IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 53

Civil Appeal No 75 of 2015

Between

Rals International Pte Ltd

… *Appellant*

And

Cassa di Risparmio di Parma e Piacenza SpA

… *Respondent*

GROUNDS OF DECISION

[Arbitration]—[Agreement]—[Assignment]
[Arbitration]—[Stay of court proceedings]—[Mandatory stay under International Arbitration Act]
[Banking]–[Promissory notes]–[Payment]

Rals International Pte Ltd
v
Cassa di Risparmio di Parma e Piacenza SpA

[2016] SGCA 53

Court of Appeal — Civil Appeal No 75 of 2015
Sundaresh Menon CJ, Judith Prakash JA and Steven Chong J
25 April 2016

5 September 2016

Judith Prakash JA (delivering the Grounds of Decision of the court):

1 The primary issue that arose in this appeal was whether the assignee of bills of exchange, in this case promissory notes, took, along with the benefit of the bills of exchange, the obligation to arbitrate disputes that was contained in the underlying contract that had led to the issue of the bills of exchange. While the issue on its face was simple, it engaged considerations of the fundamental nature of bills of exchange as well as the approach to be taken in the construction of arbitration agreements.

2 The issue arose in the context of an application under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"). When that section is properly invoked, it compels the court to stay proceedings in favour of arbitration. At first instance, the High Court judge ("the Judge") held that s 6 did not apply to the proceedings in Suit No 1173 of 2013 ("S 1173")

and therefore declined to stay those proceedings. The appeal was against that decision (see: *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd* [2016] 1 SLR 79 ("the HC Decision")).

3 We dismissed the appeal on the ground that the cause of action sued on in S 1173 did not fall within the scope of the arbitration agreement in question. That cause of action arose from the plaintiff's position as holder of certain promissory notes. For the reasons that follow, our view, briefly, was that a negotiable instrument such as a promissory note is not governed by an arbitration agreement in an underlying contract unless the agreement has been expressly incorporated in that instrument.

Background facts

Parties to the dispute

4 The appellant, Rals International Pte Ltd ("Rals"), is a company incorporated in Singapore. It was the buyer of equipment under a supply agreement ("the Supply Agreement"), which it entered into with Oltremare SRL ("Oltremare"), an Italian supplier. Rals and Oltremare also entered into an assembling and commissioning agreement ("the Services Agreement") on the same day. Rals was the maker of the eight promissory notes in dispute ("the Notes") which were issued to Oltremare on 23 December 2010.

5 The respondent, Cassa di Rispamio di Parma e Piacenza SpA ("Cariparma"), is a bank incorporated in Italy. It was the holder and indorsee (*ie*, a statutory assignee) of the Notes. It brought S 1173 against Rals to enforce its rights under the Notes.

The relevant agreements

6 The Supply Agreement was for the purchase by Rals of equipment to shell and process raw cashew nuts, and the Services Agreement was for the assembly and commissioning of the equipment at Rals' factory. Under the Supply Agreement, Rals agreed to pay Oltremare €1,950,185 in ten instalments of 10% each. The first two instalments were to be paid in cash and the last eight were to be paid by way of the Notes. The first of the Notes fell due for payment on 6 January 2012, and one of the remaining seven Notes fell due every six months from then on. The Supply Agreement was governed by Singapore law and provided for arbitration by cl 9 ("the Arbitration Agreement"):

> Arbitration
>
> All disputes arising in connection with this Agreement shall be settled by a direct conciliation between the parties. Failing this conciliation, the dispute will be settled in accordance with the rules of Conciliation and Arbitration Rules of the International Chamber of Commerce in Singapore.

7 As noted at [17] of the HC Decision, the effect of this arrangement was that Oltremare granted Rals credit. It was given a four-year period from the date of the last shipment of equipment under the Supply Agreement to pay 80% of the purchase price of the equipment. Pursuant to the Supply Agreement, the Notes were sent to Oltremare's bank in Italy on 23 December 2010 without the maturity dates filled in. This was accompanied by instructions for the Notes to be released to Oltremare upon presentation of certain stipulated documents evidencing shipment of the goods. The maturity dates were subsequently filled in by the bank.

8 In February 2011, Oltremare approached Cariparma, offering to sell the Notes at a discount from their face value. Consequently, on 19 July 2011, Oltremare and Cariparma entered into a contract governed by Italian law ("the Discount Contract"). Under Art 2(3) of the Discount Contract, Cariparma would be assigned the Notes and "the underlying credit owed to [Oltremare] by [Rals]". In exchange, Oltremare made a number of declarations in Art 3(1) of the Discount Contract guaranteeing, *inter alia*, that "the credits [were] freely assignable and transferable to third parties", "the credit instruments [were] valid and intact as well as autonomous and abstract from the credit deriving from the supply agreement" and that the Supply Agreement contained an arbitration clause.

9 Additionally, the Discount Contract was only stated to take effect after certain documents were delivered by Oltremare to Cariparma. As noted at [30] of the HC Decision, only three of those documents were potentially relevant to the issue at hand. They were:

(a) A notice from Oltremare to Rals dated 15 July 2011 stating that it had assigned "[Oltremare's] credit with [Rals] deriving from the above described promissory notes" to Cariparma, and that all subsequent payments were to be made to Cariparma.

(b) A letter from Oltremare to Cariparma dated 20 July 2011 in which Oltremare declared that there were no disputes between Oltremare and Rals relating to the Supply Agreement as at the date of the letter.

(c) A certificate of acceptance dated 5 August 2011 signed by both Rals and Oltremare certifying that "the delivery ha[d] taken place in full conformity with the Supply Agreement".

10 On 5 August 2011, the Notes were negotiated (*ie*, indorsed and delivered) to Cariparma, thereby effecting the assignment under the Discount Contract. In exchange, Cariparma paid €1,657,105.11 to Oltremare on 12 August 2011, being the purchase price of the Notes under the Discount Contract.

The commencement of legal proceedings

11 Between 30 November 2011 and 27 May 2013, Cariparma presented the first four of the Notes for payment, but each of them was dishonoured by Rals. It commenced S 1173 against Rals on 24 December 2013, claiming (aside from interest and costs) the sum of €902,000, being the total face value of the four Notes presented. Cariparma also sought a declaration that it was a holder in due course of the Notes and that Rals was liable to pay Cariparma the face values of the remaining four Notes as and when they fell due and were presented for payment.

12 In response to the action, Rals filed an application seeking a stay of S 1173 under s 6 of the IAA.

Section 6 of the IAA

13 Section 6 of the IAA reads:

> **Enforcement of international arbitration agreement**
>
> **6**.—(1) … where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court

> against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may … apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.
>
> …
>
> (5) For the purposes of this section and sections 7 and 11A — (*a*) a reference to *a party shall include* a reference to *any person claiming through or under such party* …
>
> [emphasis added]

14 It can be seen from s 6(1) read with s 6(5) that in order to put the court in the position of having to stay proceedings, an applicant must satisfy the court that:

> (a) the claimant in the proceedings is a party to an arbitration agreement (either directly or because he is claiming "through or under" such party); and
>
> (b) the subject matter of the proceedings is the subject of the arbitration agreement.

If the applicant meets both requirements, then the proceedings must be stayed unless the arbitration agreement is null and void, inoperative or incapable of being performed (see s 6(2)).

15 This meant that in the first instance the application filed by Rals involved the determination of two issues:

(a) whether Cariparma was a party to the Arbitration Agreement, either as a party "claiming through or under" Oltremare or otherwise ("the Party Issue"); and

(b) whether Rals' obligation to pay under the Notes was "a matter which [was] the subject of" the Arbitration Agreement ("the Subject Matter Issue").

The Decisions below

The AR's decision

16 On the Party Issue, the Assistant Registrar ("AR") held that there was at least an arguable case that the assignment of "the credit under the Supply Agreement" by Oltremare to Cariparma would render Cariparma bound by the Arbitration Agreement given its knowledge of the Arbitration Agreement. She also expressed her tentative view that Cariparma was a party claiming through or under Oltremare under s 6(5)(*a*) of the IAA as it was an assignee of Oltremare's "credit under the Supply Agreement".

17 As for the Subject Matter Issue, the AR held, on the authority of *Piallo GmbH v Yafriro International Pte Ltd* [2014] 1 SLR 1028 ("*Piallo*"), that it could be inferred that parties had intended that disputes over the Notes would, "like all other disputes over the performance of the Supply Agreement", be subject to the Arbitration Agreement unless specifically excluded. While Cariparma was an assignee and not an original party to the Supply Agreement or the Arbitration Agreement, she held that there was no principled basis to depart from the above given that Cariparma had accepted the assignment with knowledge of the Arbitration Agreement. Additionally, she was persuaded by

the fact that the defences that Rals intended to raise related to factual and legal issues that were closely intertwined with the Supply Agreement.

The HC Decision

18 The Judge disagreed with the AR that Cariparma was a party to the Arbitration Agreement, holding that a party to an agreement had to be a party to it in the contractual sense: the HC Decision at [52]. Nevertheless, he held that Cariparma was a party claiming "though or under" Oltremare and therefore came within the extended definition of "party" under s 6(5)(*a*) of the IAA: the HC Decision at [125]. This was because Cariparma, as an assignee of the contractual right against Rals, received not only the right to receive the purchase price under the Supply Agreement but also the burden of the Arbitration Agreement. It was therefore contractually bound to arbitrate all disputes falling within the scope of the Arbitration Agreement: the HC Decision at [124].

19 Notwithstanding his finding on the Party Issue, the Judge found that s 6 of the IAA did not apply to S 1173. This was because in respect of the Subject Matter Issue, he held that since Oltremare and Rals expressly provided for payment by way of promissory notes, they must have contemplated that the Notes would be negotiated and that the holder of the Notes could claim outside of arbitration. He also accepted Cariparma's alternative submission that *Piallo* could be distinguished on the grounds that Cariparma was a mere indorsee of the Notes and that Cariparma's claim and Rals' defences were wholly distinct from the Supply Agreement: the HC Decision at [188]–[190]. Accordingly, he held that it was not arguable that Cariparma's claim in S 1173 was a dispute arising in connection with the Supply Agreement. Indeed, the Supply Agreement, and the rights and obligations under it, were separate and

independent from the statutory contract represented by the Notes: the HC Decision at [204]. In this regard, the Judge was clearly swayed by the cash equivalence principle – that the commercial purpose of stipulating a bill of exchange as a payment mechanism is to function as a substitute for cash: the HC Decision at [150]–[153].

The issues in the Appeal

20 Before us, both parties accepted, as they did in the court below, that the question of whether Cariparma was bound by the Arbitration Agreement was governed by Singapore law. There was also no dispute that the burden imposed on an applicant under s 6(1) of the IAA is a light one. In *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*"), it was held that a court should adopt a *prima facie* standard of review when hearing a stay application under s 6 of the IAA. That means that in this case the court would grant a stay in favour of arbitration if Rals was able to establish a *prima facie* case that the Party Issue *and* the Subject Matter Issue should be determined in its favour.

21 Rals' primary ground of appeal related solely to the Subject Matter Issue. It noted that the position in Singapore, as established by the decision of *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 ("*Larsen*"), was that arbitration clauses ought to be construed generously such that all claims as between the contracting parties would generally fall within their ambit. In the present appeal, the inclusion of a widely-drafted arbitration clause in the Supply Agreement meant that Oltremare and Rals must have intended for the Notes, which were an "inextricabl[e] part of the Supply Agreement", to fall within its scope. The result, as was the case in *Piallo*, was that the claims brought by Cariparma in S 1173 were the subject of the

Arbitration Agreement. Accordingly, given the Judge's decision on the Party Issue, the court ought to order a stay of S 1173 pending arbitration under s 6(2) of the IAA.

22 Both parties also devoted a fair number of pages of their written submissions to the Party Issue, although this was not the subject of any cross-appeal by Cariparma. We agreed with Rals, however, that the failure of Cariparma to file a cross-appeal rendered the Party Issue beyond the scope of this appeal. This failure was not ameliorated by O 57 r 9A(5) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). Order 57 r 9A(5) reads:

> A respondent who, not having appealed from the decision of the Court below, desires to contend on the appeal that the decision of that Court should be varied in the event of an appeal being allowed in whole or in part, or that the decision of that Court should be affirmed on grounds other than those relied upon by that Court, must state so in his Case, specifying the grounds of that contention.

23 Although a literal reading of the rule could suggest that a respondent may challenge any finding of a judge without having to file an appeal, this court clarified in *Lim Eng Hock Peter v Lin Jian Wei and another and another appeal* [2010] 4 SLR 331 at [26] that the word "decision" did not refer only to the ultimate determination of the matter, but also to any finding of law or fact that could be *varied or affirmed* if there was sufficient reason to do so. The purpose of the rule was to allow a successful respondent to support the court's decision in his favour, by varying or affirming it, *on a ground which the court had not relied on*. It was not intended to circumvent the need to file a cross-appeal in a situation in which the respondent was challenging a holding by the court that had gone against him.

24 At the hearing of the appeal, counsel for Cariparma tendered the decision of this court in *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 (*"Ang Sin Hock*"), seemingly in support of their submission that they be allowed to argue the Party Issue. We failed to see how it advanced their case. *Ang Sin Hock* concerned the reliance on a new point on appeal pursuant to O 57 r 13(4) of the ROC where that point had not been raised in the court below; it did not concern a case such as the present where the point had not only been raised but had been adjudicated on. That Cariparma did not file a cross-appeal and our holding on the Subject Matter Issue made it unnecessary for us to decide the Party Issue. Nevertheless, given the extent to which it was canvassed in the parties' submissions and the HC Decision, we make a few observations on the point below.

25 On the other hand, O 57 r 13(4) of the ROC was relevant to Rals' secondary ground of appeal that had not been raised in the court below – that S 1173 should nonetheless be stayed in the interests of appropriate case management pending the resolution of arbitration proceedings. This was because the hearing in the lower court preceded the decision of this court in *Tomolugen* in which we recognised the inherent jurisdiction of the court to grant a stay of that nature. As this argument was not pursued in the hearing before us, we have no need to deal with it.

The broad legal principles

26 Before we move on to the analysis proper, we think it useful to set out the broad legal principles that were relevant to the appeal.

The legal nature of promissory notes

27 Neither party disputed the Judge's finding that the Notes satisfied the statutory definition of a promissory note set out in s 92(1) of the Bills of Exchange Act (Cap 23, 2004 Rev Ed) ("the Bills Act"), or his brief exposition on the legal nature of promissory notes: the HC Decision at [146]–[153]. We summarise his observations, which we endorse fully, in the following paragraphs for ease of reference. The starting point is the definition of a promissory note and the liability of its maker as set out in ss 92(1) and 97 of the Bills Act:

> **92.**—(1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.
>
> …
>
> **97.** The maker of a promissory note by making it —
>
> (a) engages that he will pay it according to its tenor;
>
> (b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

28 As noted at para 9.4 of William Hedley and Richard Hedley, *Bills of Exchange and Bankers' Documentary Credits* (LLP, 4th Ed, 2001) ("*Hedley's Bills of Exchange*") in relation to the English equivalent of s 92(1) of the Bills Act, the definition corresponds closely with the definition of a bill of exchange at s 3. Indeed, s 98 of the Bills Act expressly provides that Part II (relating to bills of exchange) applies to promissory notes with the necessary modifications. A key difference is that promissory notes are *promises* by the maker to pay, and not (as is the case for bills) *orders to* third parties to pay: *Hedley's Bills of Exchange* at para 9.3. The Notes, which were payable to the order of Oltremare, contained nothing on their face that prohibited or restricted

transfer, and were therefore negotiable instruments pursuant to s 8 of the Bills Act. That is, they possessed the three characteristics common to all negotiable instruments (see Poh Chu Chai, *Law of Negotiable Instruments* (LexisNexis, 7th Ed, 2014) at para 2):

> (a) the legal title to the Notes was freely transferrable by indorsement and delivery (see s 31(3) of the Bills Act);
>
> (b) a transferee would be entitled to sue on the Notes in his own name (see s 38(1)(*a*) of the Bills Act); and
>
> (c) a holder in due course of the Notes (*ie*, a person who had taken the Notes under the conditions set out in s 29 of the Bills Act) would hold the Notes free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves (see s 38(1)(*b*) of the Bills Act).

29 It is these characteristics that have made the use of bills of exchange "an important and essential part of financing international trade": *Hedley's Bills of Exchange* at para 1.3. As stated by this court in *Wong Fook Heng v Amixco Asia Pte Ltd* [1992] 1 SLR(R) 654 ("*Wong Fook Heng*") at [13], a bill of exchange evidences a contract *independent of any underlying contract* that should generally be honoured, and is to be treated as cash. *Wong Fook Heng* followed the decision of the House of Lords in *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713 ("*Nova*"), which featured prominently in the parties' submissions and is discussed in greater detail below. The principle of cash equivalence is given effect to by ss 47 and 57 of the Bills Act. They provide an immediate right of recourse to the holder against the drawer and indorsers of a dishonoured bill and for the amount of

the bill to be claimed as liquidated damages, for which summary judgment will generally be ordered: *Thomson Rubbers (India) Pte Ltd v Tan Ai Hock* [2012] 1 SLR 772. As noted in the HC Decision at [152], this confers significant advantages on the use of bills of exchange:

> The cash equivalence principle gives a bill of exchange two important commercial advantages over a mere promise to pay. First, where the drawer's payment obligation under the bill has not yet fallen due, a bill offers the payee the means to monetise the promise. The payee can, quickly and effectively, convert by negotiation the drawer's promise to pay in the future into cash in the present. Second, once the drawer's payment obligation under the bill has fallen due and until that obligation is met, the bill is *de facto* security for the payee. The payee can, quickly and effectively, convert by legal action the drawer's promise to pay in the present into cash in the present. Simply put: the drawer is obliged to pay now and argue later.

The construction of arbitration agreements

30 Similarly, there was no dispute as to the broad approach to be taken in determining the scope of arbitration agreements. The decision of this court in *Larsen* represents the law as it currently stands in Singapore. In *Larsen*, the court followed the decision of the House of Lords in *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] 2 All ER (Comm) 1053 ("*Fiona Trust*"), holding that arbitration clauses should be generously construed such that all manner of claims, whether common law or statutory, should be regarded as falling within their scope unless there is good reason to conclude otherwise (*Larsen* at [19]). This was a marked departure from the traditional approach of the English courts, which was based on precise words used in the arbitration clause (*Larsen* at [12]). The court in *Larsen* quoted from the judgment of Lord Hoffmann at [13] of *Fiona Trust*, in which he said:

> … [T]he construction of an arbitration clause should start from the assumption that the parties, as rational

> businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

31 Nevertheless, as the Judge noted at [137] of the HC Decision, the phrase "unless there is good reason to conclude otherwise" in *Larsen* suggests that there are limits to this generous approach. Indeed, *Larsen* itself is an example of how the "presumption" had been rebutted. The respondent in *Larsen* and its four wholly-owned subsidiaries entered into a management agreement with the appellant that contained an arbitration clause, requiring the parties to resolve their disputes through arbitration. The respondent subsequently went into liquidation, and the liquidators commenced proceedings against the appellant in relation to payments made by the respondent and its subsidiaries to the appellant. This court held that the claims were founded entirely on the avoidance provisions of the Bankruptcy Act (Cap 20, 2009 Rev Ed) and the Companies Act (Cap 50, 2006 Rev Ed) and not made under the management agreement (*Larsen* at [10]). The court in *Larsen* at [20] drew a line between private remedial claims and claims that could only be made by a liquidator or judicial manager of an insolvent company, finding that the assumption articulated by Lord Hoffmann did not apply to avoidance claims pursued during insolvency proceedings. The rationale was that a company's pre-insolvency management would have only been concerned about private remedial claims and therefore would have not contemplated including other claims arising in insolvency within the scope of the arbitration agreement.

32 Essentially, the rule of construction is that all disputes between parties are assumed to fall within the scope of the arbitration clause unless shown otherwise. As Lord Hoffmann also states in *Fiona Trust* at [5], this is not borne out of policy considerations but of the context in which arbitration agreements are entered into; ultimately, it all depends on the intention of the parties, objectively ascertained:

> … Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.

33 Similar observations were made by Austin J in *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at [119]–[120], which was also cited at [176] of the HC Decision:

> 'Liberal' construction is not a rigorous notion. In Australia, courts see their task as ascertaining the intention of the authors of a commercial instrument, as expressed in their instrument, taking into account surrounding circumstances and extrinsic materials to the extent permitted by law …
>
> In other words, while Australian courts are not constrained by considerations of public policy to adopt a 'liberal' construction of arbitration clauses, reflection on the likely intention of the parties will steer them away from any narrow construction.

34 What these cases emphasise is that the rule of construction formulated in *Fiona Trust* is not to be applied irrespective of the context in which the underlying agreement was entered into or the plain meaning of the words. Where there are compelling reasons, commercial or otherwise, that may

displace any assumed intention of the parties that claims of a particular kind are to fall within the scope of an arbitration clause, the court should be slow to conduct the exercise of contractual construction from that starting point.

The Judge's approach to the issues

35 The Judge's approach to the determination of whether proceedings ought to be stayed under s 6(1) of the IAA was as follows:

> (a) As regards the Party Issue, a "party" to an arbitration agreement must be a party in the contractual sense. The question of whether a non-contractual party can be said to be claiming "through or under" a party to the contract under s 6(5)(*a*) of the IAA is determined by whether the non-contractual party is bound by the arbitration agreement under the general law of obligations: the HC Decision at [52] and [70].
>
> (b) As regards the Subject Matter Issue, it is a matter of contractual interpretation. The manner in which the Arbitration Agreement was drafted meant that the Subject Matter Issue would be determined in Rals' favour if Cariparma's claim or Rals' defences arose in connection with the Supply Agreement: the HC Decision at [143].

36 Cariparma did not challenge the Judge's narrow definition of "party". However, it took issue with the Judge's approach in respect of the Party Issue generally, submitting that an assignee would only be regarded as a person "claiming through or under" the assignor if the assignee sought to enforce its assigned rights *under the contract containing the arbitration agreement in question*. That is, the fact that it was relying on a separate cause of action

granted to it by the Notes which each constituted a separate contract independent of the Supply Agreement meant that the Party Issue ought to be resolved in its favour, since it was the Supply Agreement that contained the arbitration clause. Rals' submission, on the other hand, was that Cariparma was claiming "through or under" Oltremare because it derived the right to the Notes through the Discount Contract, and the substance of the controversy would be no different from that if Oltremare had itself sued on the Notes.

37 The approach advocated by Cariparma was considered by the Judge, who rejected it for the reason that it would conflate the distinct inquiries captured in the Party Issue and the Subject Matter Issue: the HC Decision at [58]. We agreed with the Judge. It is important to re-emphasise here that the main question for determination was whether s 6 of the IAA applied to the facts underlying S 1173. Cariparma sought to avoid that issue entirely by contending that because two contracts existed, *viz*, the Supply Agreement (containing the Arbitration Agreement) and, secondly, the statutory contract contained in the Notes, and it was relying entirely on the second, the Arbitration Agreement did not come into the picture at all. This argument was simplistic. We say this because once Cariparma had been determined to be claiming under or through the Arbitration Agreement, the inquiry had to move on to the second stage. This was whether the Arbitration Agreement on its true construction applied to the Notes. Cariparma could not escape the second stage simply because its suit based on the Notes did not invoke the Supply Agreement.

38 Thus, the import of Cariparma's approach, as we understood it, was that even though Oltremare was a party to the Arbitration Agreement and Cariparma's rights under the Notes were derived from Oltremare, Cariparma

was not "claiming through or under" Oltremare because it was only the Supply Agreement and not the Notes that fell within the scope of the Arbitration Agreement – the precise inquiry under the Subject Matter Issue.

Our analysis of the Subject Matter Issue

39 Consistent with the manner in which it ran its case before the Judge, Cariparma's submissions on the Subject Matter Issue were two-fold. First, as between Oltremare and Rals, it argued that a claim on the Notes should *not* fall within the scope of the Arbitration Agreement. We accepted this argument for the reasons we give below. The second argument was that even if the Notes did fall within the scope of the Arbitration Agreement as between Oltremare and Rals, Cariparma's status as an indorsee of the Notes rendered its claim outside the scope of the Arbitration Agreement. This argument raised some conceptual difficulties which we indicate at [52] to [55] below.

40 Regardless of whether Cariparma stood in a better position as a holder in due course as compared to Oltremare with regard to the Subject Matter Issue, it was clear that Cariparma could not be in a worse position. That is, if it had been agreed between Oltremare and Rals that the Notes were not subject to the Arbitration Agreement, then the Subject Matter Issue would be concluded in Cariparma's favour. Our analysis in this section is therefore restricted to the position of Oltremare as the mere holder and payee of the Notes.

41 Within those confines, we agreed with Rals that there was little to distinguish *Oltremare's* position from that of the plaintiff in *Piallo*, in which the court stayed proceedings pending arbitration under s 6(2) of the IAA. *Piallo* involved a distributorship agreement between the plaintiff manufacturer

and the defendant distributor that contained an arbitration clause. The parties later became embroiled in a dispute, but it was settled on terms that involved the distributor drawing and delivering 15 post-dated cheques to the manufacturer. However, the cheques were countermanded before they could be presented. The manufacturer then filed a claim in the courts on the dishonoured cheques, and the distributor in turn applied to stay the action under s 6 of the IAA, issuing a notice of arbitration against the manufacturer at the same time. While there was no cross-claim in the present case, it similarly involved the use of bills of exchange for payment with regard to an underlying contract comprising a similarly-worded arbitration clause.

42 The judge in *Piallo* (at [36]) held that the modern approach to the construction of arbitration clauses as set out in *Fiona Trust* meant that there could be no presumption against taking bills of exchange into arbitration. Given that the manufacturer's claim on the dishonoured cheques and the distributor's cross-claim for damages for breach of the distributorship agreement both arose out of the settlement, she held that it was likely that parties had intended for such claims to be resolved by arbitration alone: *Piallo* at [38]. More generally, she expressed the view that it would have to be expressly stated if a cause of action under a bill of exchange were to be excluded: *Piallo* at [39]. On the contrary, in our judgment, an arbitration clause in an underlying contract will generally *not* be treated as covering disputes arising under an accompanying bill of exchange in the absence of express language or express incorporation. This is the clear result of the authorities we discuss below.

43 We refer, first, to the decision in *Nova*. The facts and findings of *Nova* are discussed at length in the HC Decision at [157]–[171], and we set them out

briefly. In *Nova*, an English company and a German company entered into a partnership agreement which contained an arbitration clause. They later entered into a separate contract for the sale of knitting machines by the English company to the German company, and payment was made by way of bills of exchange. The German buyer subsequently refused to honour the bills and commenced arbitration proceedings pursuant to the arbitration clause in the partnership agreement. The English seller in turn commenced an action for payment of the bills, which the German buyer sought to stay under s 1(1) of the English Arbitration Act 1975 (c 3) (UK) ("the UK Act"). One of the issues to be determined was whether there was "a dispute between the parties with regard to the matter agreed to be referred" – essentially, whether the dispute fell within the scope of the arbitration clause.

44 The House of Lords refused to grant the stay of the action for payment of the bills, finding that the arbitration agreement did not extend to those claims. Lord Wilberforce, with whom Lord Fraser of Tullybelton and Viscount Dilhorne agreed entirely, accepted the evidence that under German law "a very plain manifestation of intention to extend an arbitration clause to claims under bills of exchange is needed to *rebut the presumption* that businessmen neither wish nor expect bills of exchange to be taken into arbitration" [emphasis in original]: *Nova* at 731. While it is clear that their Lordships viewed the law regarding bills of exchange to be no different in Germany and England, it is not apparent if they shared the view of Lord Russell that there was no difference in law as regards the applicability of arbitration clauses to claims under bills of exchange as well. Regardless, as the Judge observed at [166] of the HC Decision, Lord Wilberforce was at pains to note that the decision not only accorded with the law as it stood, but gave

effect to the commercial expectations of parties. In *Nova* at 721–722, his Lordship stated:

> … [I]t is not mere technicality that supports the appellants' claim. … [Bills of exchange] are taken as equivalent to deferred instalments of cash. *Unless they are to be treated as unconditionally payable instruments … which the seller can negotiate for cash, the seller might just as well give credit.* … I must demur to the view that a result similar to granting a stay under the IAA can be obtained by any procedural stay of another character. So to hold would seem quite counter to long accepted principles regarding claims on bills of exchange and would represent an undesirable change in the law. [emphasis added]

45 Read in their full context, the observations above appeared to relate to the second ground (*ie*, whether there was a "dispute" under s 1(1) of the UK Act by reason of a cross-claim) rather than the question of whether the arbitration clause extended to the claim on the bills. But we found them to be no less pertinent. We endorse the view of the Judge, following Seagroatt J in *CA Pacific Forex Limited v Lei Kuan Ieong* [1999] 1 HKLRD 462, that as a matter of commercial common sense, it is difficult to see why any right-thinking merchant would choose to give up his rights in respect of bills of exchange. Although arbitration is sufficiently flexible to accommodate summary adjudication, up until the introduction of the Singapore International Arbitration Centre Rules 2016, there was nothing in the rules of most major arbitral institutions and, in particular, those of the International Chamber of Commerce Rules of Arbitration in force as from 1 January 2012 ("the ICC Rules"), that expressly provided for it. Indeed, the availability of summary judgment procedures in international arbitration, and specifically under the ICC Rules, appears to be a matter of controversy in England: see, *eg*, *Travis Coal Restructured Holdings LLC v Essar Global Fund Limited* (2014) 155 Con LR 61 at [44]. This injects an element of uncertainty that is at odds

with the unconditional nature of the obligation to pay under a bill of exchange that is prized by business people. More importantly, as the Judge pointed out at [194] of the HC Decision, it restricts a holder's and possibly his indorsee's options as to the mode of dispute resolution that can be adopted.

46 Rals submitted that any need for express incorporation in order for a bill of exchange to be subject to an arbitration clause would run contrary to the decision of this court in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 ("*Lufthansa*"). In that case, this court examined the question of whether there had to be a clear and express reference to an arbitration clause before it could apply, albeit in the context of incorporation into a separate agreement. In *Lufthansa*, the first and second respondents entered into an agreement under which the former would supply, deliver and commission a system to the latter. The agreement contained a dispute resolution mechanism that provided that the dispute would be resolved by arbitration if mediation failed. Subsequently, the respondents and the appellant entered into two supplemental agreements that were "annexed to and made a part of" the original agreement. Under the supplemental agreements, the second respondent undertook to transfer to the appellant moneys it received from a third party and the appellant would thereafter apply those moneys to pay the first respondent under the original agreement. However, payment disputes later arose and the first respondent commenced arbitration proceedings against the second respondent and the appellant. The appellant objected to the jurisdiction of the arbitration tribunal, arguing, *inter alia*, that it was not a party to the arbitration agreement in the original agreement between the first and second respondents.

47 The court in *Lufthansa* agreed with the appellant and held that the appellant was not bound by the arbitration agreement. It departed from the rule in England that clear and express reference to an arbitration clause contained in one contract was required before a court would find that the clause had been incorporated in a separate contract ("the strict rule"), noting the origins of the rule in negotiable instruments (*Lufthansa* at [34]):

> … *The strict rule has been overextended impermissibly from its original application in the context of bills of lading and charterparties. It clearly should not be taken as a rule of general application.* The question in general is one of construction: did the parties intend to incorporate the arbitration agreement in question by referring, in their contract, to it or to a document containing it? In our judgment, the analysis of whether a particular case is a "one contract" or a "two-contract" case as that notion has developed in English law, while possibly useful in some aspects, is not helpful for our purposes. It is ultimately a matter of contractual interpretation; and in undertaking this exercise, as we held in [*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029], the task is one which must be done having regard to the context and the objective circumstances attending the entry into the contract. … [emphasis added]

48 Accordingly, the court held, on a contextual interpretation of the supplemental agreements, that the parties had not intended that the arbitration agreement contained in the original agreement was to be incorporated as part of the supplemental agreements. The appellant was therefore not bound by the arbitration agreement. Nevertheless, as the Judge correctly noted at [140] of the HC Decision, what was said to be impermissible was the overextension from its original context of *negotiable instruments*. To the extent the position in *Larsen* was clarified or loosened, it did not concern a bill of exchange or a negotiable instrument and the clarified position did not avail Rals in the present context. In our judgment, there was good reason for the rule to continue to apply in its original setting. As Lord Robson explained in

T W Thomas & Co, Limited v Portsea Steamship Company, Limited [1912] AC 1 at 11 (which is quoted in *Lufthansa* at [24(a)]) with regard to bills of lading:

> It is to be remembered that the bill of lading is a negotiable instrument, and if the obligations of those who are parties to such a contract are to be enlarged beyond the matters which ordinarily concern them, or if it is sought to deprive either party of his ordinary legal remedies, the contract cannot be too explicit and precise. It is difficult to hold that words which require modification to read as part of the bill of lading and then purport to deal only with disputes arising under a document made between different persons are quite sufficiently explicit …

49 In our judgment, the fact that the obligations under the Notes were separate and autonomous from those arising out of the Supply Agreement supported a conclusion in Oltremare's and thus Cariparma's favour. There was no term in the Arbitration Agreement or the Supply Agreement that expressly stated that the Arbitration Agreement was to encompass disputes arising out of the Notes, nor was the Arbitration Agreement expressly incorporated into the Notes. In the circumstances, we were satisfied that a claim under the Notes, even by Oltremare, would not have been subject to the Arbitration Agreement. Accordingly, we dismissed the appeal on the Subject Matter Issue.

Assignability of arbitration agreements

50 The Judge also held for Cariparma on the alternative ground that the Arbitration Agreement did not apply to assignees, distinguishing *Piallo* on the grounds that Cariparma was a mere indorsee of the Notes and that Cariparma's claim and Rals' defences were wholly distinct from the Supply Agreement. This went against the AR's view that Cariparma's status as an indorsee provided no principled basis for distinction given that it had entered into the Discount Contract with knowledge of the Arbitration Agreement.

51 As we understood them, the Judge's grounds for distinguishing *Piallo* lay in the inherent nature of bills of exchange. That is, the negotiable nature of the Notes was at odds with any intention by Oltremare and Rals to restrict the rights of indorsees. We did not find this distinction persuasive. Given that it was common ground between Cariparma and Rals that any stay under s 6(1) of the IAA had to be based on the Arbitration Agreement, we did not think the position of Cariparma could be distinguished from that of Rals with regard to the Subject Matter Issue. If we were to accept that Oltremare and Rals had intended for the Notes to fall within the scope of the Arbitration Agreement, then we could not see how the Notes could fall outside the scope of the Arbitration Agreement upon its assignment to Cariparma. It seemed to us that any distinction that could be drawn would have to lie in the Party Issue – that is, whether Cariparma was bound by the Arbitration Agreement. As for the link, or lack thereof, between Rals' foreshadowed defences and the Supply Agreement, we thought that to be more relevant to the exercise of the court's inherent case management powers rather than the intention of the parties to the Supply Agreement.

52 This brings us back to whether Cariparma was claiming "through or under" Oltremare because the Supply Agreement had been assigned to it. In considering the Party Issue, the Judge cited the following propositions of law (HC Decision at [91]):

> (a) Arbitration agreements are, as a class, capable of assignment.
>
> (b) Where an assignor and an obligor have entered into an arbitration agreement, an assignee of a contractual right against the obligor is *entitled* to exercise all of the remedies of the assignor in respect of that right, including the right to arbitrate disputes with the obligor falling within the scope of that arbitration agreement.

> (c) Where an assignor and an obligor have entered into an arbitration agreement, an assignee of a contractual right against the obligor is *obliged* to submit to all disputes with the obligor falling within the scope of that arbitration agreement, notwithstanding the well-established rule that an assignment can convey to the assignee only contractual benefits and never burdens.

53 We did not think the first of those propositions to be controversial. It was laid down by the Court of Appeal in *Shayler v Woolf* [1946] Ch 320 and appears to have represented the law in England ever since. It is the second and particularly the third of the propositions which may give rise to some conceptual difficulty. They raise complex issues which were not fully argued before us due to Cariparma's failure to file a cross-appeal. The Judge considered the matter and raised two problems with the third proposition: first, the third proposition appears to be at odds with the well-entrenched common law principle that contractual burdens cannot be assigned; second, it allows a party that has not consented to arbitration to nevertheless be bound to arbitrate: the HC Decision at [102] and [119]. The Judge then invoked the principle of conditional benefit in rationalising the third proposition. The classic formulation of the principle was laid down by Megarry V-C in *Tito v Waddell (No 2)* [1977] 1 Ch 106, which was cited at [110] of the HC Decision. Essentially, it states that successors in title will be unable to take the right of an original obligor without also assuming the burden where the burden is an intrinsic part of the right.

54 The Judge held, in the context of the assignment of a right under a contract containing an arbitration agreement, that the application of the conditional benefit principle meant that it would not be necessary for an assignee to consent independently to the arbitration agreement, and that the intent of the assignor and assignee is irrelevant. This is because the consent to

arbitrate is found in the assignee's consent to accept the substantive right, regardless of whether it knew of the arbitration agreement: the HC Decision at [117]–[118]. He sought to reconcile this with the consensual nature of arbitration on both a conceptual and practical level. As to the former, because the intent to be bound by an arbitration agreement is objectively ascertained, an assignee could find itself bound to arbitrate despite having no subjective intent or desire to arbitrate: the HC Decision at [121]. This seems a principled and attractive argument but needs further consideration. Further, we had reservations as to whether the objective theory of contract justifies his finding that "[n]othing which the assignee does or knows can result in him receiving or rejecting the obligation to arbitrate separately from receiving the assigned right". Indeed, this appears at odds with his observation at [123] of the Decision that it is theoretically possible for the assignor and obligor to contract in such a way as to exclude the principle of conditional benefit.

55 Regarding the second proposition, there is less difficulty. The English Court of Appeal case of *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH (The "Jay Bola")* [1997] 2 Lloyd's Rep 279 ("*The Jay Bola*") suggests the reason that an assignee of a contract containing an arbitration agreement may be bound by that agreement has nothing to do with becoming a party to the agreement as a result of the assignment. It suggests instead that such an assignee would not be entitled to enforce its rights against the other party without also recognising the obligation to arbitrate (see *The Jay Bola* at p 291 *per* Sir Richard Scott VC). This approach of entitlement rather than obligation may be more easily reconcilable with the consensual nature of arbitration. This is because the assignee is only taken to submit to arbitration at the point it elects to exercise its assigned right. If it chooses to do so, we see little reason why the consent of the assignee cannot

be inferred from that choice. This, however, potentially gives rise to another conceptual difficulty – allowing non-parties to an arbitration agreement to avail themselves of the right to arbitration under the agreement would, on its face, conflict with the doctrine of privity.

56 It was not necessary for us to come to any conclusion on these thorny matters given that the appeal could be dismissed solely on the holding that the Notes did not fall within the Arbitration Agreement. We will revisit the issue of assignment of arbitration agreements as and when it falls to be determined in another case and is fully argued before us.

Sundaresh Menon	Judith Prakash	Steven Chong
Chief Justice	Judge of Appeal	Judge

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