terminated in accordance with this Agreement.

(b) Second, Clause 20.6 of the SHA is an entire agreement clause ("Entire Agreement Clause"), which provides that:

> The terms and provisions contained in this Agreement constitute the entire agreement between the Parties with respect to the subject matter hereof. This Agreement supersedes and terminates all previous undertakings, representations and agreements, both oral and written between the Parties with respect to the subject matter hereof.

(c) Third, Clause 25 of the SHA sets out a multi-tiered dispute resolution framework ("Dispute Resolution Clause"). Under the Dispute Resolution Clause, "all disputes, controversies or differences… arising out of or in connection with" the SHA shall first be referred to mediation and, failing resolution by mediation, at a party's option to arbitration. Clauses 25.1, 25.2, 25.3 and 25.4 of the SHA provide as follows:

> 25.1 If any dispute or difference arises between any of the Parties hereto during the subsistence of this Agreement or thereafter, in connection with the validity, interpretation, implementation or alleged breach of any provision of the Agreement or regarding any question, including the question as to whether the termination of the Agreement by any Party hereto has been legitimate, the Parties hereto shall endeavour to settle such dispute

amicably. The attempt to bring about an amicable settlement is considered to have failed as soon as one of the Parties hereto, after reasonable attempts, which attempt shall continue for not less than thirty (30) days, gives a written notice thereof to the other Party in writing.

25.2 The Parties shall agree that all disputes, controversies or differences ("Disputes") arising out of or in connection with this Agreement, including any questions regarding its existence, validity or termination, shall first be referred to mediation to the Singapore International Mediation Centre ("SIMC") in Singapore, in accordance with the SIMC rules and proceedings for the time being in force.

25.3 In the event that the Disputes cannot be resolved in mediation within the time agreed by the Parties, each Shareholder may, at its option, refer and resolve the Disputes by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this Clause. A Party seeking to commence arbitration under this Clause 25 shall first serve a written notice, specifying the matter or matters to be so submitted to arbitration, on the other Parties hereto.

25.4 The seat of such arbitration shall be in Singapore and all proceedings shall be conducted in the English language.

The Dispute and the Stay Application

6 In October 2019, difficulties arose between the Plaintiff and the Defendant concerning the Project. In gist, the Defendant's Chief Director of Information Technology left the Defendant's employment, and the Defendant could no longer support the Plaintiff in relation to DEVO+. While the parties presented different accounts of the subsequent attempts to part ways amicably, it is undisputed that the Defendant eventually transferred its shares in the Plaintiff to another of the Plaintiff's shareholders.

7 On 26 March 2021, the Plaintiff served the writ in the present suit on the Defendant, claiming – amongst other things – that the Defendant had breached the SPQ by its failure to deliver DEVO+ ("the Dispute"). The suit was initially stayed because the Defendant commenced voluntary winding up proceedings. In July 2021, the Plaintiff sought and obtained the leave of the Court to continue the suit. While granting leave to continue the suit, the Court expressly allowed the Defendant to apply to stay the suit on the basis of the Dispute Resolution Clause. This resulted in the present application to stay court proceedings in favour of mediation and arbitration.

Applicable Legal Principles

8 A dispute resolution clause expresses the parties' agreement on the appropriate forum for resolving any disputes which fall within the ambit of that clause. Where such a clause seeks to avoid dispute resolution in a court by having the matter proceed to arbitration, this intention ought to be upheld (see, *eg*, *Ling Kong Henry v Tanglin Club* [2018] 5 SLR 871 ("*Ling Kong Henry*") at [25]). The principle underlying judicial non-intervention in such situations is the respect for the parties' agreement on how their disputes will be resolved; or, as succinctly observed in *Ling Kong Henry*, "the premise of the court's intervention lies in the bargain struck between parties". This policy rationale finds legislative expression in the provisions relating to a stay of court proceedings in s 8 of the Mediation Act and s 6 of the Arbitration Act.

9 The principles governing the Court's exercise of power in the context of a stay of court proceedings in favour of arbitration have been clearly set out by the Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 ("*Tomolugen*") and *Sim Chay Koon and others v NTUC Income Insurance Co-operative Ltd* [2016] 2 SLR 871 ("*Sim Chay Koon*"). The principles of especial relevance to the present application are:

(a) First, as a general rule, the Court undertakes a restrained review of the facts and circumstances in determining whether it appears on a *prima facie* basis that there is an arbitration clause and that the dispute falls within the ambit of that clause (*Sim Chay Koon* at [5]). This is in the light of the *kompetenz-kompetenz* principle, which is legislatively expressed in s 21(1) of the Arbitration Act as follows:

> The arbitral tribunal may rule on its own jurisdiction, including a plea that it has no jurisdiction and any objections to the existence or validity of the arbitration agreement, at any stage of the arbitral proceedings.

(b) Second, while the arbitral tribunal generally has the right to first determine the matters mentioned in s 21(1) of the Arbitration Act, an aggrieved party may subsequently seek relief from the Court through prescribed avenues (*eg*, an application under s 48 of the Arbitration Act to set aside an arbitral award).

(c) Third, the Court will stay proceedings in favour of arbitration, except where the arbitration clause is "*clearly* invalid or inapplicable" (*Tomolugen* at [68]) (emphasis in original).

(d) Fourth, the Court has the discretion to refuse a stay of proceedings in favour of arbitration (see s 6(2)(*a*) of the Arbitration Act). However, this discretion should be exercised "sparingly and in a principled way" (*Sim Chay Koon* at [7]).

10 The points mentioned in [9] above apply similarly to multi-tiered dispute resolution clauses. For instance, in *Ling Kong Henry* at [25], the Court observed that the same policy rationale (*ie* respecting parties' intentions as expressed in a dispute resolution clause) applies "with equal force" to clauses which include conciliatory steps. In *Tan Wee Tin and others v Singapore Swimming Club* [2017] SGHCR 21 at [66]–[69], the Court granted a stay pending an agreed multi-tiered dispute resolution process which required the parties to first attempt mediation of any disputes that arise.

Issues

11 The issues arising in the present application are:

(a) First, whether, on a *prima facie* basis, the Dispute falls within the ambit of the Dispute Resolution Clause.

(b) Second, whether the Dispute Resolution Clause remains valid or applicable *vis-à-vis* the Defendant, given that the Defendant is no longer a shareholder in the Plaintiff.

(c) Third, whether the Court should exercise discretion to refuse a stay.

(d) Fourth, whether any conditions should be imposed on the stay.

Whether the Dispute falls within the ambit of the Dispute Resolution Clause

12 The first issue is whether, on a *prima facie* basis, the Dispute falls within the ambit of the Dispute Resolution Clause.

13 The parties present diametrically opposed characterisations of the SPQ. The Defendant's position is that the SPQ was merely a quotation issued for the Plaintiff's consideration and was never intended to be a standalone contract that could be enforced on its own.[note: 1] The Plaintiff's position is that the SPQ was a standalone "contract for services" between the Plaintiff and the Defendant, which is "wholly capable of being enforced on its own".[note: 2] As such, the Plaintiff contends that because the Dispute arises out of the SPQ (rather than the SHA), it does not fall within the ambit of the Dispute Resolution Clause. The Plaintiff's arguments on this issue may be summarised as six points:

(a) First, the SPQ was entered into more than two months prior to the SHA. By the time the SHA was entered into, work had already been done under the SPQ. As such, the parties have treated the SPQ as binding even before they entered into the SHA, which evinces that the SPQ is a standalone contract that can be enforced on its own.

(b) Second, the SPQ and SHA served different purposes. The former related to the Defendant's substantive duties in the construction of the Superwallet Platform, whereas the latter governed the relationship between the parties *qua* shareholders.[note: 3] While the SHA did refer to the Project, the provisions relating thereto were generic. The SHA focused more on matters such as the manner of transferring shares and appointing directors, rather than technical details relating to the subject matter of the SPQ.[note: 4]

(c) Third, there is no complete identity of parties between the SPQ and the SHA. The former was exclusively between the Plaintiff and the Defendant, whereas the latter involved additional parties (who were shareholders in the Plaintiff).

(d) Fourth, the shareholders entered into the SHA because the Defendant's director wanted to transfer shares to the Defendant. It was done "**just** to document and maintain a record" (emphasis in original).[note: 5] This had nothing to do with the SPQ.

(e) Fifth, the presence of the Entire Agreement Clause means that the SHA should be read narrowly, to avoid the parties being deprived of the effect of the SPQ.

(f) Sixth, the Defendant has not shown any correspondence or agreement that the SPQ should be subsumed or replaced by the SHA.

14 I start by expressing some difficulties I have with the arguments at [13(d)] and [13(e)] above.

(a) In relation to the argument at [13(d)], I note that the Plaintiff's director had, in the same affidavit, provided a *separate* explanation of the intentions behind the SHA. The Plaintiff allegedly entered the SHA due to its concerns about its vulnerability in the Project, given that the Defendant's work was highly specialised and technical, with a "significant amount of discretion in the way [the Defendant] conducted the project".[note: 6] According to the Plaintiff's director, the SHA was intended to ensure that the Defendant was "incentivised to take ownership of the risks of the project", and to take "responsibility of the risks [the Defendant] created".[note: 7] Seen in this light, far from having nothing to do with the SPQ, the SHA conversely appears very much linked with the Project and the SPQ.

(b) In relation to the argument at [13(e)] above, it is unclear why the Entire Agreement Clause ought to be read narrowly, when such clauses are often precisely intended to supersede the parties' various arrangements in the lead up to the final agreement. On a *prima facie* basis, the Defendant's explanation that the SHA was intended to be the definitive agreement governing all aspects of the relationship between the parties appears reasonable.[note: 8] This is buttressed by the following three points:

(i) the Project is referenced expressly in the SHA (see [4] above);

(ii) Clause 15.2(c) of the SHA, which expanded the Defendant's obligations under the SPQ by expressly reversing the position in one of the clauses of the SPQ (see [4(c)] above); and

(iii) the preamble to the SPQ stated that "a detail[ed] software development agreement will be prepared after the acceptance of this quotation", but it is undisputed that no such agreement was (or has ever been) prepared.

15 Despite the above points, I make no conclusive finding on the true relationship between the SHA and the SPQ, and whether the SPQ is subsumed within the SHA. This is because it is sufficient to proceed on the basis of the observations in this paragraph. On a restrained review of the facts and circumstances, I find that the Dispute falls within the ambit of the Dispute Resolution Clause. The operative phrase in Clause 25.2 of the SHA expressly states that "all disputes, controversies or differences… *arising out of or in connection with [the SHA]*… shall first be referred to mediation…" (emphasis added), while Clause 25.3 of the SHA provides that if mediation is unsuccessful, each party "may, at its option, refer and resolve the Disputes by arbitration in Singapore…". Even if I were to accept the Plaintiff's contention that the SPQ is technically a standalone contract, at the very least, the Dispute has *prima facie* arisen "in connection with" the SHA. This is because the SHA clearly contains numerous references to the subject matter of the SPQ (see [4] above), including the specific subject matter of the Dispute (*ie* the Defendant's failure to deliver DEVO+). For completeness, I note that the word "connected" and the phrase "connected with" have been found sufficiently broad to include any subject matter with a *prima facie* connection to the arbitration agreement, including matters that did not "arise under" (or, for present purposes, "aris[e] out of") the contract in question (see *Maniach Pte Ltd v L Capital Jones Ltd and another* [2016] 3 SLR 801 at [145], referred to in *BMO v BMP* [2017] SGHC 127 at [53]).

Whether the Dispute Resolution Clause remains valid or applicable

16 The second issue is whether the Dispute Resolution Clause remains valid or applicable *vis-à-vis* the Defendant, given that the Defendant is no longer a shareholder in the Plaintiff. On this issue, the Plaintiff contended that Clause 16.3 of the SHA meant that the Dispute Resolution Clause no longer applied to the Defendant as the Defendant had transferred the entirety of its shares and was accordingly released from all obligations under the SHA.

17 This issue concerning validity and applicability of the Dispute Resolution Clause should, at first instance, be decided by the arbitral tribunal. As provided in s 21 of the Arbitration Act, the arbitral tribunal "may rule on its own jurisdiction, including … any objections to the *existence or validity of the arbitration agreement*" (emphasis added). The Court intervenes to determine this issue at first instance only when the Dispute Resolution Clause is "*clearly* invalid or inapplicable" (see [9(c)] above). However, there is no clear invalidity or inapplicability in the present case, for three reasons:

(a) First, the Dispute Resolution Clause may be regarded as separable from the SHA, thus

surviving the Defendant's cessation of shareholding in the Plaintiff. This is because it is generally presumed (albeit not in the technical sense of a legal presumption) that parties intend a dispute resolution clause to survive the cessation of the substantive contract (see, *eg*, *BXH v BXI* [2020] 3 SLR 1368 at [84], citing *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama and another* [2018] SGHC 126 at [36]).

(b) Second, the Dispute Resolution Clause is expressly stated to apply "during the subsistence of this Agreement *or thereafter*" (Clause 25.1 of the SHA). This provides *prima facie* basis for the Defendant's position that the Dispute Resolution Clause continues to apply even after the Defendant ceases to be a shareholder of the Plaintiff.

(c) Third, while Clause 16.3 states that a shareholder is "released from its *obligations*" (emphasis added) under the SHA upon transferring the entirety of its shares, it makes no mention of whether a former shareholder retains the right to have any disputes arising in connection with the SHA resolved in accordance with the Dispute Resolution Clause.

18 I therefore find that the Dispute Resolution Clause is *not* clearly invalid or inapplicable and, as such, the issue of validity or applicability of the clause ought to be determined by the arbitral tribunal at first instance.

Whether the Court should exercise discretion to refuse a stay

19 The third issue is whether discretion should be exercised to refuse a stay. As set out at [9(d)] above, such discretion should be exercised sparingly and in a principled way.

20 On this issue, two points arise from a reading of the Plaintiff's written submissions and the affidavit of the Plaintiff's representative.

21 First, in the Plaintiff's written submissions, the Plaintiff contended that the Court should refuse a stay in view that the Plaintiff had obtained a judgment in default of Defence against the Defendant (on the same day that the present application was filed), and that allowing the dispute to proceed to arbitration may potentially result in a conflicting outcome from that obtained in Court. This submission is puzzling. The default judgment had already been set aside, by consent of the parties, six weeks prior to the hearing of the present application. It is thus unclear what inconsistency in outcome the Plaintiff was referring to, or why this would provide a reason for refusing a stay.

22 Second, in the affidavit filed to oppose the present application, the Plaintiff's representative urged the Court to refuse a stay because the Plaintiff "is determined to take these proceedings to Court by any and all necessary means".[note: 9] The Plaintiff's representative further invited the Court to "consider the futility of referring this matter to arbitration", stating that Plaintiff's counsel "will make the relevant submissions".[note: 10] Tellingly, both in written submissions and at the hearing, Plaintiff's counsel was conspicuously silent on this point (and, in my view, rightly so). The Plaintiff's determination to bring the dispute before the Court is, in itself, clearly not a principled or good reason for the Court to refuse a stay. This argument is no better than the argument rejected in *Sim Chay Koon*, where the Court of Appeal declined to refuse a stay on the basis of a party's subjective belief that he would get a better hearing in Court. While the Plaintiff has the prerogative to take "any and all necessary means" to eventually bring the present suit to Court, it will have to do so in accordance with the extant legal framework and to the extent permissible under the law. Of course, in doing so, one would do well to heed the Court of Appeal's caution that "an unmeritorious application will find its penalty in costs" (*Sim Chay Koon* at [6]).

23 I therefore find no basis to exercise discretion in refusing a stay of these proceedings.

Whether any conditions should be imposed on the stay

24 The fourth and final issue is whether any conditions should be imposed on the stay. The Plaintiff took the position that if a stay is granted, this ought to be made conditional upon the provision of security in the amount of the Plaintiff's claim, *ie* the sum of US$35 million. The basis for this position is that the Plaintiff "may not be in a position to recover costs spent in the claim".[note: 11] At the hearing, Plaintiff's counsel explained that the Plaintiff had hoped to seek protection for its claim in view of the Defendant's precarious financial situation.

25 I decline to impose the condition sought, for three reasons:

(a) First, it is unclear how the concern about the potential recovery of *costs* translates to a request for security in the sum of the entire *claim*.

(b) Second, even if the Plaintiff wished to obtain security for *costs*, the present application is not the correct forum to do so. As the plaintiff (*contra* the defendant), the Plaintiff would not be entitled to security for costs (see O 23 r 1 of the Rules of Court (2014 Rev Ed)). If the Plaintiff has concerns about the recoverability of costs, the Plaintiff may raise these issues before the arbitral tribunal as appropriate.

(c) Third, the Court of Appeal has recently held that conditions which do not facilitate or seek to give effect to the arbitration agreement ought to be subject to a higher level of scrutiny (*The "Navios Koyo"* [2021] SGCA 99 at [29]). Seeking security for the full amount of the Plaintiff's claim, without good justification for doing so, would clearly not pass muster under this standard.

Conclusion

26 For the foregoing reasons, I order that:

(a) All proceedings in this action shall be stayed pursuant to s 8 of the Mediation Act and s 6 of the Arbitration Act.

(b) All timelines in respect of the pleadings be suspended until further order.

27 I will hear parties on costs.

[note: 1] Affidavit of Aw Yong Cheong Yam (dated 1 November 2021) at paragraphs 8 and 10.

[note: 2] Affidavit of Danny Pang (dated 18 October 2021) at paragraphs 17 and 20.

[note: 3] Affidavit of Danny Pang (dated 18 October 2021) at paragraph 29.

[note: 4] Affidavit of Danny Pang (dated 18 October 2021) at paragraph 31.

[note: 5] Affidavit of Danny Pang (dated 18 October 2021) at paragraph 25.

[note: 6] Affidavit of Danny Pang (dated 18 October 2021) at paragraphs 21 and 22.

[note: 7]Affidavit of Danny Pang (dated 18 October 2021) at paragraph 22.

[note: 8]Affidavit of Aw Yong Cheong Yam (dated 1 November 2021) at paragraph 20.

[note: 9]Affidavit of Danny Pang (dated 18 October 2021) at paragraph 67.

[note: 10]Affidavit of Danny Pang (dated 18 October 2021) at paragraph 67.

[note: 11]Affidavit of Danny Pang (dated 18 October 2021) at paragraph 64.