IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 08

Originating Summons No 7 of 2019

Between

CES

… *Applicant*

And

International Air Transport Association

… *Respondent*

JUDGMENT

[Arbitration] — [Arbitral tribunal] — [Jurisdiction]

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CES
v
International Air Transport Association

[2020] SGHC(I) 08

Singapore International Commercial Court — Originating Summons No 7 of 2019
Roger Giles IJ
9 January 2020; 9 December 2019, 13 April 2020

25 March 2020 Judgment reserved.

Roger Giles IJ:

Introduction

1 CES is an Indian company, carrying on business as a travel agent. International Air Transport Association ("IATA"), a Canadian company, is a trade association of member airlines. On behalf of its member airlines, IATA appointed CES as an accredited travel agent under a Passenger Sales Agency Agreement dated 18 January 2005 ("the PSA").[1]

2 One of IATA's functions is to manage a billing and settlement system on behalf of its members. These proceedings concern an arbitrator's jurisdiction to hear a claim by IATA against CES for money due to the airlines, being money

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[1] Affidavit of Rodney D Cruz ("D'Cruz") p 2, paras 5 to 9.

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received from the sale of domestic and international airline tickets sold in March 2013, in a total sum of INR 124,31,69,623 (in the order of USD 19 million) and interest thereon.[2]

3 In a Partial Award on Jurisdiction dated 16 May 2019 ("the Award"), the learned Arbitrator ("the Tribunal") held that he has jurisdiction to hear the claim.[3] Being dissatisfied, by an Originating Summons filed on 17 June 2019, CES applied to the Singapore High Court, pursuant to s 10 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") read with Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration, to set aside the Tribunal's ruling (more correctly, for the Court to decide the matter). The application was transferred to the Singapore International Commercial Court on 26 August 2019.[4]

4 For the reasons which follow, the Tribunal has jurisdiction to hear the claim. A declaration should be made accordingly, and the Originating Summons should be dismissed.

Facts

The PSA[5]

5 The PSA is in the form of an agreement between CES, called the Agent, and "each IATA Member (hereinafter called "Carrier") which appoints the Agent, represented by the Director General of IATA acting for and on behalf of

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2 D'Cruz p 4, para 14; p 783.

3 D'Cruz pp 779 to 780.

4 See Correspondence from Courts dated 28 August 2019.

5 D'Cruz pp 30 to 35.

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such IATA Member".[6] No point was taken in the application as to the standing of IATA, rather than the Carriers, as the claimant in the arbitration. In *Delhi Express Travels Pvt Ltd v International Air Transport Association & others* [2009] 3 Arb LR 303 ("*Delhi Express*")[7] it was held (at [17]), in relation to a similar PSA, that although it was entered into by IATA as an agent for its members, IATA was itself bound by the PSA; hence, presumably, the acceptance of its standing.

6 By cl 2.1 of the PSA, the "terms and conditions governing the relationship between the Carrier and the Agent" are set forth in Resolutions and other provisions in the Travel Agent's Handbook ("the Handbook") as published from time to time. The Handbook is said to incorporate, *inter alia*, the Sales Agency Rules.[8]

7 By cl 3.1, the Agent is authorised to sell air passenger transportation on the services of the Carrier or of other air services authorised by the Carrier, together with such ancillary and other services as the Carrier may authorise.[9] The substance of cl 7 is that monies received by the Agent for transportation and ancillary services are held on trust for the Carrier and must be remitted by the Agent to the Carrier.[10]

8 Relevantly to arbitration, cl 14 provides:[11]

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6 D'Cruz p 30.

7 Affidavit of Raj Ramesh ("Raj Ramesh") pp 106 to 114.

8 D'Cruz p 31.

9 D'Cruz p 31.

10 D'Cruz p 32.

11 D'Cruz p 33.

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> **14. ARBITRATION**
>
> If any matter is reviewed by Arbitration pursuant to the Sales Agency Rules, the Agent hereby submits to arbitration in accordance with such Rules and agrees to observe the procedures therein provided and to abide by any arbitration award made thereunder.

9 By cl 17, with a qualification not presently material, the PSA is to be interpreted and governed by the law of the principal place of business of the Agent.[12] In this case, that is Indian law.

The Handbook

10 It is common ground that the June 2012 edition of the Handbook governs the parties' relationship in this application.[13] The Handbook is principally a collection of a number of Resolutions: if those in evidence are typical, the Resolutions may be described as a collection of ill-fitting provisions in desperate want of draftsmanship. Central to the application is the interlocking operation of Resolutions 818g and 820e.

11 An overview is helpful. Resolution 818g is the Passenger Sales Agency Rules ("the Rules"), being the Sales Agency Rules referred to in the PSA.[14] Amongst other things, it provides for the conduct by IATA of the billing and settlement system. That involves various decisions and actions, and Resolution 820e provides for the review of decisions and actions of the Agency Administrator, being a designated officer of IATA and in practical terms, IATA: I will generally simply refer to IATA. The review is by the Travel Agency

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12 D'Cruz p 34.

13 D'Cruz pp 37 to 162.

14 See D'Cruz p 47.

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Commissioner ("the TAC"), an office established under Resolution 820d.[15] Returning to Resolution 818g, the Rules then provide for *de novo* review by arbitration of a decision of the TAC: this is taken up in cl 14 of the PSA (see [8] above).

Review by the TAC

12 In more detail, I start with the provisions for review by the TAC.

13 Resolution 820e begins:[16]

> RESOLVE that, as established under Resolution 820d, the Travel Agency Commissioner ("the Commissioner") shall conduct reviews and act with respect to decisions and/or actions affecting Agents and applicants under the Agency Program (it being understood that the definitions in Resolution 866 apply to this Resolution), within the Commissioner's jurisdiction, in accordance with this Resolution 820e.

14 The TAC's jurisdiction is found in Section 1 of the Resolution. It provides in the preamble:[17]

> All disputes arising out of or in connection with matters enumerated in the present Section shall be finally settled, subject to review by arbitration pursuant to Section 4 herein, by the Commissioner, in accordance with this Resolution.

15 Paragraph 1.1 then provides, under the heading "Review Initiated by Agent or Applicant", for review and ruling by the TAC "on cases initiated by"

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15 D'Cruz p 99.

16 D'Cruz p 100.

17 D'Cruz p 100.

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an Agent or an applicant for accredited agency. The instances are listed in sub-paras 1.1.1 to 1.1.10. So far as is presently material, the paragraph provides:[18]

> Subject to paragraph 1.4, the Commissioner shall review and rule on cases initiated by:
>
> …
>
> 1.1.5 an Agent who has received formal notice from the Agency Administrator of impending removal of the Agent or an Approved Location of the Agent from the Agency List, or of any action or impending action by the Agency Administrator with regard to the Agent, that unreasonably diminishes the Agent's ability to conduct business in a normal manner;

16 Sub-paragraph 1.2.2.1 provides that, with an exception not presently relevant, a request for review of a decision or action of the Agency Administrator must be submitted within 30 days of "the date of the Agency Administrator's notice of the decision in question".[19]

17 Paragraph 1.3, under the heading "Review Initiated by Agency Administrator", then provides for review initiated by IATA. It commences:[20]

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18 D'Cruz pp 100 to 101.

19 D'Cruz p 101.

20 D'Cruz pp 101 to 102.

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> The Agency Administrator, on his own initiative or at the request of any Member, a group of Members, or of the Agency Services Manager, shall initiate a review to determine whether the Agent or Location has breached its Passenger Sales Agency Agreement, including IATA Resolutions incorporated into it, when the Agency Administrator has determined that a credible case has been made, in particular in respect of any of the following…

18 A number of instances are set out in sub-paras 1.3.1 to 1.3.12. The presently material instance is in sub-para 1.3.12:[21]

> pursuant to the provisions of Paragraph 1.8 of Attachment "A" to Resolution 818g, and of Paragraph 1.8 of Resolution 832, the Agency Administrator receives written information which leads him to the belief that Members' or Airlines' ability to collect monies from the Agent for Standard Traffic Documents may be prejudiced.

19 Paragraphs 1.1 and 1.3 in Section 1 of Resolution 820e are not the only provisions in the Handbook which provide for review by the TAC. Other such provisions are sprinkled throughout the Handbook. For example, sub-para 14.3.5 in Resolution 818g by which provides that an Agent may "invoke the procedures set out in Resolution 820e for review" of a decision by the Agency Administrator to terminate an Agent's services due to the latter's failure to pay the annual agency fee.[22] The parties' submissions, however, rested on the provisions I have set out plus, through sub-para 1.3.12 of Resolution 820e, para 1.8 in Attachment A to Resolution 818g: see later at [66].

Review of TAC's decision by arbitration

20 Section 4 of Resolution 820e is the link with Resolution 818g:[23]

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21 D'Cruz p 102.

22 D'Cruz p 85.

23 D'Cruz p 104.

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> **Section 4 – Review by Arbitration**
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> 4.1 an Agent or applicant which considers itself aggrieved by a decision of the Commissioner taken under the provisions of this Resolution, shall have the right to have such decision reviewed by arbitration, in accordance with the procedures set out in the Passenger Sales Agency Rules;
>
> 4.2 …
>
> 4.3 where a decision of or an action by the Agency Administrator or the Agency Services Manager has been the object of an Agent's action before the Commissioner taken under the provisions of this Resolution and the Agency Administrator, or the Agency Services Manager, contest the Commissioner's decision, the Agency Administrator or the Agency Services Manager shall have the right to have such decision reviewed by arbitration, in accordance with the procedures set out in the Passenger Sales Agency Rules.

21 The provisions for review by arbitration in the Rules are found in Section 12 of Resolution 818g. It provides in para 12.1, under the heading "Right to Arbitration":[24]

> 12.1.1 Any party to a dispute settled in accordance with Resolution 820e shall have the right to submit the Travel Agency Commissioner's decision to *de novo* review by arbitration in accordance with this Section.

22 Sub-paragraph 12.2.1 of the same Resolution then provides, under the heading "Agreement to Arbitrate", that:

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[24] D'Cruz p 82, sub-para 12.1.1.

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> 12.2.1 All disputes arising out of or in connection with a decision rendered by a Commissioner shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said Rules and judgment upon the Award may be entered in any court having jurisdiction thereof.

23 The sub-paragraphs prescribe the language and place of arbitration, and that the award shall be final and conclusive. By sub-para 12.3.1, arbitration proceedings pursuant to Section 12 shall be commenced within 30 days from the date of the TAC's award.[25]

Background to the dispute

24 Under the Rules, an Agent must remit monies received from the sale of the tickets of Member Airlines of IATA by the following stated dates:[26]

(a) For domestic air tickets sold between the 1st and 15th days of the month, the money must be remitted by the 25th day of the month;

(b) For domestic air tickets sold between the 16th and last day of the month, the money must be remitted by the 10th day of the following month;

(c) For international air tickets sold between the 1st and 15th days of the month, the money must be remitted by the 30th day of the same month;

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25 D'Cruz p 82.

26 D'Cruz p 4, para 13; p 88, sub-para 1.6.2.

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(d) For international air tickets sold between the 16th and last day of the month, the money must be remitted by the 15th day of the following month.

25 On 26 March 2013, IATA wrote to CES stating that INR 46,43,37,605 due from it for the period 1-15 March 2013 had not been received, and demanding payment by close of business on 28 March 2013.[27] The letter also gave CES a "notice of irregularity" in that respect. In so acting, IATA gave effect to the Rules, sub-para 1.7.2.1(a) concerning overdue remittance; the Rules required that it take those steps.[28]

26 CES replied on the same day, saying that it was "not able to settle the payment due on 28 March 2013". It gave as the explanation that in changing banks it had reduced its credit limit with one bank in anticipation of new credit from another bank, but "the sanction is still under process". It said:[29]

> From the above, you will find this is a sad miscalculation of arranging funds resulting in reduction of bank limit. We are hoping that Dena Bank credit limit of Rs 60.50 CR will be active shortly and we will pay the dues to you.

27 IATA wrote to CES again on 28 March 2013, advising that as payment had not been received and in accordance with the Rules, it declared CES's Agency in default, and that the airlines would be notified of such default. Furthermore, CES's ticketing facilities would be withdrawn. It said also that it gave notice of termination of the PSA effective on 30 April 2013, subject to payment of the money by that date or payment of 50% of the money and an

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27 D'Cruz p 164.

28 D'Cruz p 89.

29 D'Cruz p 166.

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agreed firm schedule for repayment of the balance.[30] This was in accordance with the Rules, sub-para 1.7.2.1(b) requiring that IATA take Default Action.[31]

28 So far as the evidence shows, CES did not reply to this. It did not pay or agree to a schedule for payment.

29 On 1 May 2013, IATA wrote to CES advising that the PSA was terminated with immediate effect. The letter included:[32]

> If you disagree with this decision, you may invoke the procedure set out in Resolution 820e for review of the Agency Administrator's action by the Travel Agency Commissioner.

30 CES took no action at that time.

Initiation of TAC review

31 Over a year later, on 23 May 2014, CES wrote to the TAC. The letter was not in any clear way initiation of a review by the TAC of the termination of the PSA or any other action or decision of IATA; rather, the extensive complaints were as to IATA's acts and omissions after the termination of the PSA. It included that CES had paid refunds demanded by clients and, apparently in that regard, asked the TAC "to instruct IATA to sit with us on a common platform to arrive at the net outstanding and reconcile accounts with us". More generally, it asked the TAC "to kindly intervene and help us to come out from this dire situation".[33]

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30 D'Cruz p 168.

31 D'Cruz p 89.

32 D'Cruz p 170.

33 D'Cruz pp 172 to 175.

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32 The TAC replied on 26 May 2014. It appears to have regarded the CES letter as an initiation of a review of the termination of the PSA. It drew attention to the 30 day limit in sub-para 1.2.2.1 of Resolution 820e (see [16] above) and said, "[a]s you can see the opportunity for the mounting of a review has long passed and hence I am unable to intervene."[34]

Indian court proceedings and arbitration

33 The narrative then moves to court proceedings in Delhi, India ("the Indian proceedings"). At this point, I will only outline the events, and will return to them in more detail later in these reasons.

34 On 27 January 2016, IATA began proceedings against CES and its Chairman and Managing Director, "M", claiming INR 124,31,69,623 plus interest. The amount claimed was made up of the INR 46,43,37,605 demanded on 26 March 2013 (see [25] above) and further amounts for international air tickets for the period 1-15 March 2013 and for domestic and international air tickets for the period 15-25 March 2013.[35]

35 On or about 18 July 2016, CES and M filed an application that the court "reject the suit" for a variety of reasons, one being that it was not maintainable and should be referred to arbitration pursuant to s 8(1) of the Arbitration and Conciliation Act, 1996 (India) ("the ACA"). On 5 February 2018, the court referred the parties to arbitration.[36]

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34 D'Cruz p 177.

35 First Affidavit of M ("M-1") at p 4, para 16.

36 D'Cruz p 180, para 5.

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36 Thus, the narrative moves to the arbitration. On 29 March 2018, IATA submitted a Request for Arbitration to the International Chamber of Commerce ("the ICC"), the designated institution for arbitration in sub-para 12.2.1 of Resolution 818g.[37] Singapore was elected as the place of arbitration.[38] It claimed against CES alone, and claimed the same amount of INR 124,31,69,623.

37 On 5 June 2018, CES submitted a Written Statement/Reply which, amongst other things, challenged the arbitrator's jurisdiction in the absence of a prior decision of the TAC.[39]

38 The Tribunal was constituted, and ordered that the question of jurisdiction be heard as a preliminary issue. A hearing before the Tribunal on 28 January 2019 was followed by a raft of supplementary written submissions. The Tribunal issued the Award on 16 May 2019, holding that he has jurisdiction to hear the claim.[40] The arbitration proceedings have been stayed pending the disposal of the present application, by the mutual agreement of the parties.[41]

39 This application is a hearing *de novo*, not a review of or an appeal from the Tribunal's decision (see *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [40]–[42]). Without intending any disrespect, I will not here set out or describe the grounds for his decision.

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37 D'Cruz pp 82 and 182.

38 M-1 p 41, para 29.

39 D'Cruz pp 186 to 302, see especially pp 189 to 190, at para 4.

40 D'Cruz p 13, para 49; pp 779 to 780.

41 D'Cruz p 13, para 50.

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The evidence in the application

40 The evidence comprised, on CES's side, three affidavits of M and two affidavits of Rameshwar Singh Malik ("Rameshwar"), a former Judge of Punjab and Haryana High Court and Senior Advocate of the Supreme Court of India ("SCI");[42] and on IATA's side, an affidavit of Rodney Augustine D'Cruz ("D'Cruz"), the Head of IATA's India, Nepal and Bhutan branch, and an affidavit of Mr Raj Ramesh Panchmatia ("Raj"), an Advocate on Record in the SCI. None of the deponents were cross-examined.

41 The evidence of Rameshwar and Raj was put forward as expert evidence of Indian law, in the light of cl 17 of the PSA and the Indian proceedings. I will later say something of the presentation of the evidence.

The issues in outline

42 It was common ground that, as a matter of construction of Resolutions 818g and 820e, a decision of the TAC was a pre-condition to arbitration. It was also common ground that there was no relevant decision. CES's letter of 23 May 2014 to the TAC, if a request for review of IATA's earlier money claim at all, had been out of time and rejected, and so far as the amount in the arbitration included a claim to more than was stated on 26 March 2013, it appears that there was no request for review at all. It should be noted, however, that the arbitration is a *de novo* review: that is, what is submitted to arbitration is the subject matter of the TAC's decision, so far as remaining in dispute. The arbitration is not akin to an appeal from the TAC's decision, leaving room for arbitration of the underlying dispute.

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42 First Affidavit of Rameshwar Singh Malik ("Rameshwar-1") para 1.

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43 The first issue is whether, notwithstanding the absence of a TAC decision, the Tribunal nonetheless has jurisdiction because the absence of a TAC decision should be attributed to CES's failure to initiate a review by the TAC, such that CES cannot rely on its non-fulfilment of the pre-condition to deny the Tribunal's jurisdiction ("the default question").

44 The second issue, arising only if the default question is answered against IATA, is whether CES is estopped from denying the Tribunal's jurisdiction, or has waived fulfilment of the precondition, by reason of representations concerning arbitration made in the course of the Indian proceedings ("the estoppel/waiver question").

The default question

45 Clause 14 of the PSA is a submission to arbitration "[i]f any matter is reviewed by arbitration pursuant to the Sales Agency Rules", and requires reference to when a matter can be reviewed by arbitration. That reference takes one to Section 4 in Resolution 820e and Section 12 in Resolution 818g.[43] In different language, those sections state the precondition: what is reviewed by arbitration is a decision of the TAC, and what is submitted to *de novo* review and finally settled by arbitration is dispute arising out of or in connection with a decision of the TAC. So, in *Delhi Express* at [21], a decision of the TAC was described as a precursor to the arbitration and a pre-requisite step.

***The decision in* Delhi Express**

46 In *Delhi Express*, however, it was held that there could be review by arbitration of the disputed matter even though there had not been a decision of

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43 D'Cruz pp 82 and 104.

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the TAC. In that case, the plaintiff was an accredited travel agent under a PSA incorporating Resolutions which, although differently expressed in some respects from those in the June 2012 edition of the Handbook, provided a like scheme for review by the TAC followed by arbitration. Under the scheme, the plaintiff claimed a money sum and rendition of accounts against IATA. IATA applied for referral to arbitration pursuant to s 8 of the ACA. The plaintiff contended that there could be arbitration only against a decision of the TAC, and that the TAC had no jurisdiction to decide "on the matter of accounts"; implicitly, therefore, the plaintiff asserted that the subject matter of the dispute could not be referred to arbitration.

47 The Court (Rajiv Sahai Endlaw J) held that the plaintiff could have requested review by the TAC (*Delhi Express* at [19]), a matter to which I will return. His Honour continued (*Delhi Express* at [21]):

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> The contention of the counsel for the plaintiff of the disputes being not subject matter of arbitration for the reason of no decision having been given by the Travel Agency Commissioner is also misconceived. Merely because the agreement between the parties provides for a precursor to the arbitration, arbitration cannot be avoided on the ground of the pre requisite step having not been taken. A party cannot be permitted to renegate out of the Arbitration Agreement by contending that owing to its own default or otherwise the precursor event to arbitration has not occurred. In the present case it was open to the plaintiff to have applied to the Travel Agency Commissioner for review of the decision of the Agency Administrator with which the plaintiff was aggrieved. The plaintiff having not done has itself to blame for not adopting the course leading to arbitration and cannot maintain a suit on that basis. …

48 Rameshwar and Raj both accepted *Delhi Express* as good law in India.[44] It was followed in this respect in *International Air Transport Association v All India Travel Agency (Madurai) Private Ltd* (2012) 4 CTC 748 ("*All India*"), where the agent unsuccessfully argued that the absence of a TAC decision was not its fault because, while it could have initiated a review, it was not obliged to do so (see *All India* at [5], [17]–[18] and [20]).

49 Rameshwar said that *Delhi Express* was distinguishable, on the following grounds:

(a) First, the plaintiff in *Delhi Express* had filed a claim against IATA, whereas in the present case, it was IATA which filed a claim against CES.[45]

(b) Secondly, in *Delhi Express*, the plaintiff-Agent had contended that the dispute was not a subject matter of arbitration, whereas in the

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44 Rameshwar-1 at p 20, para 24; Affidavit of Raj Ramesh Panchmatia ("Raj") at p 36, para 3.8.

45 Rameshwar-1 at p 21, para 26.

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present case, both parties agreed that the dispute is a subject matter of arbitration.[46]

(c) Thirdly, the plaintiff in *Delhi Express* was trying to bypass the arbitration agreement by contending that as there was no TAC decision and as it had started a suit, the dispute was no longer within the purview of the arbitration agreement; whereas in the present case, CES had filed the s 8 application because IATA "had not approached the TAC for a decision and was trying to avoid its obligation thereunder".[47]

50 I do not think *Delhi Express* can be distinguished on either of the first two grounds. For the principle in [21] of the judgment, it matters not which of the Agent or IATA is the plaintiff seeking to rely on the absence of a decision of the TAC. Indeed, in that case, as in the present case, it was the Agent seeking to rely on the absence of a decision of the TAC, and it equally does not matter that the Agent happens to be the defendant in an arbitration rather than the plaintiff in court proceedings. The principle is not affected by the contention that the dispute was not a subject matter of arbitration, which had been rejected by the court in *Delhi Express* and so did not affect the decision to refer the parties to arbitration.

51 The third ground for distinction is not easy to understand. I do not think the plaintiff in *Delhi Express* contended as suggested. Within the suggested distinction, however, was that in the present case IATA could have approached the TAC for a decision, and that became the matter for debate in this application. CES accepted at the hearing, in my view correctly, that if it alone could have

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46 Rameshwar-1 at p 21, para 27.

47 Rameshwar-1 at p 21 para 26 to p 22 para 29.

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initiated a review by the TAC and did not do so, it could not rely on the absence of a decision of the TAC in order to avoid an arbitration.

Could IATA have initiated a review?

52 With that acceptance, the default question comes down to whether the present case is outside *Delhi Express* because IATA could have initiated a review by the TAC, and so the absence of a decision by the TAC was not due to CES's default alone. CES contended that IATA could have initiated, indeed was obliged to initiate, a review by the TAC. IATA contended that it could not have initiated a review.

53 It is necessary to have well in mind the relevant decision or action to be reviewed. IATA had declared CES's agency in default, and had ultimately terminated the PSA. But the actions relevant to the claim in the arbitration are its demands for payment of INR 46,43,37,605 and the other amounts making up the INR 124,31,69,623 claimed in the arbitration. Any review by the TAC would be focused on whether the money was due.

54 Whether IATA could have initiated or was obliged to initiate a review of the demands is a question of construction of the Rules. Raj's expert report included, with references to judgments of the Indian courts, that the cardinal rule of interpretation for deeds is to gather the intention of the parties from the words of the document and the interpretation adopted should be one which gives effect to all parts of the document and does not reject any of them; and that the principles of interpretation of commercial contracts "as under English law" were:[48]

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[48] Raj at p 25, para 2.16.

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(a) words used in the contract are to be construed in their ordinary and popular sense;

(b) the contract should be construed in accordance with sound commercial principles and good business sense;

(c) the commercial object or function of the relevant clause and its relationship to the contract as a whole is relevant; and

(d) the contract and its provisions should be construed in order to avoid unreasonable and absurd results.

55 Rameshwar said nothing to the contrary. These are familiar principles in the common law, readily applied in this Court.

56 As has been seen, Resolution 820e provides in para 1.1 for review initiated by an Agent, and in para 1.3 for review initiated by IATA (see [15] and [17] above).

57 CES accepted that it could have initiated a review pursuant to sub-para 1.1.5. To return to *Delhi Express*, it was there held at [19] that a claim by IATA for INR 1,38,35,897 and its declining to pay INR 30,35,732 were within the then equivalent to sub-para 1.1.5, and could have been referred by the Agent to the TAC as an action that unreasonably diminished the Agent's ability to conduct business in a normal manner. What about IATA?

58 CES submitted that the preamble to Section 1 in Resolution 820e made clear that, subject to arbitration, all disputes were to be finally settled by

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decision of the TAC.[49] It said that since the dispute fell within the jurisdiction of the TAC (because CES could have initiated a review pursuant to para 1.1.5 of Resolution 820e), it followed that IATA also could have submitted the dispute to the TAC.

59 This cannot be accepted. The preamble speaks of settlement in accordance with the Resolution, and the Resolution then provides for settlement in stated circumstances: on review initiated by (relevantly) the Agent, on the one hand, or on review initiated by IATA, on the other hand, and in either case in one or more of the stated circumstances. The TAC's jurisdiction depends on submission of a dispute to it, or more correctly initiation of a review by it, by an Agent in one of the circumstances in para 1.1, or by IATA in one of the circumstances in para 1.3.

60 Three particular matters put by CES in support of its submission should be noted.

61 First, CES referred to *Delhi Express* for the observation at [19] that the preamble to Resolution 820e provides that the TAC shall conduct reviews with respect to all decisions affecting agents, which decisions would include in relation to the money sums there in issue. It said, in effect, that the court endorsed jurisdiction of the TAC over all decisions regardless of who initiated the review. That is not correct. The court went on to hold that the Agent could have applied to the TAC, by virtue of the equivalent of sub-para 1.1.5: that is, it looked to the provisions dealing with who could initiate a review.

62 Secondly, CES cited a passage from *All India* at [20]:

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[49] See D'Cruz p 100.

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> … if we go through the clauses in the Agreement, Resolution and T A Handbook, I am of the opinion that the intention of the parties is that in case of any dispute, the same has to be referred to the Travel Agency Commissioner and on rendering a decision, the same has to be referred to the Arbitrator. … Therefore, I am of the opinion that the intention of the parties to the agreement at the time of entering into the contract is only to refer the disputes to the Travel Agency Commissioner and thereafter to the Arbitration proceedings.

63 CES extracted the proposition that the parties intended that all disputes should be submitted to the TAC, in context meaning that either it or IATA could submit all disputes. The passage does not support the proposition. It was dealing with a submission that there was no clear intention to refer disputes to arbitration at all. It was not concerned with the particular provisions as to who could initiate a review by the TAC.

64 Thirdly, CES adverted to para 1.4 in Resolution 820e, which states when the TAC shall decline to act (for example, claims under restraint of trade law).[50] It submitted that from the specific statement of cases which do not fall within the TAC's jurisdiction, it followed that matters not falling under para 1.4 "were meant to be covered by the jurisdiction of the TAC". The reasoning is horrendously astray, particularly when sub-para 1.4.2 says that the TAC "shall decline to act … in any matter in relation to which [it] does not have jurisdiction".[51] In any event, being within jurisdiction as a general proposition says nothing about whether the Agent or IATA could "initiate" an exercise of the jurisdiction.

65 However, CES also submitted that the dispute came within sub-para 1.3.12 of Resolution 820e, or more correctly that IATA's action in demanding

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50 D'Cruz p 102.

51 D'Cruz p 102.

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the money from CES came within the circumstances in which IATA was obliged to initiate a review. The sub-paragraph is set out above; for convenience, I repeat it:

> 1.3.12 pursuant to the provisions of Paragraph 1.8 of Attachment "A" to Resolution 818g, and of Paragraph 1.8 of Resolution 832, the Agency Administrator receives written information which leads him to the belief that Members' or Airlines' ability to collect monies from the Agent for Standard Traffic Documents may be prejudiced.

66 The sub-paragraph turns on a belief of IATA, being a belief brought about by written information received pursuant to the paragraphs to which it refers. I will assume that the "and" in sub-para 1.3.12 is to be read disjunctively as "or". The Resolution 832 paragraph was not in evidence, and presumably is not relevant. So far as material to the submission, the Resolution 818g paragraph is in the following terms:[52]

> **1.8 Prejudiced collection of funds**
>
> The provisions of this Paragraph govern the procedures for the protection of BSP Airlines' monies in situations where the ability or intent of an Agent to pay them is in doubt.
>
> **1.8.1** in the event that the Agency Administrator receives written information, which can be substantiated, leading to the belief that BSP Airlines' ability to collect moneys for Location may be prejudiced, the Agency Administrator shall notify the Agent of the irregularity and may remove all by [sic] the Travel STDs in the Agent's possession;
>
> **1.8.2** the Agency Administrator shall request an immediate review by the Travel Agency Commissioner;
>
> **1.8.3** the Travel Agency Commissioner shall review such written information and other factors and shall commence a review under the terms of Review by Travel Agency Commissioner of the applicable Passenger Sales Agency Rules within three working days from receipt of

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52 D'Cruz pp 91 to 92.

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> such a request. Pending the results of this review, the Agent may within 30 days of the date on which the STDs were withdrawn or of the date when the review was initiated, apply pursuant to Resolution 820e for interlocutory relief staying the withdrawal of STDs. Before granting an interlocutory order under this Subparagraph, the Travel Agency Commissioner shall require that the Agent provide a bank or other financial guarantee.

67 From definitions contained in Resolution 866, a BSP Airline is a Carrier or other airline identified on a ticket and participating in the billing and settlement plan, and "STDs" refers to "Standard Traffic Documents", which appear to be forms of ticketing.[53]

68 Sub-paragraph 1.3.12 in Resolution 820e is a short-form incorporation of the Resolution 818g paragraph, picking up its obligation to request a review without itself having a wider operation. In my view, it is clear that the Resolution 818g paragraph did not oblige IATA to initiate a review. It is for where the Agent's viability, more specifically its ability to remit money to airlines, comes into doubt because of information outside the state of accounts between the Agent and IATA, as is evident from the trigger of receipt of written information which can be substantiated and the first step of notifying the Agent of the irregularity. The sanction is withdrawal of STDs, not recovery of money. No doubt because the step of withdrawal of STDs would significantly affect the Agent, in the Agent's interests IATA must get a third party check from the TAC on the soundness of the written information and its belief and the appropriateness of any withdrawal of STDs. But that is worlds away from where the Agent simply does not remit money, in which case as earlier described the Rules separately mandate that IATA must demand payment, must

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53 D'Cruz pp 131 and 134.

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give notice of the irregularity, and must take Default Action (see [25] to [27] above).

69 This is unsurprising. If a creditor demands payment, it is for the debtor to protest. Here, CES could protest by initiating a review pursuant to sub-para 1.1.5 of Resolution 820e, itself raising the question of its viability. It would make no sense if each time an Agent failed to remit money, IATA was required to get a third party check on its demand for payment, particularly when the Rules required it to make the demand and take other actions inconsistent with the initiation of a review.

70 It follows that *Delhi Express* is not to be distinguished. CES alone was able to initiate a review by the TAC, and it cannot rely on the absence of a decision of the TAC to dispute the Tribunal's jurisdiction (see *Delhi Express* at [21]). Accordingly, the Tribunal has jurisdiction.

71 I should note IATA's further submission that even if the absence of a TAC decision was not due to the failure of CES alone to initiate a review by the TAC, the Tribunal still had jurisdiction. The submission was founded on a passage in *Delhi Express* at [21] immediately following that set out at [47] above ("Passage 2"):

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> Even otherwise the only requirement of Section 8 is that the subject matter of the dispute brought before the court is the subject matter of an arbitration. Once the court finds so, the court has no option but to refer the parties to arbitration. The court is not to go into the question whether the party which has applied under Section 8 of the Act has been ready and willing to proceed with the arbitration or not. That is one of the drastic changes made in the 1996 Act from the 1940 Act. Thus even if there had been a default of the Travel Agency Commissioner not attributable to the plaintiff, the disputes raised by the plaintiff against the defendant No. 1 in the present suit would still be governed by the Arbitration Agreement and hence this court has no jurisdiction to entertain the suit.

72 The submission misapprehends Passage 2. The Court was not saying that the precondition to arbitration could be entirely ignored so that the arbitrator had jurisdiction. It was saying no more than that the dispute was governed by the arbitration agreement and so, under the ACA, an order referring to arbitration had to be made: see the explanation of s 8(1) of the ACA at [90]–[92] below.

73 I should also note IATA's submission that CES's failure to initiate a review by the TAC was a waiver of the precondition to arbitration, or alternatively estopped CES from relying on the absence of a decision by the TAC. Waiver may be a different way of saying that CES cannot rely on its own default, see *M.K. Shah Engineers and Contractors v State of Madhya Pradesh* (1999) 2 SCC 594 at [17]. If the submission went further, there are difficulties with either alternative, but given my finding that the Tribunal has jurisdiction, it is not necessary to consider the submission.

The Estoppel/Waiver Question

74 Since the arbitrator has jurisdiction, it is unnecessary to deal with the question of whether CES has waived or is estopped from disputing the jurisdiction of the Tribunal by reason of the representations concerning

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arbitration made by it in the Indian proceedings. However, there is the possibility of an appeal from my decision and I will therefore consider this point. I return to the Indian proceedings.

75 To begin, s 8(1) of the ACA provides:

> (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.

76 IATA began the Indian proceedings on 27 January 2016.[54] On 18 July 2016,[55] CES and M filed an Application ("the Application") praying that the court :[56]

> …reject the suit of the plaintiff… being … in utter violation of provisions [of the] Arbitration and Conciliation Act 1996, Passenger Sales Agency Agreement as well as Resolution 800 of Travel Agent's Handbook.

77 The Application, which was verified by affidavit, referred in paras 2 and 3 to cl 14 of the PSA and Section 12.2 of the Rules, in the latter case saying that it provided that all disputes arising out of or in connection with a decision rendered by a TAC shall be finally settled by arbitration under the ICC Rules.[57] In para 5, it said that CES had "submitted its grievances" to the TAC, referring

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54 M-1 p 4, para 16.

55 Date: M-2 p 105.

56 M-2 p 105.

57 M-2 pp 69 to 70.

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to emails on 22 May 2014 (this presumably refers to the email of 23 May 2014 described at [31] above) and 5 June 2014 (any such email is not in evidence). It said that "no response to the said mail has been brought or informed to" the applicants.[58]

78 After an extensive complaint of the conduct of some of the airlines and of IATA, the Application said at para 7 that there was a mechanism in the Handbook for "resolving the disputes with regard to the alleged recoveries of the Plaintiff and other Airlines as well as the grievances/claims of the Applicants/Defendants…", and that IATA "ought to have taken up the matter to [the TAC] as per section 13 of [the Handbook] of [*sic*] Resolution 800 to the Arbitrator".[59] The Application continued:[60]

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58 M-2 p 71.

59 M-2 pp 98 to 99.

60 M-2 pp 99 to 100.

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> … From the conjoint reading of PSA Agreement along with the TA Handbook and the resolution No 800 would show that there is a provision to refer the matter to arbitration. When, that being the position, the suit filed by the plaintiff bypassing the arbitration proceedings is not maintainable and is liable to be rejected.
>
> 8. That in view of the provisions of Section 13 of Resolution 800 of Travel Agent's Handbook it has been specifically mentioned in 13.2.1, that all the disputes arising out of and in connection with the decisions rendered by Travel Agency Commissioner shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more Arbitrator appointed, "in accordance with the said Rules and Judgment upon the Award may be entered in any Court having jurisdiction thereof. So in this view of the matter it has become necessary and essential that the matter in hand against the decision of Travel Agency Commissioner comes under the Arbitration for finally settling the claim of the Applicants/Defendants under the Rules of Arbitration of the International Chamber of Commerce for its decision on merits, which the Plaintiff miserably failed to avail.

79 The culmination of the Application was:[61]

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[61] M-2 pp 104 to 105.

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> 14. That the ends of justice requires and would be better served if the present application is allowed and the Plaintiff or the concerned airlines be ordered to approach to the matter for its adjudication by the Board of Arbitrators nominated under the International Chamber of Commerce as envisaged in the Travel Agent's Handbook and the relevant resolutions incorporated therein.
>
> So in view of the above narrated factual details it is clear that the Applicants/Defendants deserve to be heard on merits and in view of the Rules and Resolution of Travel Agent's Handbook, the alleged disputes of the Plaintiff as well as claims of the Applicants/Defendants comes within the ambit of Arbitration & Conciliation Act, 1996 and the Board of Arbitrators under International Chamber of Commerce against the decision of Travel Agency Commissioner, whereby the claim of the Applicants/Defendants has been kept in withhold mode without putting into the test of final settlement under the Rules of Arbitration in view of the relevant resolution 800 of Section 13 of the Travel Agent's Handbook.

80 From documents provided by the parties at the hearing, it appears that Resolution 800 is a version of the Rules in which Section 13 corresponds to Section 12 in Resolution 818g. The relationship between the two Resolutions is not clear.

81 IATA filed a Reply on 28 February 2017.[62] It began that the disputes were not capable of arbitration because they involved complex allegations of fraud.[63] Of more relevance to this application IATA said at para 4:[64]

> 4. In terms of the PSAA, recourse to arbitration is available only against the decision of the Travel Agency Commissioner. Section 1.2.2.1 of Resolution 820 e provides that a request for review to the Travel Agency Commissioner should be submitted within 30 calendar days of the date of the Agency Administrator's notice of the decision in question. In the present case, the BSP link of Defendant No 1 was admittedly

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62 Date: See D'Cruz p 964.

63 D'Cruz pp 900 to 901, para 3-4.

64 D'Cruz p 901.

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> withdrawn on March 28, 2013 while it had applied for review to the Travel Agency Commissioner about 14 months thereafter on May 22, 2014. Therefore, the Travel Agency Commissioner had rejected the request for review vide his email dated May 26, 2014. Accordingly, the disputes sought to be raised by the Defendants are not arbitrable for this reason as well. This fact has been deliberately concealed by the Defendants in the application under reply. A copy of the email dated May 26, 2014 from the Travel Agency Commissioner is annexed herewith...

82 The Reply said in various later paragraphs that the dispute was "not capable of adjudication by way of arbitration" or "not arbitrable", with further reference to the TAC's rejection of the request for review, and took the point that M was not a party to the PSA.

83 CES and M filed a Rejoinder on 1 December 2017. It said in para 1 that it "is wrong to say that the disputes between the parties are not capable of adjudication by way of arbitration",[65] and in para 2 that "since there exists agreement of resolution of disputes by arbitration the present proceedings … filed by the Plaintiff is sheer misuse and abuse of process …".[66] It said in other places that that the disputes between the parties were "very much amenable and capable of adjudication by arbitration", and that the Handbook and Resolution 800 showed that there was "provision to refer the matter to arbitration".[67] It repeated that para 13.2.1 provided that all disputes arising out of and in connection with the decision rendered by the TAC should be settled by arbitration.[68]

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65 D'Cruz p 1022.

66 D'Cruz p 1024.

67 D'Cruz p 1029.

68 D'Cruz p 1030.

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84 The Rejoinder included:[69]

> 4. That the contents of para 4 of the Preliminary Objections are wrong and denied except those which are matter of record. However, in reply to this para it is submitted that in terms of PSAA Agreement, it is necessary to solve the dispute by way of Arbitration by a Special Tribunal as envisaged by the Agreement. In reply to this para the contents of para 7 of the application may be referred to being not repeated here for the sake of brevity. Section 12.2 of the Sales Agency Rules] which forms a part and parcel of the PSAA dated 18.01.2005 Inter alia expressly provides that all disputes arising out of or in connection with a decision rendered by a Travel Agency Commissioner shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or other arbitrators appointed in accordance with Rules of Arbitration of the International Chamber of Commerce.

85 The case came before Rajiv Sahai Endlaw J, the same judge who had given the *Delhi Express* decision, on 5 February 2018. The record of the Court's order relevantly reads:[70]

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69 D'Cruz p 1025.

70 D'Cruz pp 179 to 180.

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> 2. The counsel for the plaintiff has fairly stated that the matter is covered by *Delhi Express* … and against which, both counsels [sic] agree, no appeal was preferred and there is no contrary view.
>
> 3. The counsel for the plaintiff on further query agrees that the action brought before this Court by way of this suit is subject matter of arbitration agreement.
>
> 4. In this view of the matter, the application is allowed and disposed.
>
> …
>
> 5. The parties are referred to arbitration under Section 8 of Arbitration and Conciliation Act, 1996.
>
> 6. The suit is disposed of.

86 According to D'Cruz, prior to the order being made, the Judge referred counsel to *Delhi* Express and asked them to consider the parties' positions. There was no other evidence of what transpired at the hearing.

87 IATA submitted that the absence of a TAC decision and the fact that it was no longer possible to get a decision had been clearly raised, and that by the various assertions of arbitrability nonetheless, and by maintaining the Application after reference to *Delhi Express*, CES had represented that despite the absence of a TAC decision, the claim should be referred to arbitration.[71] It said that on that basis it consented to the matter being referred to arbitration by the Indian court, thereby incurring the detriment of a change in position and spending time and money on commencing the arbitration, or the ultimate detriment of losing its claim if it could neither proceed in the Indian courts nor proceed by arbitration.[72] Accordingly, it said, CES was estopped from raising

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71 IATA Written Submissions, paras 121 to 126.

72 IATA Written Submissions, para 129.

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the absence of a TAC decision as a bar to arbitration.[73] Alternatively, it said that in maintaining arbitrability although the absence of a TAC decision had been brought out, CES waived the need for a prior TAC decision.[74]

88 CES responded that its application, and more particularly what was said about arbitrability in the documents filed in the Indian proceedings, were to be seen against the background of the law on s 8(1) of the ACA. Section 8(1) required only that the matter be "the subject of an arbitration agreement". It submitted that just as an application under the section looked only to the *prima facie* existence of an arbitration agreement and not to its application to the facts, so also CES represented only the existence of the provisions for arbitration in the Handbook, and did not represent that the provisions had been triggered or that any mandatory precondition had been satisfied or waived. To the contrary, it said, it had at all times stated that what was to be arbitrated was a decision of the TAC.[75]

89 To address these submissions, an understanding of s 8(1) of the ACA is necessary.

90 According to Raj, in an application under s 8(1), the court looks only to whether *prima facie* there is a valid arbitration agreement.[76] He cited the 246th Report of the Law Commission of India on which the legislation was based, which at para 33 so recommended and said that if the court is of the opinion that *prima facie* an arbitration agreement exists, it should refer the dispute to

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73 IATA Written Submissions, para 133.

74 IATA Written Submissions, paras 134 to 136.

75 CES Written Submissions, paras 72 and 76.

76 Raj p 39, para 4.6.

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arbitration and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal.[77] He also referred to the SCI's decisions in *Ameet Lalchand Shah v Rishabh Enterprises* (2018) 15 SCC 678 at [27]–[30] and *Hema Khattar and another v Shiv Khera* (2017) 7 SCC 716 at [35]–[36], in the latter of which it is said that where there is an arbitration clause in an agreement, it is mandatory for the court to refer the parties to arbitration.[78]

91 Rameshwar's evidence on the matter was to similar effect. He said that the legislative purpose of an application under s 8(1) was to inform the court that an arbitration agreement exists and that the court should not assert its jurisdiction over the dispute as it was a subject matter of arbitration. In this regard, he cited the SCI's decision of *M/S Sundaram Finance Limited v T Thankam* (2015) 14 SCC 444 at [15] for the observation that the approach of the court should not be to see whether it has jurisdiction, but to see whether its jurisdiction has been ousted; that is, taken away by the procedure under the statute.[79] Rameshwar referred also to *Hindustan Petroleum Corporation v M/S Pinhcity Medway Petroleums* (2003) 6 SCC 503, where it was said at [14] that referral was mandatory because there was an arbitration clause in the agreement between the parties, even though "the applicability thereof is disputed by the respondent". In that case, the court went on to say (at [16]) that any objection to the applicability of the arbitration clause had to be raised before the arbitral tribunal and should be left to be determined by the tribunal.[80]

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77 Raj p 38, para 4.5.

78 Raj p 39, para 4.8.

79 Rameshwar-1 p 27, para 43.

80 Rameshwar-1 pp 30 to 32, at para 51.

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92 The experts did not directly address the specific question of whether, in an application under s 8(1), referral to arbitration could be resisted by contending that although there was an arbitration agreement, a precondition to arbitration was not satisfied. From the previous two paragraphs, the answer is no. Looking at the position after referral, Raj said it was settled law that a question of the jurisdiction of the arbitral tribunal could be raised and determined by the tribunal, and that CES could raise a jurisdictional challenge before the Tribunal even after the referral to arbitration.[81] Implicit in this is that the answer to the question is no, which is supported by *Delhi Express* to which Raj rather obliquely referred in this respect. It was there contended that the precondition of a decision by the TAC had not been satisfied. The court put that aside because of the Agent's default, but in Passage 2 set out at [71] above, it said that even if the absence of a TAC decision was not attributable to the Agent, referral to arbitration was mandatory because the dispute was governed by an arbitration agreement.

93 The parties appear to have assumed that Indian law concerning estoppel or waiver applied. There was scant evidence of that law, but the parties helpfully agreed on concise statements of the ingredients of each.

94 For estoppel, it is sufficient to say that the parties' agreement on the law included that there must be a clear and unequivocal representation by words or conduct on which reliance was placed. The representation put forward by IATA was the representation by CES that, despite the absence of a TAC decision, the claim should be referred to arbitration. On the operation of s 8(1) described above, that would not suffice: it would leave open contesting the arbitrator's

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[81] Raj p 41, para 4.12.

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jurisdiction after referral. A better formulation would be representation by CES that despite the absence of a TAC decision, the arbitrator had jurisdiction to determine the claim. However, particularly with regard to the operation of s 8(1), I do not think a clear and unequivocal representation to that effect can be found.

95 It was common ground that there was no estoppel simply because CES brought the Application. The representation must be found elsewhere. Without going through them in detail, CES's assertions in the documents filed in the Indian proceedings did not clearly go beyond that the dispute was the subject of an arbitration agreement. Where in the Reply it was said in various ways that the dispute was capable of arbitration, when read in context no more was meant than, as was sufficient for the Application, it was within s 8(1) in that respect. There was certainly no clear acceptance that, despite the absence of a TAC decision, the arbitration could proceed with the arbitrator having jurisdiction to determine the dispute – and it was not necessary, on the state of the law, for the arbitral tribunal's jurisdiction to be accepted by the court or the parties in order that the Application succeed.

96 The record of the court's order is consistent with this. The parties were referred to *Delhi Express*. Counsel for IATA agreed that the matter was covered by it and that the action was the subject matter of an arbitration agreement. In what way was the matter covered? By the reference to the action being the subject matter of an arbitration agreement, not because CES could not rely on the absence of a TAC decision: but because, being the subject matter of an arbitration agreement, referral to arbitration was mandatory. The record does not support that counsel was acting on the basis of a representation that, despite the absence of a TAC decision, the arbitrator had jurisdiction to determine the claim.

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97 Raj accepted that CES was not estopped "on account of its representations in the Delhi HC suit or otherwise" from bringing a jurisdictional challenge before the Tribunal.[82] He considered, however, that CES was estopped from "taking an expressly contradictory position from that which [it] had already taken".[83] He reasoned:[84]

> Accordingly, having accepted before the Delhi High Court, in its pleadings and submissions, that CES had approached the TAC and having not disputed that the TAC had rejected such request, CES effectively accepted the position that the request for review by TAC had been made and rejected and that only the notice from ICC was remaining …
>
> Having so accepted and admitted in pleading, CES will be estopped from claiming otherwise or that the lack of a reference to the TAC is non-satisfaction of the precondition to IATA bringing its claims to arbitration. …

98 Treating this as a submission by IATA, I do not accept it. It is not clear what is meant by rejection of the request for review. If it is meant that the rejection was a decision, it was not a decision on IATA's demand for money. If, as I think is the case, it is meant that the TAC declined to give a decision, that is the problem, not the solution to the problem. Acceptance by CES that there was no TAC decision goes nowhere unless it is then represented by CES that, despite that fact, the arbitrator has jurisdiction.

99 The estoppel ground fails. It is not necessary to consider IATA's alternative ground of waiver in any detail. It was put as a waiver by election. It is difficult to see the application of that doctrine, but the parties' agreed statement of the law included that an unequivocal representation in relation to

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82 Raj at p 41, para 4.13.

83 Raj at p 41, para 4.13.

84 Raj at p 44, paras 4.15 and 4.16.

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the right or remedy being waived was required. Here, the right was the right to challenge the arbitrator's jurisdiction for want of a TAC decision, and it follows from what I have said that I decline to find the necessary unequivocal representation.

Back to the Tribunal's Decision

100 It is evident from the Award[85] that the Tribunal was presented with more issues and more wide-ranging submissions than in this application. On the default question the Tribunal held that he has jurisdiction essentially because CES alone could have initiated review by the TAC, although he used the taxonomy of estoppel and waiver. He dealt relatively briefly with a variant of the estoppel/waiver question, holding that by not seeking timely review by the TAC and by making the Application, CES "elected to require IATA to bring its claim to arbitration",[86] and was thereby estopped from objecting to IATA bringing its claim in that arbitration. This was not how the estoppel or waiver was put before me, and I respectfully come to a different conclusion concerning the Indian proceedings.

Some observations on the evidence

101 In the Singapore International Commercial Court, it may be ordered that a question of foreign law be determined on the basis of submissions from qualified lawyers: O 110 r 25 of the Rules of Court (Cap 322, R 5, 2014 Ed). Putting that aside, in Singapore, foreign law is a matter of fact, which must be proved by evidence. To an extent it can be proved by evidence of raw sources of foreign law; or it can be proved, and commonly needs to be proved, by the

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85 M-1 at pp 35 to 111.

86 M-1 at p 108, para 232.

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evidence of an expert in the foreign law: see generally *Pacific Recreation Pte Ltd v SY Technology Inc and another appeal* [2008] 2 SLR (R) 491 ("*Pacific Recreation*") at [59]–[60].

102 In Pacific *Recreation* at [76], the court adopted from *MCC Proceeds Inc v Bishopsgate Investment Trust plc* [1999] CLC 417 at [23] a summary of the function of an expert witness on foreign law:

> (1) to inform the court of the relevant contents of the foreign law; identifying statutes or other legislation and explaining where necessary the foreign court's approach to their construction;
>
> (2) to identify judgments or other authorities, explaining what status they have as sources of foreign law; and
>
> (3) where there is no authority directly in point, to assist [the court] in making a finding as to what the foreign court's ruling would be if the issue was to arise for decision there.

103 In their affidavits, Rameshwar to some extent and Raj to a considerable extent went beyond this. Rameshwar, for example, was asked to opine on whether CES could be prevented from relying on the lack of a TAC decision if it were found that the absence of a decision was its fault. He answered by construing the Rules to the conclusion that IATA was obliged to initiate a review pursuant to para 1.8 of Attachment A to Resolution 818g.[87] That is a matter for the court. Again, as examples, Raj was asked whether IATA was obliged by para 1.8 to request a review by the TAC; whether by its conduct in failing to apply for timely review by the TAC, CES had waived the precondition; and whether by the representations made and position taken by CES in the Indian proceedings, it was estopped from objecting to IATA bringing

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87 Rameshwar-1 p 17 para 16 to p 20 para 22.

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its claims in the arbitration.[88] In his answers, as well as explaining Indian law, he also construed the Rules and applied the law to the facts to come to conclusions. These were matters for the court.

104 No blame attaches to Rameshwar or Raj: they did what they were asked to do. There is no bright line edging the discharge of the functions in the summary set out above, and in *Pacific Recreation* at [78] it was said that the purpose of procuring expert evidence is not merely to place the contents of foreign law before the court but also to obtain the expert's opinion as to the effect of the law. But the experts were asked to go beyond their proper roles. Both gave opinions on the conclusions which the court ought to draw, but those conclusions should be the subject of counsel's submissions. It is appropriate to remind practitioners that the instructing lawyers should not ask the expert to opine beyond his or her proper role, and should bring to the expert's attention the limits of that role (see *Pacific Recreation* at [89]).

105 There was a similar problem in the affidavits of M and D'Cruz. Evidentiary affidavits are there to place facts before the court, including disputed facts. They are not there for submissions on conclusions of fact or legal argument, and should not include either: those are matters for counsel in written or oral submissions. M's first affidavit contained some factual material, but was largely argument in support of CES's case. D'Cruz began with factual material, but then descended into argument responding to M's arguments. The second and third affidavits of M replied in kind, the apparently self-written third affidavit being barely comprehensible.

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88 Raj pp 10 to 11, para 1.3.

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106 This should not have happened. Again, it is timely to remind practitioners of the function of evidentiary affidavits. A party's lawyers should ensure that the proper bounds are not transgressed, and should restrain their client's enthusiasm to take on the advocate's role (see, generally, Re *Application by Dow Jones (Asia) Inc* [1987] SLR(R) 627 at [16] and [17] and *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54 at 63).

Costs

107 CES fails in the application. Ordinarily, it will follow that it pays IATA's costs. I will so order, but with liberty to apply with 14 days if either party seeks a different or additional order as to costs. I invite the parties to agree on the costs amount, or on directions for determining it.

Orders

108 I make the following orders:

(a) Declare that the Tribunal has jurisdiction to hear the claims of IATA in the arbitration;

(b) the Originating Summons is dismissed; and

(c) CES is to pay IATA's costs of the application, with liberty to apply within 14 days if either party seeks a different or additional order as to costs any such application may be made by letter to the Registry.

Addendum on confidentiality

109 The confidentiality attending arbitral proceedings is recognised in s 23 of the IAA, which seeks to accommodate it with open justice in curial proceedings and the value of guidance from publicly available court decisions.

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Section 23(2) provides for directions as to whether and what information relating to the proceedings may be published. By s 23(3)(*b*), the court must be satisfied that the information, if published, would not reveal any matter, including the identity of any party to the proceedings, that any party reasonably wishes to remain confidential. Section 23(4) makes further provision for possible publication in the law reports, implicitly when that publication would go beyond the information permitted by directions under s 23(2).

110 It is common that in a case such as the present, in conformity with giving directions under s 23(2), an order is made restricting access to the court file and for redaction of the parties' names, and that the judgment is written or redacted so as not to reveal the parties' identities.

111 In August 2019, CES and IATA applied for consent orders restricting access to the court file and for redaction of their names in the judgment. Perhaps by oversight, only the order restricting access was made. In preparing the judgment, I concluded that while the parties' names could be redacted, the identity of IATA would nevertheless be apparent to a reader from the necessary references to the Handbook and provisions in it and to *Delhi Express* and *All India*. Accordingly, when the judgment was issued to the parties (as the dispositive judgment) on 25 March 2020, I directed that it not be released to the public or made available for possible publication until I had received submissions on whether and what steps should be taken so as not to reveal the identity of one or both parties.

112 On 6 April 2020, IATA wrote that it "does not wish to request for any redaction of the Judgment". On 8 April 2020, CES wrote requesting that its name "be redacted for confidentiality", giving reasons for that course. IATA then wrote, on 13 April 2020, saying that it did not object to CES's request for

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confidentiality but asking that, if that were done, its name be redacted "in order to maintain consistency between the parties as to the level of confidentiality observed by each party in respect of the arbitration proceedings".

113 CES's name has been redacted, by the use instead of those letters, and the references to its Chairman and Managing Director have also been anonymised by use of the letter M. However, I did not accede to IATA's request.

114 First, IATA had initially not wanted redaction of its name at all, and the change on 13 April 2020 was not for concern over knowledge of its identity, but for a reason to which it is difficult to give any weight: confidentiality is not a matter of equal treatment, but of IATA's own interest in not having its identity revealed. Secondly, the request was pointless when IATA's identity would be apparent even if its name was redacted in the same manner as that of CES; and IATA did not, having received the judgment, request redaction of the references to the Handbook and the Indian cases or anything beyond redaction of its name.

115 Returning to s 23 of the IAA, CES did not ask for confidentiality as to IATA's identity, and in the combination of circumstances described in the previous paragraph, I am not satisfied that IATA's most recent wish for confidentiality by redaction of its name is reasonable. There could nonetheless be the redaction, but the court should not go through an empty exercise.

116 The judgment has been amended for release beyond the parties by the redaction of the names of CES and M, and by the addition of this Addendum to explain why the name of IATA has not been similarly redacted.

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Roger Giles
International Judge

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