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Case Comment

INTERPRETING AND ENFORCING CONFLICTING JURISDICTION AND ARBITRATION CLAUSES IN THE SINGAPORE COURTS

Silverlink Resorts Ltd v MS First Capital Insurance Ltd **[2020] SGHC 251**

This article observes that there may be at least three substantially different contexts under which conflicting jurisdiction and arbitration clauses may be construed: (a) when the conflict (broadly) occurs within the same contractual document, under a section providing for dispute resolution mechanisms; (b) when the conflict occurs amidst a chain of contracts or related contracts concluded by the parties in such a manner where one does not supersede the other; and (c) in poorly-structured multi-tiered dispute resolution mechanisms. This article also provides a brief contrast regarding the interpretation and enforcement of coexisting jurisdiction and arbitration agreements by the courts. Against this detailed background, this article critiques the High Court's judgment in *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251, arguing that the court ought to have first paid meticulous attention to the precise drafting of the disputed clause, before turning to precedents for assistance in its interpretation.

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I. Introduction

1 Dispute resolution clauses are frequently referred to as "midnight" clauses, as in practice it is normal for parties concluding a contractual agreement to leave it till the very end of negotiations for its contemplation.[2] Whilst it is recognised today as an essential mechanism for the management of dispute risks,[3] it is not uncommon for parties to neglect drafting dispute resolution clauses meticulously.[4] For instance, in *Silverlink Resorts Ltd v MS First Capital Insurance Ltd*[5] ("*Silverlink Resorts Ltd*"), the parties were bound by a dispute resolution mechanism which, on the face of its drafting, mandates parties to proceed to arbitration to ventilate "[a]ny dispute arising out of or in connection with" their contract, *and* proceed to the Singapore courts to litigate "any dispute [arising] between the [parties] regarding the interpretation or the application" of their contract.[6] As Chua Lee Ming J astutely pointed out, "[o]ne cannot have recourse to both arbitration *and* the court for the same dispute" [emphasis in original].[7] It is therefore imperative to rely on first principles of contractual interpretation to de-conflict the clauses.[8] As such, this case is noteworthy of deeper analysis, for the interpretive methodology adopted by the court will serve as precedent (or provide a persuasive analogy) for future decisions.

2 Interestingly, in the last decade (that is, between the years 2011 and 2020), there were a handful of cases of conflicting jurisdiction and arbitration clauses disputed and reported in published judgments

2 Jane Willems, "The Arbitrator's Jurisdiction at Risk: The Case of Hybrid and Asymmetrical Arbitration Agreements" in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A Karrer* (Patricia Shaughnessy & Sherlin Tung eds) (Kluwer Law International, 2017) at para 2.

3 Tiong Min Yeo, "The Choice of Court Agreement: Perils of the Midnight Clause" 12th Yong Pung How Professorship of Law Lecture (22 May 2019) at para 5.

4 See Thomas LJ's observations in *Sebastian Holdings Inc v Deutsche Bank AG* [2011] 2 All ER Comm 245 at [57].

5 [2020] SGHC 251.

6 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [16].

7 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [1].

8 This is in line with the well-accepted methodology to construe conflicting jurisdiction and arbitration clauses as harmoniously as possible: *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [146] and *Capital Ltd v CMS Energy Corp* [2008] EWHC 1843 (Comm) at [95]–[96].

from the Singapore High Court:[9] most of them were decided recently between 2019 and 2020. As (at the time of writing) the Singapore Court of Appeal has yet to set out specifically the law on the interpretation and enforcement of conflicting jurisdiction and arbitration clauses,[10] this is a good opportunity to provide a critique on the law.

II. Facts

3 The pertinent facts of the case may be summarised as follows. The plaintiff, Silverlink Resorts Limited ("Silverlink"), was an insured party under an industrial all risks policy ("the Policy") issued by the defendant, MS First Capital Insurance Limited ("First Capital"). Silverlink, which ran the Amanpuri resort ("the Amanpuri") in Phuket, Thailand, made a claim under the Policy, as it had suffered losses as a result of the COVID-19 pandemic. Section II of the Policy contained the following provisions:[11]

> CLOSURE BY PUBLIC AUTHORITIES (LIMIT: USD10,000,000)
>
> Loss resulting from interruption or interference with the Business directly or indirectly arising from closure denial of access or evacuation of the whole or part of the Premises by order of a competent public or civil authority due to the operation of a cause of peril not Excluded by this Policy shall be deemed to be a loss resulting from Damage to property used by the insured at the Premises.
>
> …

9 See *BXH v BXI* [2020] 3 SLR 1368, which was affirmed on appeal in *BXH v BXI* [2020] 1 SLR 1043; *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292, which was overturned on appeal, but for reasons unrelated to the court's analysis of the relevant conflicting jurisdiction and arbitration clauses (*Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223); and *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251. Also see *ST Group Co Ltd v Sanum Investments Ltd* [2020] 1 SLR 1, which involved an unusual multi-tiered arrangement providing for arbitration of the same issue after litigation proceedings have concluded.

10 It should be noted that in *BXH v BXI* [2020] 1 SLR 1043, the Court of Appeal's ruling was delivered in the context of setting-aside proceedings: the party seeking to enforce the impugned arbitral award needed to prove in court that the award flowing from a dispute resolution clause containing an arbitration agreement which conflicted with a jurisdiction agreement was not founded on an invalid arbitration agreement. The Court of Appeal ruled: "Where parties evince a real intention to have matters resolved by arbitration, the court ought to give effect to that intention. Minor inconsistencies between clauses cannot be allowed to detract from the parties' agreement to arbitrate" (at [60]). Hence there was no basis to set aside the impugned arbitral award, as it was a result of a valid arbitration agreement, buttressed on an appreciable intention to have disputes resolved at arbitration.

11 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [9].

> CONTINGENT BUSINESS INTERRUPTION (LIMIT: 10% OF INSURED VALUES FOR RESPECTIVE LOCATIONS)
>
> This Policy is extended to cover the actual loss sustained and/or Extra Expenses incurred by the Insured which the Insured would have accounted for on an Accruals Basis during the Indemnity Period resulting from:
>
> Direct physical loss or physical damage
>
> OR
>
> Closure by Public Authorities due to perils insured under this Policy but not necessitating direct physical loss or physical damage
>
> to the following specified locations:
>
> a) …
>
> b) Phuket International Airport 222 Mai Khao, Thalang, Phuket, Thailand
>
> c) …

4 As a result of the COVID-19 pandemic, the Governor of the Province of Phuket ordered that all hotels in Phuket, including the Amanpuri, be closed on 2 April 2020. Furthermore, the Civil Aviation Authority of Thailand had banned the arrival of international air travel into Thailand. Silverlink's claim under the Policy for its losses were founded on these two events ("the Two Events").[12]

5 However, First Capital rejected Silverlink's claim under the Policy. It asserted that Silverlink ought to have made a claim under the corresponding Section I of the Policy for material damage loss, and have that claim accepted first, before its claim under Section II of the Policy may be admitted.[13] Since First Capital found that there was no material damage established and claimed of Silverlink's insured properties *per* Section I of the Policy, it asserted that the latter's claims in respect of the Two Events under Section II were not admissible.[14]

6 Disputing the application of the terms of the Policy as proffered by First Capital, Silverlink on 29 May 2020 commenced proceedings in the High Court, seeking a declaration that under the terms of the Policy, it did not need to establish an admissible claim under Section I of the Policy before its claim may be admitted under Section II.[15] Silverlink also

12 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [10].
13 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [11].
14 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [11].
15 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [12].

sought a declaration that it had a valid claim under the Policy for business interruption suffered as a result of the Two Events.[16]

7 On 2 July 2020, First Capital applied to stay the proceedings in favour of arbitration. The following clause was relied upon, found in the General Conditions of the Policy:[17]

> 10. Mediation
>
> (a) In the event of any dispute, …, the parties agree to meet in good faith to resolve the dispute before commencing any Arbitration proceedings.
>
> …
>
> 11. Arbitration
>
> *Any dispute arising out of or in connection with this contract*, including any question regarding its existence, validity or termination, which is not settled pursuant to the Mediation General Condition within sixty (60) days of commencement of the discussions described in the Mediation General Condition (a) above, shall be referred to arbitration and the parties shall unless otherwise mutually agreed, use the best practice within the jurisdiction of this Policy to have the dispute arbitrated before legal action is commenced.
>
> …
>
> 13. Jurisdiction
>
> Should *any dispute arise between the Insured and the Insurers regarding the interpretation or the application of this Policy* the Insurers will, at the request of the Insured, submit to the jurisdiction of any competent Court in Singapore. Such a dispute shall be determined in accordance with the practical applicable to such Court and in accordance with the laws of Singapore.
>
> [emphasis added by the High Court]

8 As the Policy was renewed on 6 September 2019, the dispute resolution clause found in the renewal certificate ("Renewal Certificate") was also relevant for consideration:[18]

Choice of Law and Jurisdiction:	In the event of *any dispute over interpretation* of this Policy:	
	Law:	Singapore
	Jurisdiction:	Courts of Singapore

[emphasis added by High Court]

16 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [12].
17 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [16].
18 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [17].

9 Since the court opined that it was clear that the dispute between Silverlink and First Capital could fall within the scope of the "Arbitration" clause (as it is clearly a dispute arising out of the Policy), as well as the "Jurisdiction" clause (as it related to the interpretation or application of the Policy, being an issue of whether Silverlink was bound by its terms to establish an admissible claim under Section I before its claim may be admitted under Section II of the Policy),[19] the court had to decide whether the arbitration clause or jurisdiction clause should be applied to the dispute. It should be noted that both the arbitration and jurisdiction clauses are mandatory in nature.

III. Decision of the High Court

10 The premise of the court's judgment is an interesting one: Chua J referred to the clauses as "two seemingly conflicting clauses".[20] It was clear, in the court's view, that the dispute resolution clause found in the Renewal Certificate (that is, the clause providing for litigation in the Singapore courts) did not supersede that in the Policy (namely, cll 11 and 13).[21] With respect to the interpretation of arbitration agreements, Chua J observed that it is common for the court to construe such agreements "based on the presumed intentions of the parties as rational commercial parties".[22] One example of such a presumed intention is in respect of the parties' preferences to have disputes, arising out of the relevant contractual (actual or purported) relationship covered by the arbitration clause, to be decided by the same tribunal, unless a contrary intention is otherwise objectively evident ("the first example").[23] Another example ("the second example") was observed by the Court of Appeal in *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA*:[24] "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."

11 Yet the court was minded and anxious to emphasise that, presumptions aside, the interpretation of dispute resolution clauses must ultimately turn on the intention of the parties, as objectively ascertained.[25] With respect to the first example, Chua J observed that parties may agree

19 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [20].
20 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [21].
21 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [60].
22 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [22], citing *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [124].
23 *Fiona Trust & Holding Corp v Privalov* [2007] 2 Lloyd's Rep 267 at [13], *per* Lord Hoffmann.
24 [2016] 5 SLR 455 at [32].
25 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [30] and [50].

to have some types of disputes flowing from their business relationship to be resolved by arbitration, and others by litigation, because "certain types of disputes may be better suited for arbitration whilst others may be better suited for litigation".[26] Where it is evident from their agreed dispute resolution provisions that the parties intend to have different disputes resolved in court and at arbitration, "that intention should be respected and given effect to".[27]

12 This is made complicated when, because of poor drafting, there may be some cases where an arbitration clause is provided in a contract to apply to all disputes (*per* the second example), whilst at the same time and within the same contract, a choice of court agreement is provided to apply to certain specific disputes.[28] Given this fact pattern, but in spite of the *evident* conflict in choice of court and arbitration provisions, Chua J refers to this situation as an "apparent inconsistency", for his Honour opined that it is possible to "[interpret] the jurisdiction clause as having carved out the specific disputes from the scope of the arbitration clause".[29] Whilst it is unclear on the face of the court's judgment what is the contractual basis of the carve-out provision, it is possible that Chua J may have had the test of business efficacy in mind when making such an implication of terms in the dispute resolution provision.[30] Crucially, it was the court's opinion that "reserving disputes relating to the interpretation or application of the Policy to be decided by the court made commercial sense because such disputes may be resolved effectively, efficaciously and efficiently through the originating summons procedure".[31] Furthermore, Chua J found that the fact that the Renewal Certificate contained a dispute resolution clause which provided for the courts of Singapore to resolve disputes relating to the interpretation of the Policy (confined similarly to the jurisdiction clause found in the original Policy, that is, to "the interpretation or the application of this policy") lent support to the court's position that such disputes have been carved out into the jurisdiction clause, from the scope of the arbitration clause.[32]

13 Accordingly, the court refused to grant First Capital its application for a stay of proceedings in favour of arbitration. The court found that the dispute between Silverlink and First Capital (that is, pertaining to

26 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [31].
27 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [32].
28 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [33].
29 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [33].
30 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [47]. Here, Chua Lee Ming J opined: "Further, in my view, where the jurisdiction clause covers specific disputes only, the carve out approach makes sound commercial sense."
31 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [58].
32 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [57].

the interpretation or application of the Policy, being an issue of whether Silverlink was bound by its terms to establish an admissible claim under Section I before its claim may be admitted under Section II of the Policy) did not fall within the scope of the arbitration clause, as such disputes have been carved out by the insertion of the jurisdiction clause, which specifically provided for disputes in relation to the interpretation or application of the Policy.

IV. Setting out the law with illustrations

14 Before indulging in a critical analysis of the case, it is prudent in this part to set out what conflicting jurisdiction and arbitration clauses are, how they appear in contracts, and distinguish them from *coexisting* jurisdiction and arbitration clauses. This part also sets out and critically evaluates the interpretive methodology which the courts have adopted to construe conflicting jurisdiction and arbitration clauses harmoniously.

A. Conflicting jurisdiction and arbitration clauses

15 Conflicting jurisdiction and arbitration clauses are dispute resolution clauses which direct parties to pursue a mandatory dispute resolution mechanism in *both* arbitration and judicial forums over one dispute. The conflict arises because parties cannot have recourse to both arbitration and the court in relation to the same dispute.[33] First, the conflict may occur when within the same contractual document, under a section providing for dispute resolution mechanisms, the parties oblige themselves to mandatorily proceed to arbitration and court in the event of a dispute. An oft-cited example may be observed in *Paul Smith v H & S International Holding*[34] ("*Paul Smith*"), where the parties in dispute were bound by the following dispute resolution clause:[35]

> 13. SETTLEMENT OF DISPUTES If any dispute or difference shall arise between the parties hereto concerning the construction of this Agreement or the rights or liabilities of either party hereunder the parties shall strive to settle the same amicably but if they are unable to do so the dispute or difference shall be adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with those Rules.
>
> 14. LANGUAGE AND LAW This Agreement is written in the English language and shall be interpreted according to English law.

33 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [1].
34 [1991] 2 Lloyd's Rep 127.
35 *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 at 128.

> The Courts of England shall have exclusive jurisdiction over it to which jurisdiction the parties hereby submit.

16 In the clauses cited above, cl 13 binds parties to proceed mandatorily to arbitration when a relevant dispute arises. But on plain reading, the provision after cl 14 conflicts with cl 13, as it mandates that the English courts *shall* have exclusive jurisdiction over *all* disputes between parties.

17 Secondly, a conflict may occur when a chain of contracts or related contracts are concluded, in such a manner where one does not supersede the other,[36] and *each* contract contains a mandatory provision to proceed to arbitration (in one contract) and to a chosen court (in the other). This was observed in *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp*[37] ("*Transocean Offshore*"), where the parties concluded a contract containing a condition precedent that both parties were to enter into an escrow agreement for the setting up of an escrow account, and failure by one party to deposit escrow funds by a stipulated date entitled the other to terminate the main contract. The parties' main contract had contained an arbitration agreement:[38]

> 25.1 Arbitration
>
> The following Dispute Resolution provision shall apply to this Contract.
>
> (a) Any dispute, controversy or claim arising out of or in relation to or in connection with this Contract … shall be exclusively and finally settled by arbitration …

18 However, the parties had also concluded an escrow agreement, and cl 6.2(a) of the escrow agreement contained the following non-exclusive jurisdiction clause:[39]

> Each of the Parties irrevocably submits to and accepts generally and unconditionally the non-exclusive jurisdiction of the courts and appellate courts of Singapore with respect to any legal action or proceedings which may be brought at any time relating in any way to this Agreement.

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36 This is in contrast with contracts concluded to supersede a pre-existing one; consider the conclusion of settlement agreements as an example (see *Monde Petroleum SA v Westernzagros Ltd* [2015] 1 Lloyd's Rep 330). Also see *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [63].

37 [2010] 2 SLR 821.

38 *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821 at [13].

39 *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821 at [11].

19 In respect of the parties' subsequent dispute over a defendant's failure to deposit the escrow funds, the parties are bound mandatorily to proceed to arbitration over the dispute by the clause in the main contract (because proper performance in relation to the escrow agreement was a condition precedent to the main agreement), *and* to proceed to the Singapore courts in relation to the escrow agreement.

20 Thirdly (but much less commonly), in poorly structured multi-tiered dispute resolution mechanisms, a conflict between arbitration and jurisdiction clauses may occur. In *ST Group Co Ltd v Sanum Investments Ltd*,[40] the parties were bound by the following dispute resolution clause:[41]

> [Clause 2(10) of the Master Agreement]
>
> 10) If any dispute shall arise, the Parties agree to conduct an amicable negotiation. If such dispute cannot be settled by mediation, the Parties may submit such disputes to the Resolution of Economic Dispute Organization or Courts of the Lao PDR according to the provision and law of Lao PDR in accordance with this Agreement. All proceedings of the arbitration shall be conducted in Lao and English Languages.
>
> Before settlement by the arbitrator under the rules of the Resolution of Economic Dispute Organization, the Parties shall use all efforts to assist the dispute resolution in accordance with the laws of Lao PDR.
>
> If one of the Parties is unsatisfied with the results of the above procedure, the Parties shall mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration company in Macau, SAR PRC.

21 On plain reading of the clause, it appears that the parties had envisaged that they shall submit their disputes to mediation, failing which parties *may* begin arbitration or court proceedings in Laos. But unusually, the clause provided for further mandatory mediation and arbitration in Macau over the same dispute if there was any dissatisfaction with the results of the above-mentioned procedures, even if court proceedings in Lao PDR had been concluded.[42]

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40 [2020] 1 SLR 1.

41 *ST Group Co Ltd v Sanum Investments Ltd* [2020] 1 SLR 1 at [8].

42 See *ST Group Co Ltd v Sanum Investments Ltd* [2020] 1 SLR 1 at [63], where the Court of Appeal put the following question to the parties: "As a matter of the proper construction of the [Macau] arbitration clause, if you are dealing with a clause that seems to contemplate that it could leave the parties with a decision of the Supreme Court of Laos and then the parties can go to arbitration after that, is that even [a valid] arbitration agreement to begin with?"

(1) Interpreting conflicting clauses harmoniously

22 It bears emphasis that the Singapore courts are minded to construe conflicting jurisdiction and arbitration clauses as harmoniously as possible.[43] In theory, the methodology that must be applied to construe such conflicting dispute resolution clauses would be a scrutiny unique to the precise drafting of each particular clause.[44] However, in practice, this exercise is a difficult one, and the courts have unfortunately, several times, found themselves shoe horning such conflicting clauses into a putative "*Paul Smith* approach" analysis.[45] It is submitted that an uncritical and categorical application of the "*Paul Smith* approach", in respect of the conflicting clauses in dispute, should be avoided. This is because the outcome of *Paul Smith* turned on the unique drafting of the conflicting dispute resolution mechanism.

23 In *Paul Smith*, the choice of court limb set out the following: "The Courts of England shall have exclusive jurisdiction *over it* to which jurisdiction the parties hereby submit" [emphasis added]. The English High Court put emphasis on the words "over it", and discerned that parties had prioritised arbitration proceedings over litigation in the Courts of England. It subsequently flowed logically for Steyn J (as he then was) to decide that in spite of the fact that the plain and ordinary reading of the words "over it" should refer to the contractual agreement concluded between the parties, under the precise circumstances in which those words appear, they may attract a reference to the curial law instead.[46] Such a reading is made sensible because of the poor drafting of the arbitration clause, *which left the seat of arbitration unspecified*. Construing the choice of the Courts of England as a reference to the curial law provides an arguably sensible reading of the clauses for the court to galvanise the meaning of the arbitration provision.[47] Turning on the precise drafting of the clause, the English High Court made a difficult attempt to construe the entire clause as harmoniously as possible. Whilst admitting that the court's interpretation of the clause "is not felicitous", Steyn J nevertheless opined: "This incongruity pales into insignificance, however, when compared to the unfortunate consequences of treating the arbitration clause in a non-domestic commercial agreement as *pro non*

43 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [146]; *Capital Ltd v CMS Energy Corp* [2008] EWHC 1843 (Comm) at [95]–[96].

44 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [82].

45 See *BXH v BXI* [2020] 3 SLR 1368 at [243]; this was affirmed by the Court of Appeal in *BXH v BXI* [2020] 1 SLR 1043. This was also referred to in *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [29]–[30].

46 *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 at 130.

47 Paul Tan, "Between Competing Jurisdiction Clauses: A Pro-Arbitration Bias?" [2011] LMCLQ 15 at 17.

scripto [*ie*, as if it were not written]."[48] Furthermore, it is noteworthy that the English High Court was not in favour of simply reading the choice of court provision as "subject to" the arbitration agreement on the basis of contractual implied terms.[49] Steyn J opined: "In my view, the linguistic manipulation required and the unbusinesslike spectre of some disputes going to Court and some to arbitration, militate strongly against this interpretation."[50] It may be possible to reconcile the English High Court's position based on the fact that there were express provisions (that is, the words "over it") which may assist it sufficiently to deduce that the parties had intended to prioritise proceeding to arbitration over litigation in the Courts of England, with respect to the relevant disputes.

24 Before the appearance of the "*Paul Smith* approach", the courts in Singapore would have been minded to scrutinise conflicting jurisdiction and arbitration clauses particularly. In 2009, the High Court in *PT Tri-MG Intra Asia Airlines v Norse Air Charter Ltd*[51] ("*Tri-MG*") had to construe the following clause appearing in the same contractual document:[52]

> 15. ARBITRATION
>
> All disputes under this Agreement shall be submitted for resolution by arbitration pursuant to the Rules of conciliation and Arbitration of the International Chamber of Commerce in effect as of the date any dispute arose.
>
> …
>
> 22. GOVERNING LAW AND JURISDICTION
>
> 22.1 This Agreement shall be governed and construed in accordance with the laws of The Republic of Singapore.
>
> 22.2 Each of the parties to this Agreement agrees for the exclusive benefit of the others that the courts of The Republic of Singapore shall have jurisdiction to hear and determine any suit, action or proceedings and to settle any disputes which may arise out of or in connection with any Governing Document (respectively 'Proceedings' and 'Disputes') and, for such purposes irrevocably submits to the jurisdiction of such courts.

25 Analysing the factual matrix of the case, the court found that the parties had intended to prioritise arbitration over litigation. Examining the post-contractual communications they exchanged, the court found that the parties were engaged in earnest discussions to direct their disputes to arbitration (but at a varied forum), before the plaintiff, Tri-

48 *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 at 130.
49 *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 at 129.
50 *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 at 129.
51 [2009] SGHC 13; [2009] 1 Lloyd's Rep 258.
52 *PT Tri-MG Intra Asia Airlines v Norse Air Charter Ltd* [2009] SGHC 13; [2009] 1 Lloyd's Rep 258.

MG, changed its position[53] and argued in court that the choice of court agreement should prevail.[54] Ascribing substantial weight to this piece of evidence, Darius Chan AR inferred that the parties were more likely than not to have intended to proceed first to arbitration to resolve their substantive disputes. Since the parties had not expressly drafted a choice of seat in the arbitration agreement in cl 15, the court adopted the analogous interpretive approach of the English High Court in *Paul Smith*, when construing the conflicting dispute resolution clause.[55] Chan AR construed cl 22.2 as an express submission to the Singapore court's supervisory jurisdiction over the arbitration, reading it as the parties' stipulation of Singapore to be the seat of arbitration in their dispute resolution provisions.[56]

26 In contrast, the High Court in *BXH v BXI*[57] had purported to apply a "*Paul Smith* approach" when construing a conflicting jurisdiction and arbitration agreement appearing in the same contractual document.[58] In this case, the parties were bound by clauses that provided mandatorily for two conflicting forums for dispute resolution:

> 25.8 Governing Law, Jurisdiction and Venue. This Agreement shall be governed by and interpreted in accordance with the laws of Singapore, except for its rules regarding conflict of laws. The jurisdiction and venue for any legal action between the parties hereto arising out of or connected with this Agreement, or the Services and Products furnished hereunder, shall be in a court located in Singapore. …
>
> 25.9 Disputes. Disputes arising out of or in connection with this Agreement shall be finally settled by arbitration which shall be held in Singapore in accordance with the Arbitration Rules of Singapore International Arbitration Center [*sic*] ('SIAC Rules') then in effect. …

53 *Cf BWG v BWF* [2020] 1 SLR 1296. In this interesting case recently delivered by the Singapore Court of Appeal, the court established generally that where a party adopts inconsistent positions in its defence in the context of jurisdictional challenge proceedings, the court may draw inferences of abuse of process on the part of that party, upon this inference the court may find strong cause to refuse to allow that party to rely on the expressed forum selection clause which it seeks judicial assistance for (see [52]–[58]).

54 *PT Tri-MG Intra Asia Airlines v Norse Air Charter Ltd* [2009] SGHC 13; [2009] 1 Lloyd's Rep 258 at [49].

55 *PT Tri-MG Intra Asia Airlines v Norse Air Charter Ltd* [2009] SGHC 13; [2009] 1 Lloyd's Rep 258 at [46] and [50].

56 *PT Tri-MG Intra Asia Airlines v Norse Air Charter Ltd* [2009] SGHC 13; [2009] 1 Lloyd's Rep 258 at [46] and [50].

57 [2020] 3 SLR 1368.

58 The Singapore Court of Appeal, unfortunately, affirmed the High Court's approach as to this issue, in *BXH v BXI* [2020] 1 SLR 1043.

27 The plaintiff applied to the Singapore courts to set aside an arbitral award rendered by the Singapore International Arbitration Centre, pleading – amongst a number of submissions – that the arbitration clause was irreconcilably inconsistent and, hence, invalid.[59] Vinodh Coomaraswamy J rejected the plaintiff's arguments.[60] Whilst the High Court could have justified its decision by plainly reasoning that the arbitration clause was not patently invalid,[61] Coomaraswamy J went on in *obiter dictum* to elaborate how courts may interpret conflicting arbitration and jurisdiction clauses:[62]

> [A] dispute over the parties' substantive rights and obligations arising out of or connected with [their contract] cannot obviously be the subject of *both* litigation and arbitration. The only practical – thought [*sic*] not entirely satisfactory – solution is to adopt the *Paul Smith* approach and hold that the parties intended to resolve substantive disputes in arbitration under cl 25.9 and to resolve disputes arising out of any such arbitration in the Singapore courts in the exercise of their supervisory jurisdiction under cl 25.8. [emphasis in original]

28 Strictly speaking, it was unnecessary for the court to address whether parties had preferred arbitration over litigation, *per* the court's reading of the conflicting dispute resolution clause, since arbitration had *already occurred* and *an award had been rendered*. Yet Coomaraswamy J nonetheless made the finding that the arbitration clause took priority over the jurisdiction clause. To do so, the court applied the purported "*Paul Smith* approach", as if it represented a general rule of constructing such conflicting jurisdiction and arbitration clauses.

29 Respectfully, it is submitted that this decision may be critiqued for demonstrating a fundamental lack of contextual appreciation that the drafting of each dispute resolution clause will be different from case to case.[63] Since cl 25.9 had clearly identified Singapore as the arbitral seat, it was pointless for the court to superfluously read cl 25.8 to doubly establish Singapore as the seat of arbitration.[64] Moreover, it remains unclear how the court reached its inference that the parties had preferred their substantive disputes to be resolved at arbitration (over and above

59 *BXH v BXI* [2020] 3 SLR 1368 at [232]–[233].
60 *BXH v BXI* [2020] 3 SLR 1368 at [233].
61 Indeed the court resolutely concluded that it "must proceed on the basis that the parties intended for both [arbitration and choice of court] clauses to have *some* contractual effect" (*BXH v BXI* [2020] 3 SLR 1368 at [241]).
62 *BXH v BXI* [2020] 3 SLR 1368 at [243].
63 See *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [82].
64 This was the same concern that Chua Lee Ming J had in *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [53].

the choice of court provided in cl 25.8). The following opinion by Coomaraswamy J could elucidate the court's reasoning:[65]

> This approach is consistent with the underlying trend in Singapore arbitration jurisprudence that a clear intent to arbitrate disputes manifested in an international commercial contract should, as far as possible, be upheld.

30 One possible reading of the court's judgment would be to attribute this as a nod to the "pro-arbitration bias" palpable in the Singapore court's decision-making process when determining issues in relation to the allocation of jurisdiction between the judicial and arbitration forums.[66] The subconscious "bias" of the courts to prioritise arbitration when a jurisdiction agreement conflicts with an arbitration clause leads, in theory, to the promotion of the arbitration mechanism, through the contrived or strained conceptualisation of rules and precedents to purportedly construe and uphold the manifest intentions of parties to an international business contract.[67] However, it is submitted that applying the "pro-arbitration bias" to construe conflicting jurisdiction and arbitration agreements risks obfuscating the parties' actual intentions when they agreed to such an arrangement in contract. Consequently, it is submitted that the courts may not be adopting the soundest method of interpretation, if they justified their finding that arbitration would under every circumstance be prioritised by the parties to a conflicting jurisdiction and arbitration agreement (for instance, by applying a putative "*Paul Smith* approach") on the basis of a "pro-arbitration bias".

31 In *Grains and Industrial Products Trading Pte Ltd v State Bank of India*[68] ("*Grains and Industrial Products*"), the parties were bound by the following:

> 12. Governing Law
>
> 11.1. [*sic*] This Agreement shall be governed by, and construed in accordance with, the law of Singapore.
>
> 11.2. [*sic*] The Parties agree to submit to the non-exclusive jurisdiction of the Courts of Singapore.
>
> 13. Arbitration

65 *BXH v BXI* [2020] 3 SLR 1368 at [244].

66 *Cf* Paul Tan, "Between Competing Jurisdiction Clauses: A Pro-Arbitration Bias?" [2011] LMCLQ 15 and Richard Garnett, "Coexisting and Conflicting Jurisdiction and Arbitration Clauses" (2013) 9(3) *Journal of Private International Law* 361 at 361–362.

67 See Paul Tan, "Between Competing Jurisdiction Clauses: A Pro-Arbitration Bias?" [2011] LMCLQ 15 at 20.

68 [2019] SGHC 292.

> Any dispute shall be referred to the final and binding arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre …

32 In this instance, the parties were engaged in a complicated procedural dispute around the question of whether the Singapore court was seised with *in personam* jurisdiction over proceedings in respect of a bundle of disputes surrounding a chain of contracts.[69] The conflicting jurisdiction and arbitration clauses cited above were contained in one contract amongst the chain of contracts. It is noteworthy that the Court of Appeal subsequently found that the dispute over jurisdiction would not turn on the conflicting dispute resolution clause, because a subsequent contract along the chain of contracts contained a term which superseded its effect: that is, an exclusive jurisdiction clause in the subsequent contract was expressly drafted to supersede the preceding conflicting dispute resolution clause.[70] However, the interpretive methodology adopted by the High Court to construe the conflicting dispute resolution clause bears some note.

33 Hoo Sheau Peng J in the High Court was minded to harmoniously construe the ambiguously worded dispute resolution provision,[71] which provided that the Singapore courts had jurisdiction, as well as for the mandatory referral to arbitration (seated in Singapore) at the Singapore International Arbitration Centre. Whilst the court (applying Singapore law) ruled that the arbitration clause took priority over the jurisdiction clause, how Hoo J arrived at her inference that the parties had undoubtedly intended that their substantive disputes were to be first referred to arbitration remains ambivalent on the face of her judgment. Instead, the court applied *Paul Smith* as if it had provided for a general rule of interpreting conflicting jurisdiction and arbitration clauses.[72] The result which the court arrived at – "that the reference to the Singapore courts was in relation to the supervisory role of the court"[73] – is futile and puzzling: in stark contrast with the arbitration clause in *Paul Smith*, the parties had expressly (in cl 13) articulated that Singapore is to be the seat of the arbitration. Since the Singapore courts would ordinarily be the supervisory court of the arbitration, there is simply no need or basis

69 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [63].

70 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [63].

71 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [146].

72 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [144] ff.

73 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [149].

to superfluously read cl 12 to doubly establish the seat of arbitration. Moreover, it bears note that if one were to apply *Paul Smith* as a general rule of construction for conflicting arbitration and jurisdiction clauses, as the Singapore High Court did in *Grains and Industrial Products*, a reconciliation problem would arise when the articulated seat of arbitration does not coincide with the chosen court in the conflicting jurisdiction clause.[74]

34 At this point, it bears reminding (and emphasising) that the court in *Paul Smith* had arrived at its result, having construed the conflicting clauses before it with due regard to the precise drafting of the provisions. With respect, it is submitted that the two interpretive methods applied recently by the Singapore High Court had probably operated under an imprecise reading of *Paul Smith*. This resulted in an inaccurate application of a categorical "*Paul Smith* approach", as if it stood for some all-encompassing rule of interpreting conflicting jurisdiction and arbitration clauses. Instead, it is submitted that the context under which the clause is worded and concluded must be paid due attention.[75]

(2) Chain of contracts: The "pith and substance" test

35 Since a dispute resolution clause needs to be construed on its own terms, it bears note that conflicts in jurisdiction and arbitration agreements which occur when a chain of contracts or related contracts are concluded[76] ought to be construed differently from dispute resolution clauses where the conflict occurs within the *same* contractual document. In *Transocean Offshore*, which was cited earlier in this article as an illustration,[77] the parties concluded a contract containing a condition precedent that both parties were to enter into an escrow agreement for the setting up of an escrow account, and failure by one party to deposit escrow funds by a stipulated date entitled the other to terminate the main

74 *Cf Indian Oil Corp v Vanol Inc* [1991] 2 Lloyd's Rep 634, where the contract provided for arbitration seated in India, as well as for litigation in the English courts.

75 But of course, this analysis is confined by the rules of evidence in each individual jurisdiction as well. Take, for instance, the courts from common law traditions are generally hesitant to admit pre-contractual negotiations (see *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWHC 42 (Comm); [2012] 1 Lloyd's Rep IR 198 (High Court decision) at [8]), save under circumstances where, for instance, a misrepresentation of terms is alleged. The Evidence Act (Cap 97, 1997 Rev Ed) governs the admitting of evidence flowing from pre-contractual negotiations to support the terms of a contractual agreement. See generally *BNA v BNB* [2019] 1 SLR 456; [2020] 1 Lloyd's Rep 55 at [71]–[88].

76 That is, in such a manner where one does not supersede the other, and *each* contract contains a mandatory provision to proceed to arbitration (in one contract) and to a chosen court (in the other).

77 See paras 17–19 above.

contract. The court had to determine, in respect of the parties' dispute over a defendant's failure to deposit the escrow funds, if the parties were bound mandatorily to proceed to arbitration by the clause in the main contract (because proper performance in relation to the escrow agreement was a condition precedent to the main agreement), or to proceed to the Singapore courts in relation to the escrow agreement.

36 Andrew Ang J found that the parties had carved disputes in relation to the escrow agreement out, on the basis of a separate provision in the main contract, which expressly stipulated that the main contract's commencement date was conditional upon the entry into effect of the escrow agreement.[78] Another indicator which informed the court about the parties' intention to carve out disputes with regards to the escrow agreement from the main contract was in the phrasing of the dispute resolution clause in that agreement, which clearly provided:[79]

> … unconditionally the non-exclusive jurisdiction of the courts and appellate courts of Singapore with respect to any legal action or proceedings which may be brought at any time *relating in any way to this Agreement*. [emphasis added]

Ang J opined that this was a clear indication that the choice of court agreement in the escrow agreement would apply to all disputes arising out of *that agreement*, furthermore alluding to the "trite canon of construction [of contractual terms] that the general should give way to the specific".[80]

37 Additionally (and more importantly), Ang J laid down the following principle in Singapore law:[81]

> I was of the view that where different but related agreements contained overlapping and inconsistent dispute resolution clauses, the nature of the claim and the particular agreement out of which the claim arose ought to be considered. Where a claim arose out of or was more closely connected with one agreement than the other, the claim ought to be subject to the dispute resolution regime contained in the former agreement, even if the latter was, on a literal reading, wide enough to cover the claim.

38 Two subsequent decisions in the High Court have applied this closest connection test, by searching for the "pith and substance" of the

78 *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821 at [21] read with [5].

79 *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821 at [25].

80 *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821 at [25].

81 *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821 at [26].

dispute,[82] where a chain of contracts or related contracts are concluded, in such a manner where one does not supersede the other,[83] and *each* contract contains a mandatory provision to proceed to arbitration (in one contract) and to a chosen court (in the other) over overlapping disputes. If the "pith and substance" of the dispute were more closely connected with one agreement than the other(s), the claim that arises shall be subject to that dispute resolution provision contained therein.

(3) Poorly-structured multi-tiered dispute resolution mechanisms

39 Less commonly, in poorly structured multi-tiered dispute resolution mechanisms, a conflict between arbitration and jurisdiction clauses may occur. In *ST Group Co Ltd v Sanum Investments Ltd*,[84] which was cited earlier in this article as an illustration,[85] parties provided that they shall submit their disputes to mediation, failing which they may begin arbitration or court proceedings in Laos, but they also provided for further mediation and arbitration in Macau if there was any dissatisfaction with the results of the above-mentioned procedures. Whilst the Singapore Court of Appeal maintained its skepticism about the validity of the second arbitration agreement in the context of the legally questionable multi-tier litigation-arbitration process, the party in the appeal that sought to plead its invalidity failed to submit expert evidence from the perspective of Lao law (which was the governing law of the dispute resolution clause). Thus, it failed to discharge its evidential burden in its contention that an arbitral award rendered on the basis of the second arbitration clause should be set aside because the arbitration agreement providing the tribunal with the necessary competence was invalid. The second arbitration agreement stood on the feeble basis that the parties challenging its validity did not submit sufficient evidence to prove that under the governing Lao law, it should have been invalidated.

40 The method of interpretation for this type of conflicting jurisdiction and arbitration clause remains open for the Singapore courts to establish and define. It is possible that a court in future may rule that such clauses may be invalid, or for the court to find some sensible, coherent and harmonious method to construe it appropriately, giving best effect to party autonomy in drafting ones' contractual terms.

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82 *Oei Hong Leong v Goldman Sachs International* [2014] 3 SLR 1217 at [36]; *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [185].

83 This is in contrast with contracts concluded to supersede a pre-existing one; consider the conclusion of settlement agreements as an example (see *Monde Petroleum SA v Westernzagros Ltd* [2015] 1 Lloyd's Rep 330).

84 [2020] 1 SLR 1.

85 See paras 20–21 above.

B. Coexisting arbitration and jurisdiction agreements

41 Coexisting arbitration and jurisdiction agreements stand in contrast with conflicting ones. Generally, such coexisting clauses may be intentionally drafted into a commercial contract in two distinct ways. They may be structured as "alternative forums", or as non-binding options to proceed either to arbitration or the chosen court.

(1) Alternative forum arrangements

42 First, parties may structure their dispute resolution mechanism in an "alternative forum" fashion. In the context of coexisting arbitration and jurisdiction agreements, such a structure may allocate the initiation (and exhaustion or waiver) of arbitral proceedings as a condition precedent to filing court proceedings in the chosen jurisdiction. For instance, in *BTN v BTP*,[86] the parties involved were bound by two agreements which contained an almost identical dispute resolution clause, governed by the laws of Malaysia. To illustrate, one only needs to refer to one; reproduced, the clause reads:[87]

> 18.4 Dispute Resolution
>
> 18.4.1 If any dispute … between the Parties arises out of or in connection with this Agreement …, the Parties shall use all reasonable endeavours to negotiate with a view to resolving the Dispute amicably. [A framework for amicable dispute resolution is set out methodically in the clause] …
>
> 18.4.2 Subject to Clause 18.4.1 above, any Dispute shall be finally submitted to binding arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre …
>
> 18.4.3 The arbitrators shall have powers to award and/or enforce specific performance. The arbitration award shall be final and binding on the Parties and the Parties shall be entitled to apply to a court of competent jurisdiction for enforcement of such award. … The venue of the arbitration shall be Singapore.
> …
>
> …
>
> 18.5 Governing Law and Jurisdiction
>
> 18.5.1 This Agreement and the relationship between the Parties hereto shall be governed by, and interpreted in accordance with, the laws of Malaysia. Subject to the provisions of Clause 18.4 (*Dispute Resolution*), the courts of Malaysia shall have exclusive jurisdiction in relation to all matters arising out of this Agreement.

86 [2020] 5 SLR 1250; [2020] 1 Lloyd's Rep 1.
87 *BTN v BTP* [2020] 5 SLR 1250; [2020] 1 Lloyd's Rep 1 at [10].

43 The clause above provides for the preconditions which must be fulfilled before arbitration proceedings are initiated in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre: the parties must pursue amicable negotiations on an established timeline before they refer their dispute to arbitration.[88] Additionally, the provisions set out the preconditions which shall be fulfilled before the courts of Malaysia shall possess exclusive jurisdiction over all disputes arising out of (or in connection with) the contract as an "alternative forum": the exclusive jurisdiction of the Malaysian courts is subject to the satisfaction of the negotiation and arbitration clause provided in cl 18.4, implying that *only if and when* the provisions in cl 18.4 fail to give rise to a dispute resolution outcome, the Malaysian courts shall then seize jurisdiction. Normally, a dispute would be finally resolved after arbitration proceedings are concluded and an award is rendered. Yet if, for instance, the tribunal makes some findings of fact which precludes their competence[89] to pursue some issues under discrete claims within the matrix of the dispute, the parties may resort to the alternative forum, under which the expressly chosen courts (that is, the Malaysian courts) shall possess exclusive jurisdiction over those issues (which may be residual in nature) that the tribunal cannot render an award thereof.[90]

44 Alternative forum arrangements may also appear as carve out provisions, which provide that disputes may be generally heard in one forum, but setting out *expressly* what disputes may be heard in an alternative forum. The court in *Silverlink Resorts Ltd* cited an illustration from the New Zealand case of *Hi-Tech Investments Ltd v World Aviation Systems (Australia) Pty Ltd*[91] ("*Hi-Tech*"). The parties, which were

88 Under English law and the common law, such clauses – if drafted clearly and adequately – may be enforced by the courts: *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC); [2019] BLR 576.

89 This may include concerns over matters of subject matter competence (*ie*, arbitrability of certain discrete subject matters), which occasionally a tribunal may think that it is not the competent forum through which it may render an award over. Take, for instance, disputes over the validity of intellectual property rights are considered non-arbitrable subject matters in some jurisdictions, which specifically allocate such jurisdiction on a mandatory law basis to specialist courts for determination: see Gyooho Lee, Keon-Hyung Ahn & Hacques de Werra, "Euro-Korean Perspectives on the Use of Arbitration and ADR Mechanisms for Solving Intellectual Property Disputes" (2014) 30 *Arbitration International* 91 at 104.

90 See *Carlsberg Breweries A/S v CSAPL (Singapore) Holdings Pte Ltd* [2020] 4 SLR 35 at [7]–[8].

91 [2006] NZHC 1228.

landlord and tenant, were bound by the following dispute resolution clause in their lease agreement:[92]

> 44.1 UNLESS any dispute or difference is resolved by mediation or other agreement, the same shall be submitted to the arbitration of one arbitrator who shall conduct the arbitral proceedings in accordance with the Arbitration Act 1996 and any amendment thereof or any other statutory provision then relating to arbitration.
>
> …
>
> 44.3 THE procedures prescribed in this clause shall not prevent the landlord from taking proceedings for the recovery of any rent or other monies payable hereunder which remain unpaid or from exercising the rights and remedies in the event of such default prescribed in clauses 28 and 29 hereof.[93]

45 The High Court of New Zealand found that the parties had expressly agreed to submit all disputes to arbitration, with the exception of disputes which arose in relation to the recovery of "rent or other monies payable" *per* cl 44.3, read with cll 28 and 29, where the landlord had reserved its rights to proceed to a forum (such as a court) of its choice.[94]

(2) Elective options

46 Secondly, parties may provide non-binding options for themselves to proceed either to arbitration or the chosen court. Essentially, such

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92 *Hi-Tech Investments Ltd v World Aviation Systems (Australia) Pty Ltd* [2006] NZHC 1228 at [11].

93 In *Hi-Tech Investments Ltd v World Aviation Systems (Australia) Pty Ltd* [2006] NZHC 1228 at [19], cll 28 and 29 are reproduced:

> Distress
>
> 28. THE Landlord may distrain for rent or other moneys payable under this lease remaining unpaid fourteen (14) days after due date.
>
> Re-entry
>
> 29. THE Landlord may re-enter the premises at the time or at any time thereafter
>
> (a) if the rent shall be in arrear fourteen (14) days after any of the rent payment dates,
>
> …
>
> (e) if the Tenant shall suffer distress or execution to issue against the Tenant's property goods or effects under any judgment against the Tenant in any Court for a sum in excess of five thousand dollars ($5000.00)
>
> and the term shall terminate on such re-entry but without prejudice to the rights of either party against the other.
>
> Clauses 28 and 29 – Default
>
> For the purposes of clauses 28 and 29, the expression 'rent' is deemed to include any and all money payable under this Lease.

94 *Hi-Tech Investments Ltd v World Aviation Systems (Australia) Pty Ltd* [2006] NZHC 1228 at [15]–[24].

a structure would allow parties to elect to proceed to either forum. For instance, in *The Dai Yun Shan*,[95] the parties were bound by the following:

> Jurisdiction: All disputes arising under or in connection with this bill of lading shall be determined by Chinese law in the courts of, or by arbitration in, the People's Republic of Singapore [*sic*].

47 However, there may be further expressed caveats imposed contractually on that choice. For instance, in unilateral (or asymmetrical) arrangements,[96] there may be a contractually provided unilateral power allocated to or reserved by one party to bring proceedings in their preferred forum. This unilateral right may be exercised if, for example, the defendant-party were dissatisfied with the claimant-party's choice of forum. The circumstances under which the unilateral right may be exercised turn on the *precise provisions* of the dispute resolution clause, as articulated and agreed by the parties to the contract. Essentially:[97]

> … [t]he … non-option holder … has *ex ante* and *ex post* certainty as to the jurisdiction in which it can initiate proceedings but no certainty *ex ante* or *ex post* as to the jurisdiction in which it can be expected to defend proceedings.

48 Asymmetrical jurisdiction clauses may provide for arbitration, but provide one party with an express unilateral option to refer that dispute to a chosen court (of exclusive or non-exclusive jurisdiction) if they opt to do so for whatever reasons.[98] Conversely, asymmetrical arbitration clauses may provide for a choice of court as a default forum for dispute resolution, but provide one party with a unilateral option to submit a dispute to arbitration.[99]

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95 *The Dai Yun Shan* [1992] 1 SLR(R) 461 at [10].

96 Jane Willems, "The Arbitrator's Jurisdiction at Risk: The Case of Hybrid and Asymmetrical Arbitration Agreements" in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A Karrer* (Patricia Shaughnessy & Sherlin Tung eds) (Kluwer Law International, 2017) at p 413; Lauren D Miller, "Is the Unilateral Jurisdiction Clause No Longer an Option? Examining Courts' Justifications for Upholding or Invalidating Asymmetrical or Unilateral Jurisdiction Clauses" (2016) 51 Tex Int'l LJ 321 at 323.

97 Mary Keyes & Brooke Adele Marshall, "Jurisdiction Agreements: Exclusive, Optional and Asymmetrical" (2015) 11(3) *Journal of Private International Law* 345 at 364.

98 Lauren D Miller, "Is the Unilateral Jurisdiction Clause No Longer an Option? Examining Courts' Justifications for Upholding or Invalidating Asymmetrical or Unilateral Jurisdiction Clauses" (2016) 51 Tex Int'l LJ 321. Such clauses are enforceable in common law: *Law Debenture Trust Corp plc v Elektrim Finance BV* [2005] 2 All ER (Comm) 476.

99 Simon Nesbitt & Henry Quinlan, "The Status and Operation of Unilateral or Optional Arbitration Clauses" (2006) 22(1) *Arbitration International* 133. Such clauses are also enforceable in common law: *NB Three Shipping Ltd v Harebell Shipping Ltd* [2005] 1 All ER (Comm) 200.

(3) Coda

49 Properly drafted, all forms of coexisting arbitration and choice of court agreements may be enforceable. Unfortunately, owing to space constraints, it is not possible to set out the basis for the enforcement of such clauses by the courts in this article.

V. Critique

50 Respectfully, it is submitted that the High Court in *Silverlink Resorts Ltd* had adopted a flawed methodology in construing the conflicting arbitration and jurisdiction clauses. First, it is unclear why the court was reluctant to make a resolute finding that there *exists* a conflict between the arbitration provision and the choice of court provision. It is quite evident, on the face value of the facts, that the dispute between Silverlink and First Capital could fall within the scope of the "Arbitration" clause (as it is clearly a dispute arising out of the Policy), as well as the "Jurisdiction" clause (as it related to the interpretation or application of the Policy, being an issue of whether Silverlink was bound by its terms to establish an admissible claim under Section I before its claim may be admitted under Section II of the Policy);[100] and both clauses conflict with each other because they are couched mandatorily.

51 Secondly, it is unclear why the court had thought the cases of *Transocean Offshore* and *Hi-Tech* would provide the most-suitable analogy, given the facts at hand. Silverlink and First Capital were bound by a conflicting dispute resolution clause which was contained in a single contract, whilst in contrast, the parties in *Transocean Offshore* were bound by a chain of *two* contracts, namely a main contract and an escrow agreement. Furthermore, as analysed above,[101] the courts in *Transocean Offshore* and *Hi-Tech* found that there were *express terms* in the main contracts which carved out the relevant dispute at hand from the reach of the arbitration agreements in them. None of these elements were evident in the facts of the case at hand: there were no express terms in the agreement between Silverlink and First Capital to buttress such a finding. It also bears noting that the precedents are resolute in establishing that courts would be slow to *imply* terms into a conflicting dispute resolution mechanism to favour such a carve-out provision;[102] if the High

100 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [20].

101 See paras 36 and 45 above.

102 *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 at 129. In *Paul Smith*, the court was not in favour of simply reading – by applying the rule of implied terms in contract – the choice of court clause as "subject to" the arbitration agreement. Steyn J opined (at 129): "In my view, the linguistic manipulation

(cont'd on the next page)

Court's judgment were to be read as having made such an implication of terms,[103] it would be taking a significant (and diametric) departure from the accepted methodology to construe conflicting jurisdiction and arbitration clauses.

52 Thirdly, whilst the court was thorough in citing a wide variety of applicable legal principles,[104] it is respectfully submitted that the court should have simply begun with the plain reading of the conflicting dispute resolution clause itself. It bears re-emphasis that dispute resolution clauses must be scrutinised according to its precise drafting;[105] beginning the analysis with "legal principles"[106] and shoe horning the disputed clauses therein would be putting the cart before the horse. The interpretive methodology adopted by the High Court in this instance may be criticised. Furthermore, it is argued that the legal principles cited by the court ought to be confined in accordance with the precise nature of the clauses construed in the respective precedents. As examined in the previous part of this article,[107] there are three main ways the conflict between jurisdiction and arbitration clauses may arise. Respectfully, it is submitted that the High Court has not appreciated this context.

A. Possible solution: A closer scrutiny of the choice of court clause

53 It is first proposed that the courts ought to pay due regard to the context under which a conflict in jurisdiction and arbitration agreements arise. This means that the courts must first discern whether the conflict is found in a single contractual document, or subsists across a chain of contracts, none of which supersede each other. In the latter context, the "pith and substance" analysis would be relevant. In the former context, a closer scrutiny of the plain words of the conflicting clause, in light of the other terms of the contract, is necessary.

54 It may be possible that upon a perusal of the other terms of the contract, an express carve-out provision may have been made with regard to certain disputes in respect of one element of the dispute resolution mechanism. However, it is likely for courts to be slow to imply terms

required and the unbusinesslike spectre of some disputes going to Court and some to arbitration, militate strongly against this interpretation."

103 See *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [47]. Here, Chua J opined: "Further, in my view, where the jurisdiction clause covers specific disputes only, the carve out approach makes sound commercial sense."

104 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [22]–[48].

105 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [82].

106 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [22].

107 See paras 14–40 above.

into the dispute resolution mechanism which favours such a carve-out provision.[108]

55 Where the court is presented with conflicting clauses in one contractual document, it may scrutinise each precise word or phrase drafted or omitted (for instance, where the choice of a seat of arbitration is not expressly articulated) in a manner which would favour a harmonious reading of the entire provision. Where a literal reading, in ignorance of the necessary legal subtext, could possibly lead to a harmonious reconciliation of the entire provision, the court may adopt such a reading, even if it "is not felicitous".[109]

56 Turning back to the clauses in *Silverlink Resorts Ltd*, it is submitted that on a plain reading of cl 13 of the policy (which was found by the court not[110] to have been superseded by the clause in the subsequently concluded Renewal Certificate), the Singapore courts may nevertheless be seized of proceedings in relation to the dispute. It bears reproducing cl 13 below:[111]

> 13. Jurisdiction
>
> Should any dispute arise between the Insured and the Insurers regarding the interpretation or the application of this Policy *the Insurers will, at the request of the Insured, submit to the jurisdiction of any competent Court in Singapore*. Such a dispute shall be determined in accordance with the practical applicable to such Court and in accordance with the laws of Singapore.
>
> [emphasis added]

57 It is submitted that reading the clause with the emphasis placed on the italicised words above may lead to a possible (and sensible) interpretation of cl 13 as an asymmetrical or unilateral one, expressly providing the insured (Silverlink) with the option (and preserving its right) to request that the insurers (First Capital) submit, with regards to a relevant dispute relating to the interpretation or application of the

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108 *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 at 129. In *Paul Smith*, the court was not in favour of simply reading – by applying the rule of implied terms in contract – the choice of court clause as "subject to" the arbitration agreement. Steyn J opined (at 129): "In my view, the linguistic manipulation required and the unbusinesslike spectre of some disputes going to Court and some to arbitration, militate strongly against this interpretation."

109 *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 at 130. Steyn J further opined: "This incongruity pales into insignificance, however, when compared to the unfortunate consequences of treating the arbitration clause in a non-domestic commercial agreement as *pro non scripto* [*ie*, as if it were not written]."

110 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [60].

111 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [16].

Policy, to a Singapore court. Such an interpretation appears to comport with the court's inclination to find that the clauses are "seemingly conflicting",[112] and that they may be read to coexist in some recognised fashion.[113] Under this proposed interpretation, the parties shall refer to arbitration any dispute arising out of or in connection with their contract. However, there is an express unilateral right reserved by the insured party to proceed to the Singapore courts, in respect of disputes relating to the interpretation or application of the Policy. Therefore, it is mandatory for First Capital to submit accordingly to the jurisdiction of a Singapore court, *at the request of Silverlink*. Based on the facts, since Silverlink was the first in time to commence proceedings in the High Court on 29 May 2020,[114] it is likely that the conditions for the jurisdiction agreement to take effect mandatorily (and over the arbitration provision) would have come into effect.

VI. Conclusion

58 It bears emphasis that dispute resolution clauses, including conflicting jurisdiction and arbitration agreements, must be construed in accordance with their particular context and precise drafting.[115] This article has observed that there may be at least three substantially different contexts under which conflicting jurisdiction and arbitration clauses may be construed: (a) when the conflict (broadly) occurs within the same contractual document, under a section providing for dispute resolution mechanisms; (b) when the conflict occurs amidst a chain of contracts or related contracts concluded by the parties in such a manner where one does not supersede the other; and (c) in poorly-structured multi-tiered dispute resolution mechanisms. Furthermore, this article has observed that the Singapore courts, when construing clauses arising from context (a), have recently and inaccurately applied a putative "*Paul Smith* approach" as a general rule of constructing conflicting jurisdiction and arbitration agreements. It argues that such an approach should be discontinued, in favour of objective attention paid to the precise words and context under which the conflicting clause was concluded. This article also provided a brief contrast with regard to the interpretation and enforcement of coexisting jurisdiction and arbitration agreements by the courts. Against this detailed background, this article critiques the High

112 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [21].

113 That is, as alternative forums of each other, or as elective options, as analysed briefly in the previous section (see paras 41–49), examining how coexisting arbitration and jurisdiction clauses may be drafted into a commercial contract.

114 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251 at [12]; First Capital subsequently sought a stay of proceedings on 2 July 2020 (at [13]).

115 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [82].

Court's judgment in *Silverlink Resorts Ltd*, arguing that the court ought to have first paid meticulous attention to the precise drafting of the disputed clause, before turning to precedents for assistance in its interpretation.

59 It is finally hoped that this article has provided some clarity in what the law governing the interpretation of conflicting jurisdiction and arbitration agreements in Singapore ought to be.
