IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHCR 20

Originating Claim No 495 of 2023 (Summons No 2878 of 2023)

Between

Qompass Voyage Ltd

… *Claimant*

And

APACPAY Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure — Stay of proceedings]
[Conflict of Laws — Choice of jurisdiction — Exclusive]

Qompass Voyage Ltd
v
APACPAY Pte Ltd

[2023] SGHCR 20

General Division of the High Court — Originating Claim No 495 of 2023
(Summons No 2878 of 2023)
AR Perry Peh
18 October, 14 November 2023

24 November 2023

AR Perry Peh:

Introduction

1 In HC/SUM 2878/2023 ("SUM 2878"), the defendant sought the stay or dismissal of the entire action in HC/OC 495/2023 ("OC 495") pursuant to s 12(1) of the Choice of Court Agreements Act 2016 (2020 Rev Ed) ("the CCA"), or alternatively, on the ground that the court should decline to exercise jurisdiction over OC 495. In support of SUM 2878, the defendant relied on an exclusive jurisdiction clause in favour of the courts of England and Wales ("the EJC"). However, the defendant denied having any contractual relationship with the claimant.[1] Instead, the basis on which it relied on the EJC is that the EJC formed part of a set of standard terms and conditions that would have been

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[1] 1st Affidavit of Ang Wai Siang ("Ang's affidavit") at para 11; Defence (Jurisdiction) at para 4.

incorporated into the agreement governing that contractual relationship, if one ever existed.[2] What impact do these inconsistent positions have, if any, on whether the defendant can establish a "good arguable case" that the EJC exists and governs the dispute, which is the threshold requirement that the defendant must satisfy to succeed in the jurisdictional challenge? I dismissed SUM 2878 on the basis that these inconsistent positions deprived the defendant of any factual basis for alleging the existence of the EJC, which meant it necessarily fell short of the required standard of proof. I explain my reasons in full in these grounds.

Background

2 The background facts to which OC 495 relate are relatively straightforward. The defendant, APACPAY Pte Ltd ("APL"), was a Singapore-incorporated company in the business of providing digital payment and online payment gateway services. It is not in dispute that, while APL was in operation, it held the necessary operating licence issued by the Monetary Authority of Singapore ("the MAS").[3] The claimant, Qompass Voyage Limited ("QVL"), was a Hong Kong-incorporated company in the business of providing online travel platform services.[4]

3 According to QVL, between October 2018 and June 2019, it used APL's payment processing and ancillary services. It entered into a Merchant Service Agreement bearing number AP90115092018 dated 15 September 2018 ("the MSA") with APL, under which APL provided its services, and QVL was

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2 Ang's affidavit at paras 27–28.

3 Ang's affidavit at paras 5–7.

4 1st Affidavit of Chen Xumin ("Chen's affidavit") at para 7.

to pay various monthly and per transaction processing fees to APL.[5] Under the MSA, among other things, APL must settle with QVL sums received from payments made through APL (less service fees) once a week.[6]

4 QVL states that, in June 2019, it was notified by APL that APL had since ceased operations and services, and that it would contact QVL within the next thirty days to confirm the amount of outstanding balance owed to QVL and arrange for repayment of the outstanding balance in accordance with the MSA.[7] Shortly after, QVL informed APL of the total outstanding balance, and asked APL to settle this outstanding balance as soon as possible.[8] QVL avers that there has been no response since from APL, and APL has also failed to make any payment of the outstanding sum, which amounted to US$253,089.34.[9] QVL therefore seeks to recover this outstanding sum pursuant to the MSA. In the alternative, QVL seeks recovery of this sum pursuant to: (a) an implied contract which it said was formed from the course of dealing between itself and APL and also contains materially the same terms as those found in the MSA;[10] and/or (b) on the basis that APL has been unjustly enriched.[11]

5 APL, which has not filed a defence on the merits in OC 495, offers a starkly different version of events in response. In its Defence (Jurisdiction) and supporting affidavit filed for SUM 2878, APL denies having any contractual

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5 Chen's affidavit at para 9.

6 Chen's affidavit at para 12.

7 Chen's affidavit at para 13.

8 Chen's affidavit at para 14.

9 Chen's affidavit at para 15.

10 Statement of Claim at para 14.

11 Statement of Claim at para 18.

relationship with QVL, whether express or implied.[12] APL's position is that QVL had contracted with another payment services company Cosmopay Holdings Limited ("Cosmopay"), a company incorporated in England.[13] APL states that, while it was unrelated to Cosmopay, there was an agreement between itself and Cosmopay under which Cosmopay could use APL's payment gateway services for its own clients. Cosmopay was therefore a client of APL, and APL processed payments on Cosmopay's instructions, including for Cosmopay's own merchants,[14] such as QVL. As part of those business operations, APL came into possession of the Merchant Service Agreement between Cosmopay and QVL.[15] APL adds that, when it ceased operations, it had met all its liabilities to its customers, including Cosmopay.[16] The long and short of APL's position is that any agreement for payment services that QVL had was with Cosmopay, and consequently, any claim that QVL had for outstanding sums would lie with Cosmopay, and not APL.

6 APL further adds that QVL had made a complaint to the MAS about the alleged outstanding sums. Following this complaint, in November 2019, the MAS made an inquiry with APL, to which APL responded by confirming that it owed no outstanding amounts to QVL, and that APL merely acted as a remittance intermediary for Cosmopay and had no direct relationship with QVL.[17] There is no evidence in the affidavits relating to whether the MAS had made any further inquiry following APL's response. It would appear, however,

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12 Ang's affidavit at para 11; Defence (Jurisdiction) at para 4.

13 Ang's affidavit at paras 13–14.

14 Ang's affidavit at paras 15-16.

15 Ang's affidavit at para 19.

16 Ang's affidavit at para 20.

17 Ang's affidavit at paras 21–22 and p 70.

that APL's subsequent cessation of its operations was uneventful, and in May 2023, the MAS effected a full refund of APL's security deposit, which APL had to maintain while its operational licence was still in force.[18]

7 QVL accepted in its reply affidavit filed in SUM 2878 that it had signed a Merchant Service Agreement with Cosmopay.[19] This, it explained, was purely a result of regulatory reasons because only Cosmopay but not APL met the audit requirements of European banks. Notwithstanding this Merchant Service Agreement with Cosmopay, the parties' intention was always for APL to directly provide payment processing services to QVL and at all material times, it was APL that had provided such services to QVL and charged QVL the requisite fees.[20]

The application

8 In SUM 2878, APL relied on the EJC and sought a stay or dismissal of the entire action in OC 495 pursuant to s 12(1) of the CCA, or in the alternative, a stay or dismissal of the entire action on the basis that the court should decline to exercise its jurisdiction in OC 495. APL stated that the EJC formed part of its standard terms and conditions, which are accessible online at its website, and are incorporated by reference in every Merchant Service Agreement that it would have entered into with its customers. Therefore, if the MSA alleged by QVL existed, it would have incorporated these terms and conditions, which would contain the EJC.[21] On this note, it is undisputed that Schedule 1 of the MSA, which has been exhibited in these proceedings, states that APL's terms

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18 Ang's affidavit at paras 7 and 23.

19 Chen's affidavit at para 18.

20 Chen's affidavit at paras 18 and 20.

21 Ang's affidavit at paras 27–28.

and conditions, which are "[p]rovided separately and available online" at APL's website, forms part of the MSA.[22] It is also not in dispute that the MSA has not been signed by the stated contracting parties.[23]

9 To summarise: while APL denies the existence of any contractual relationship between itself and AVL, if the MSA alleged by QVL existed, then it would have contained the EJC, and it was on this basis that APL mounted its jurisdictional challenge in SUM 2878.

The applicable principles

10 At common law, in an application for a stay of proceedings commenced in the forum based on an exclusive jurisdiction clause, the applicant bears the burden of showing a "good arguable case" that an exclusive jurisdiction agreement exists and governs the dispute in question (see *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 ("*Vinmar*") at [41]). Once such a "good arguable case" is shown, the burden shifts to the party seeking to sue in the forum to show "strong cause", by reference to the factors set out in *The Eleftheria* [1969] 1 Lloyd's Rep 237, and which were endorsed by the Court of Appeal in *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1977–1978] SLR(R) 112, as to why a stay should nevertheless be refused (see *Vinmar* at [69] and [71]).

11 The CCA gives effect to the Hague Convention on Choice of Court Agreements 2005 ("the Convention"), which establishes an international legal regime for upholding exclusive choice of court agreements in international civil or commercial cases. Section 12(1) of the CCA, on which APL relied, states:

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22 Ang's affidavit at pp 117 and 126.

23 Ang's affidavit at para 21.

> **12.**—(1) Despite any other written law or rule of law, if an exclusive choice of court agreement does not designate any Singapore court as a chosen court, a Singapore court must stay or dismiss any case or proceeding to which the agreement applies, unless the Singapore court determines that —
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> (*a*) the agreement is null and void under the law of the State of the chosen court;
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> (*b*) a party to the agreement lacked the capacity, under the law of Singapore, to enter into or conclude the agreement;
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> (*c*) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of Singapore;
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> (*d*) the agreement cannot reasonably be performed for exceptional reasons beyond the control of the parties to the agreement; or
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> (*e*) the chosen court has decided not to hear the case or proceeding.

12 Part 2 of the CCA, in which s 12(1) is contained, applies in every "international case" (defined in s 4(1) of the CCA) where there is an "exclusive choice of court agreement" (defined in s 3 of the CCA).

13 The principles relating to the application of s 12(1) of the CCA were considered by the High Court in *6DM (S) Pte Ltd v AE Brands Korea Ltd and others and another matter* [2022] 3 SLR 1300 ("*6DM (S) Pte Ltd*") (at [34]–[38]):

> (a) Applications under s 12(1) of the CCA for a stay or dismissal of proceedings fall to be considered in two stages. At the first stage, the court has to consider whether there *exists* an exclusive choice of court agreement which does not designate Singapore as a chosen court and which applies to the case or proceeding in which the s 12(1) application is made. If the court is satisfied that there is such an exclusive choice of court agreement before it, then the court moves to the second stage of

the analysis, where the court *must* stay or dismiss the case or proceeding, unless it is shown that one of the five exceptions set out in s 12(1) applied.

(b) In connection with the first stage, the burden is on the applicant seeking a stay or dismissal of the case or proceeding under s 12(1) to show a "good arguable case" that an exclusive choice of court agreement exists and that it governs the dispute in question. This test of a "good arguable case" is the same as that applied at common law in an application for a stay based an exclusive jurisdiction agreement (see *6DM (S) Pte Ltd* at [33]).

(c) If the applicant discharges its burden under the first stage, the burden then shifts to the party resisting the stay or dismissal of the case or proceeding to show that the case falls within one of the five exceptions specified in s 12(1) of the CCA. If none of the five exceptions apply, the court has no discretion to refuse a stay. Therefore, unlike at common law, it is insufficient for the party resisting a stay or dismissal under s 12(1) to establish "strong cause".

14 For ease of discussion, in these grounds, I will refer to an application for a stay based on an exclusive jurisdiction agreement under the common law as a "stay application", and an application under s 12(1) of the CCA as a "CCA application".

The submissions

15 Before I turn to the parties' submissions, I should state at the outset that it was not in dispute that the CCA applied in this case. This was an "international case" coming within s 4 of the CCA as QVL and APL, which were respectively

Hong Kong- and Singapore-incorporated companies, do not reside in the same Contracting State. The EJC, on which the defendant relied, was also a "choice of court agreement" coming within s 3(1) of the CCA, as it was concluded or documented in writing and designates the courts of the England and Wales for the purposes of deciding disputes arising from any contractual relationship incorporating those standard terms and conditions of which the EJC is part. It was also not in dispute that the only exception in s 12(1) of the CCA that was capable of application is the public policy exception in s 12(1)(*c*), which is that giving effect to the EJC would lead to a "manifest injustice" or be "manifestly contrary to the public policy of Singapore".

16 APL raised the following arguments in support of SUM 2878. First, despite its primary position that there exists no contractual relationship between itself and QVL, it is nevertheless entitled to rely on the EJC, which it said would have formed part of the MSA, if that existed at all.[24] Secondly, it has shown a good arguable case that an exclusive choice of court agreement exists by virtue of the EJC because the terms and conditions referred to by Schedule 1 of the MSA are those same standard terms and conditions which it relied on in SUM 2878 and which it claimed contains the EJC. Furthermore, the EJC had been validly incorporated into the MSA because it was not an unusual or onerous term in the circumstances of the case.[25] Thirdly, in addition to the claims based on the MSA, the EJC also governs the dispute arising from QVL's alternative claims based on implied contract and unjust enrichment because those claims arise under or in connection with the MSA, to which the EJC applied.[26] Therefore, if any stay or dismissal of OC 495 were granted, it ought to extend

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24 Defendant's written submissions at paras 4 and 10.

25 Defendant's written submissions at paras 41 and 54–57.

26 Defendant's written submissions at paras 63 and 70.

to the entirety of OC 495 and not only the claims based on the MSA. Finally, in the circumstances of this case, QVL has not been able to demonstrate that giving effect to the EJC would cause manifest injustice or be manifestly contrary to the public policy of Singapore for the purposes of s 12(1)(*c*) of the CCA.[27]

17 The claimant raised the following arguments in response. First, it disagreed that APL had shown a good arguable case that the EJC exists and applies to the dispute in question. It argued that APL was not entitled to deny the existence of any contractual relationship with QVL on the one hand and yet on the other take the inconsistent position that the EJC governed the dispute between the parties.[28] In any event, there is no evidence to substantiate APL's contention that the terms and conditions incorporated into the MSA by virtue of Schedule 1, are those same standard terms and conditions on which APL relied in SUM 2878 and which APL claimed contains the EJC.[29] In fact, at the time the MSA was entered into, there had been no discussions between the parties as to where disputes arising therefrom were to be resolved and it had not been brought to QVL's attention that any such terms and conditions incorporated by the MSA would have included the EJC. If, however, the court finds that there is a good arguable case that the EJC exists and governs the dispute in OC 495, a stay or dismissal of OC 495 nevertheless ought to be refused because the enforcement of the EJC would: (a) be manifestly contrary to the public policy against the deception of public authorities and public servants;[30] and (b) result in manifest injustice for QVL by requiring it to incur considerable time and

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27 Defendant's written submissions at para 72.

28 Claimant's written submissions at para 17.

29 Claimant's written submissions at para 18.

30 Claimant's written submissions at para 32.

expense to pursue the legal action in another jurisdiction (*ie*, the English courts) and then enforce any judgment obtained against APL in Singapore.[31]

Whether APL could rely on the EJC in SUM 2878?

18 In my view, the issue on which SUM 2878 turned is whether APL could even rely on the EJC in the CCA application or the stay application, given its primary position that it had no contractual relationship with QVL whatsoever. This raised, among other things, a question of principle: in a CCA application or a stay application, can the defendant-applicant nevertheless show a "good arguable case" that an exclusive jurisdiction agreement exists and governs the dispute in question, where in the first place it denies having any contractual relationship with the claimant?

19 I turn to consider this question of principle first. If this is answered in the negative, then SUM 2878 necessarily has to be dismissed.

Where a defendant denies having any contractual relationship with the claimant, can it nevertheless show a "good arguable case" that an exclusive jurisdiction agreement exists and governs the dispute?

20 Whether in a CCA application or a stay application, the burden is on the applicant in the jurisdictional challenge to show a "good arguable case" that an exclusive jurisdiction agreement exists and governs the dispute in question (see *Vinmar* at [41]; see [13(b)] above). To do so, the applicant must, on the evidence before the court, have the better of the argument that the agreement *exists* and that it *applies* to the dispute (see *Vinmar* at [45]). This is a higher threshold than a mere *prima facie* case but is different from the standard of a balance of probabilities, which the court would face inherent limitations in application

[31] Claimant's written submissions at para 29.

given the stage at which such applications typically come to be heard (see *Vinmar* at [45]).

21 In both CCA applications and stay applications, the end sought by the defendant-applicant is a common one, and that is to enforce the contract that it had made with the forum claimant on where to sue and where to be sued (see generally, Yeo Tiong Min, "The Contractual Basis of the Enforcement of Exclusive and Non-exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306 ("*Choice of Court Agreements*") at paras 29 and 31). The enforcement of that contract is the *end* sought by the applicant in the CCA application or the stay application, and the relief sought in that application – that the court declines to exercise its jurisdiction over the dispute – is the *means* by which that contract is to be enforced. Of course, whether the court would eventually decline to exercise jurisdiction and therefore stay or dismiss the action will turn on non-contractual considerations, namely, the forum claimant's failure to demonstrate the existence of a "strong cause" (in a stay application) or the applicability of any of the s 12(1) factors (in a CCA application), if these are alleged. However, these considerations are only enlivened where the court is in the first place satisfied that the case is one in which the applicant seeks to enforce an exclusive jurisdiction agreement. This explains the two-stage test that our courts have adopted for both stay applications and CCA applications, where the court would only turn to the second stage of that test where it is satisfied, on the basis of a "good arguable case", that an exclusive jurisdiction agreement exists (see *Vinmar* at [68]–[69]; *6DM (S) Pte Ltd* ([13] above) at [35]).

22 Therefore, the *enforcement* of the exclusive jurisdiction agreement forms the basis of both CCA applications and stay applications. Therefore, as the Court of Appeal explained in *Vinmar* (at [72] and [114]–[115]) in the context of a stay application, the court grants a stay of proceedings commenced in

breach of an exclusive jurisdiction agreement to give effect to that agreement and respect parties' choice of forum, and the "strong cause" test, which sets a high threshold to be met before the court will refuse such a stay, reflects the judicial philosophy that courts should in general give effect to the parties' agreement on the forum where their disputes will be resolved. The objective of the legal regime in the Convention, which forms part of our law by virtue of the CCA, is the *enforcement* of choice of court agreements (see, for example, Trevor Hartley and Masato Dogauchi, "Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report" (Hague Conference on private international law, 2013) at para 5; Yeo Tiong Min, "Report of the Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005" (Singapore Academy of Law, 2013) at para 10).

23 Of course, a jurisdiction agreement can exist independently of a substantive contractual relationship – parties can be *ad idem* regarding their choice of forum but reach no agreement on any other matter, including the substance to which the dispute relates. However, it is quite another matter altogether where the defendant *denies* the existence of any contractual relationship between the parties. A jurisdiction agreement can only exist where there is some form of contractual relationship between the parties in the first place, whatever the subject matter to which that contract relates. If there is no contractual relationship whatsoever between the parties, there can also be no jurisdiction agreement between them. Put another way, a pre-existing contractual relationship is anterior to the existence of any jurisdiction agreement, and if the former does not exist, neither will the latter. Accordingly, if the applicant in a CCA application or a stay application denies the existence of any contractual relationship between itself and the forum claimant, there is no *factual basis* on which it can *allege* the existence of an exclusive jurisdiction

agreement, much less demonstrate a "good arguable case" that it exists. Such an applicant therefore necessarily falls short of the required standard of proof at the first stage of the CCA application or stay application.

What is the significance of APL's inconsistent positions?

24 In so far as the defendant has not derived a judgment in its favour by virtue of its primary position that there exists no contractual relationship between the parties in the course of previous interlocutory applications that might have been taken up before the stay application or CCA application comes to be heard and decided (which is not the case here), in principle, there is nothing precluding the defendant from adopting in the CCA application or stay application the inconsistent position that there exists an exclusive jurisdiction agreement, which, for the reasons explained earlier (at [23]), fundamentally contradict each other. As the Court of Appeal explained in *BWG v BWF* [2020] 1 SLR 1296 (at [127]), a party in litigation is normally entitled to pursue alternative and seemingly inconsistent positions, and the abuse of process doctrine, whether in the form of the doctrine of waiver by election or the doctrine of approbation and reprobation, is typically engaged only when a party has secured a *benefit* from an earlier inconsistent position, such as where it obtains a judgment in its favour by virtue of that position. Therefore, to clarify, there is nothing objectionable in principle with the inconsistency in positions arising from the defendant's denial of any contractual relationship with the claimant and his reliance on an exclusive jurisdiction agreement in a jurisdictional challenge, if the defendant has not obtained a benefit in the proceedings on account of that denial. The inconsistent positions are only significant in connection with the issue of proof under the first stage of the CCA application or stay application, in that the defendant will necessarily by virtue

of its inconsistent positions, fail to establish a good arguable case that the alleged jurisdiction agreement exists and governs the dispute.

25 APL argued that it is entitled to rely on the EJC, notwithstanding its primary position that no contractual relationship exists between itself and QVL, by virtue of the principle stated by the High Court in *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 ("*Hai Jiang*"). As I will explain below, I did not find the *Hai Jiang* principle relevant to the present case and it therefore does not assist APL. For now, I only point out that, in so far as APL argues that it is entitled to rely on the EJC in spite of its denial of any contractual relationship with the claimant, that entitlement is not in dispute in the circumstances of this case, for the reasons I have just explained (at [24]). It is therefore unnecessary for APL to rely on the *Hai Jiang* principle to justify the taking of such inconsistent positions where there is nothing precluding it from doing so in the first place.

26 Turning now to *Hai Jiang*, the factual paradigm in that case, which has also arisen in similar cases in other jurisdictions, is as follows: (a) the applicant (referred to as an "ASI claimant") seeks an anti-suit injunction in the forum against the defendant (referred to as an "ASI respondent"); (b) the ASI claimant is sued by the ASI respondent in foreign proceedings pursuant to a contract or at least in respect of claims that would be characterised as contractual in nature by the law of the forum; (c) the anti-suit injunction is sought on the basis that the foreign proceedings were inconsistent with the exclusive jurisdiction agreement or arbitration agreement found in that contract, and so the maintenance of those proceedings by the ASI respondent was a breach of that agreement; and (d) the ASI claimant takes the position that it is not a party to the contract on which those foreign proceedings had been brought and in which the jurisdiction or arbitration agreement is contained, or denies the validity of

that contract in a way that would impeach that agreement (see also *Hai Jiang* at [49], [53], [57], [62], [65]–[67], [77] and [78]). The High Court in *Hai Jiang* held that the ASI claimant is nevertheless entitled to rely on the exclusive jurisdiction or arbitration agreement and thereby obtain an anti-suit injunction against the ASI respondent (provided that the requisite legal grounds for the grant of an anti-suit injunction are made out), despite it denying being a party to the contract on which those foreign proceedings had been brought. As the court explained (at [81]):

> … This principle enables an ASI claimant, although claiming not to be a party to the contract which the ASI respondent sues upon in a foreign jurisdiction (which is inconsistent with the exclusive forum clause (or arbitration agreement) to which the ASI respondent's claim would be inherently subject under the contract), to be granted an ASI restraining the ASI respondent from bringing or continuing proceedings abroad (which is inconsistent with the exclusive forum clause to which his claims would be inherently subject if any contractual relationship subsists). The grant of such an ASI is an exercise of the court's equitable jurisdiction … the foreign proceedings must be in breach of the exclusive jurisdiction clause, the ASI claimant must be entitled to enforce the clause, the clause must be binding and not invalid, and the claim in the foreign proceedings must fall within its terms.

27 The court's jurisdiction to grant anti-suit injunctions restraining the ASI respondent from commencing or pursuing legal proceedings in a foreign jurisdiction is rooted in equity (see *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 ("*Sun Travels*") at [64]–[65]). This equitable jurisdiction is exercised when the "ends of justice" require it, in connection with which the following factors are relevant: (a) whether the ASI respondent is amenable to the jurisdiction of the Singapore courts; (b) whether Singapore is the natural forum; (c) whether the foreign proceedings would be vexatious or oppressive to the ASI claimant if they were allowed to continue; (d) whether the anti-suit injunction would cause any

injustice to the ASI respondent; and (e) whether the foreign proceedings was or would be in breach of any agreement between the parties (see *Sun Travels* at [66]). Although these factors are considered in the round, the breach of an agreement has been regarded as a separate basis on which an anti-suit injunction may be granted (see *Sun Travels* at [29]). Therefore, foreign proceedings commenced in breach of an exclusive jurisdiction agreement constitute an independent ground for the grant of an anti-suit injunction because that agreement ought to be enforced unless there were strong grounds for not doing so (see *Morgan Stanley Asia (Singapore) Pte (formerly known as Morgan Stanley Dean Witter Asia (Singapore) Pte) and others v Hong Leong Finance Ltd* [2013] 3 SLR 409 at [29]; see also *Choice of Court Agreements* ([21] above) at [29]).

28 However, a closer look at the cases in which the *Hai Jiang* principle has been applied shows that the anti-suit injunction granted in those cases had not been premised on any breach of agreement between the parties or the need to enforce the agreement between the parties (see, for example, the observations of Popplewell J in *Jewel Owner Ltd and another v Sagaan Developments Trading Ltd* [2012] EWHC 2850 (Comm) at [15], cited in *Hai Jiang* at [53]). Instead, what justified the grant of the anti-suit injunction is the fact that the ASI respondent had not been entitled to found a claim upon a contract containing the exclusive jurisdiction agreement without also being bound by that jurisdiction agreement, because his choice to sue the ASI claimant in reliance on that contract in which the jurisdiction agreement is found results in him being subject to an estoppel or equitable obligation that prevents him from maintaining the claim in the foreign proceedings, or renders it vexatious or oppressive for him to do so (see *Hai Jiang* at [83]; see also Thomas Raphael QC, *The Anti-suit Injunction* (Oxford University Press, 2nd Ed, 2019) at paras

10.81–10.85). Therefore, in cases where the *Hai Jiang* principle applies, the anti-suit injunction is *not* granted in enforcement of the jurisdiction agreement.

29 This is significant for two reasons. First, the *Hai Jiang* principle does not stand for a general proposition that a party can enforce a jurisdiction agreement even where it denies the existence of any contractual relationship with the other party. This is because the ASI claimant's entitlement to an anti-suit injunction by virtue of the *Hai Jiang* principle flows not from the enforcement of any jurisdiction agreement or contract, but the conduct of the ASI respondent in bringing and maintaining the foreign proceedings. Secondly, the *Hai Jiang* principle can be of no relevance to a CCA application or stay application, where the basis is that of enforcing a jurisdiction agreement between the parties (see [22] above).

30 Furthermore, the factual paradigm of cases in which the *Hai Jiang* principle has been applied is fundamentally distinct from that arising in a CCA application or stay application. Where the *Hai Jiang* principle applies, there is no dispute that the exclusive jurisdiction agreement (a) exists, (b) forms part of the agreement or contract on which the ASI respondent relies in the foreign proceedings and (c) governs the dispute to which the foreign proceedings relate. To the contrary, in a stay application or CCA application, these are all matters in dispute. Whether the jurisdiction agreement exists and governs the dispute in question is the very matter that the applicant must make good on the standard of a "good arguable case" at the first stage of the CCA application or stay application. The claimant, by commencing proceedings in a forum that is not the designated court in the purported jurisdiction agreement, would obviously deny that the jurisdiction agreement forms part of the agreement or contract on the basis of which proceedings in the forum have been commenced. This is a further reason why the *Hai Jiang* principle is not one of general application but

is instead a creature of specific factual circumstances which warrant the grant of an anti-suit injunction on grounds independent of the enforcement of a jurisdiction agreement.

APL's inconsistent positions prevent it from establishing the EJC on a good arguable case

31 In APL's Defence (Jurisdiction), it is stated that APL "reserves its right to aver, in the appropriate forum, that it does not have a contractual relationship …, with [QVL]".[32] In APL's supporting affidavit filed in SUM 2878, it is stated in unequivocal terms that "there is and was no contractual relationship between [QVL] and [APL], whether express or implied",[33] and that APL "does not have any records" of the MSA which QVL alleged had been entered between itself and APL.[34] Clearly, APL adopts as its primary position a complete denial of any contractual relationship between itself and QVL. That being the case, I do not see on what factual basis APL can allege the existence of the EJC and that it governs the dispute in OC 495, and APL is necessarily far from showing a "good arguable case" about the same. Both the CCA application and the stay application, which was maintained by APL in the alternative, must fail for this reason.

32 In submissions, APL argued that it is entitled to rely on the EJC, notwithstanding its denial of any contractual relationship with QVL, because it was QVL which chose to found its case on the MSA which, if it existed, would have incorporated those standard terms and conditions containing the EJC. In my view, QVL's reliance on the MSA in OC 495 is neither here nor there. To

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32 Defence (Jurisdiction) at para 4.

33 Ang's affidavit at para 11.

34 Ang's affidavit at para 12.

begin with, it is *not* QVL's case that the MSA incorporated the EJC and it is quite the opposite (see [17] above). To cite QVL's reliance on the MSA as a reason for invoking the EJC is to put the cart before the horse. Importantly, in both CCA applications and stay applications, the onus is on the applicant to establish that the exclusive jurisdiction agreement exists and that it governs the dispute to which the proceedings relate. It is for APL to make good its proposition about the EJC, and APL's inconsistent positions meant that it necessarily failed to discharge its burden of establishing the EJC on the standard of a good arguable case.

33 Finally, I address QVL's reliance on APL's failure to challenge the jurisdiction of the Singapore courts in HC/S 677/2019 ("S 677"), which were High Court proceedings brought against APL by one Supersoft Limited, which was also a user of APL's payment processing services. Like OC 495, S 677 involved an express contractual claim based on APL's Merchant Service Agreement for outstanding amounts owed by APL to the plaintiff in S 677. Similar to the MSA, the Merchant Service Agreement in S 677 also made reference to APL's standard terms and conditions. In the event, S 677 was discontinued by consent.[35] QVL argued that APL's failure to mount a jurisdictional challenge in S 677, when contrasted with the position it has taken so far in OC 495, reveals an evasive or inconsistent course of conduct, which meant that APL's allegation about the EJC in SUM 2878 ought to be treated with circumspect.[36] I did not find this to be of assistance to QVL. There were many possibilities as to why APL might have chosen to not mount a jurisdictional challenge in S 677 – it might have been that no exclusive jurisdiction agreement existed in that case, but equally, it might also have been

35 Chen's affidavit at paras 32 and 48.

36 Claimant's written submissions at paras 10–13.

a result of APL's decision to not enforce any jurisdiction agreement that otherwise existed. Whether the EJC exists and governs the dispute in OC 495 is to be determined squarely by reference to the facts of the present case. The previous positions taken by APL in S 677, a separate set of proceedings involving a different plaintiff, can have no bearing on this question of proof.

The remaining issues in SUM 2878

34 Given my finding that APL failed to establish the EJC on the standard of a good arguable case, it necessarily failed in both the CCA application and the stay application, and in the circumstances it was unnecessary for me to consider the issues arising at the second stage of the CCA application. Nonetheless, as the parties had dedicated some part of their submissions to this point, I make the following brief observations for completeness. To recall, the question is whether the enforcement of the EJC would lead to "manifest injustice" or be "manifestly contrary to the public policy of Singapore", thereby engaging s 12(1)(*c*) of the CCA, so that if the grounds for a stay or dismissal of OC 495 were made out at the first stage of the CCA application, it nevertheless ought to be refused.

35 As the High Court held in *6DM (S) Pte Ltd* ([13] above) (at [60]), the threshold for making out the "manifest injustice" or "manifestly contrary to public policy" limbs in s 12(1)(*c*) is a high one – the "manifest injustice" limb could cover the exceptional case where one of the parties would not get a fair trial in the foreign State, or if there are other reasons specific to that party which would preclude him from bringing or defending proceedings in the chosen court, while the "public policy" limb covers cases where basic policies of public order or norms of the State are violated with extremely serious consequences. The party resisting the stay or dismissal must show that the manifest injustice

or violation of public policy is "highly probable" if the exclusive choice of court agreement were enforced, and a mere speculative possibility that something undesirable might happen was insufficient (see *6DM (S) Pte Ltd* at [61]). The words "manifest/manifestly" imply that any injustice or violation of public policy arising from the enforcement of the exclusive choice of court agreement must both be clear and extremely serious (see *6DM (S) Pte Ltd* at [61]).

36 In my view, neither of the limbs in s 12(1)(*c*) would have been engaged in this case. In respect of the "manifest injustice" limb, this needs no further explanation. That a stay or dismissal of OC 495 would put QVL to the considerable expense of pursuing the action in one jurisdiction and then require it to enforce any judgment obtained in another jurisdiction does not give rise to a "manifest injustice".

37 The "public policy" limb requires slightly more elaboration. QVL made reference to Chapter 10 of the Penal Code 1871 (2020 Rev Ed), which provided for offences relating to "Contempts of the lawful authority of public servants", as well as the relevant Parliamentary debates, and argued that Singapore has a clear public policy against the deception of public authorities and public servants. QVL pointed to e-mail reply sent by APL to the MAS in November 2019, in which APL claimed that it owed no outstanding amounts to QVL and all outstanding amounts in the account with QVL have been fully settled (see also [6] above). QVL relied on that e-mail and argued that APL's representatives appear to have made false, inaccurate and/or misleading statements to the MAS in connection with the surrender of its remittance licence and subsequent ceasing of operations.[37] It is only by allowing OC 495 to proceed in the Singapore courts, and by allowing the Singapore courts to make findings

[37] Chen's affidavit at paras 50–52; Claimant's written submissions at para 31.

and/or orders in relation to APL's conduct *vis-à-vis* the MAS at the material time would the identified public policy be met. Enforcement of the EJC would run contrary to the identified public policy because any such findings made in relation to APL's conduct may only be taken up by MAS if they were made by a Singapore court, and the English courts have no connection or concern with the MAS.

38 As I understand QVL's argument, the point of a trial in open court is that APL's alleged deception or false practices would be ventilated in public and prompt the regulatory authorities to take follow up action. However, APL's alleged deception or false practices would equally come to light, whether the action was tried in the Singapore or English courts. The only parties to the proceedings in OC 495 are QVL and APL and even if APL is found by a Singapore court to have engaged in the alleged deception or false practices, no part of the court's order or judgment can oblige the MAS to take any follow up action against the MAS; it would be for the MAS to take notice of the court's findings and follow up with enforcement action against APL. That same outcome would have followed if the action was tried in the English courts. Therefore, in my view, the prospect of the MAS taking follow up action against APL pursuant to any findings made *against* APL in a trial of QVL's claim would not be dependent on whether that trial took place in Singapore or in the UK. I therefore do not see how the enforcement of the EJC would in any way be contrary to the public policy identified by QVL, bearing in mind that what QVL had to show was a "high probability" that the identified public policy would be violated.

Conclusion

39 To conclude, I dismissed SUM 2878 on the basis that APL had failed to establish the existence of the EJC on the standard of a good arguable case, which meant it necessarily failed in the CCA application and in the stay application that was maintained in the alternative. I also ordered APL to pay QVL costs of $9,000 and disbursements of $3,151.03. In respect of an application of this nature, the Guidelines for Party-and-Party Costs Awards in Appendix G of the Supreme Court Practice Directions 2021 provide for a costs range of $6,000 to $21,000. In this case, I accepted that $10,000 was an appropriate starting point for the quantification of costs. Although the factual issues raised in the parties' affidavits were relatively straightforward, the legal issues raised in SUM 2878 were somewhat involved and the parties also addressed quite a number of legal authorities in their written and oral submissions. I considered a downward adjustment of $1,000 from the starting point to $9,000 appropriate as I had found against QVL in respect of its arguments on s 12(1)(*c*) of the CCA, and some part of the parties' written and oral submissions had been dedicated to that issue.

Perry Peh
Assistant Registrar

Esther Lim and Glenn Ang (Braddell Brothers LLP) for the claimant;
Joshua Chow (IRB Law LLP) for the defendant.