Case Note

THE TITANIC BATTLE FOR JURISDICTION TO DETERMINE THE VALIDITY OF ARBITRATION AGREEMENTS IN APPLICATIONS FOR STAY OF COURT PROCEEDINGS

The Titan Unity
[2013] SGHCR 28

Singapore arbitration law permits a defendant in court proceedings to apply for a stay of the court proceedings on the ground that the dispute is subject to an arbitration agreement. At the same time, the law permits the plaintiff to resist the stay application by demonstrating that the arbitration agreement is, broadly speaking, invalid. These two rules are further complicated by yet a third rule that permits the arbitral tribunal to determine any challenge to its jurisdiction which may, from time to time, involve issues as to the validity of the arbitration agreement. Which is the proper forum to raise and determine such issues of validity?

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I. Introduction

1 It is trite that a Singapore court will generally not exercise its jurisdiction to hear a dispute that is the subject of an arbitration agreement. Where there exists a valid arbitration agreement between the plaintiff and defendant which covers the dispute that is before the court, the court must, pursuant to s 6(2) of the International Arbitration Act[1] ("IAA"),[2] stay its proceedings upon an application by the defendant.

2 Implicit in this trite proposition is an oft-ignored process, which is that the court would have to, in determining whether to stay its

* The author is grateful to the anonymous referee for his comments. The author bears sole responsibility for all errors. The views expressed in this note are those of the author, and should not be construed as representing the views of his employer or colleagues.

1 Cap 143A, 2002 Rev Ed.

2 This article limits its discussion to international arbitrations as opposed to domestic arbitrations in which court intervention is more permissible, generally speaking.

proceedings, consider and reach a conclusion on the *merits* of the question of whether there exists a valid arbitration agreement in the first place. Such an act of considering the validity of an arbitration agreement, and by extension, the jurisdiction of any extant or putative arbitral tribunal, may appear to be at odds with Art 16 of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration ("Model Law"),[3] in particular, Art 16(1) which is widely accepted as a codification of the *kompetenz-kompetenz* principle.

3 The court, therefore, appears to be caught in no man's land. Should it engage in a full examination and determination of the validity of the arbitration agreement? Can it do so without offending Art 16(1)? This issue was raised, for the first time in Singapore, in the High Court case of *The Titan Unity* ("*Titan Unity*").[4]

II. Facts of *Titan Unity*

4 The plaintiff bank provided financing to a third party for the purchase of a cargo of fuel oil by way of a letter of credit. A dispute relating to the delivering of the cargo ensued and the plaintiff, who held the bills of lading for the carriage of the cargo on board the vessel, commenced an *in rem* action against the demise charterer as well as the owner of the vessel in the Singapore High Court. The demise charterer sought a stay of the court proceedings on the ground that there was an arbitration agreement between itself and the third party which was incorporated into the bills of lading. The plaintiff denied that there was an arbitration agreement between itself and the demise charterer.

5 After a compendious survey of the jurisprudence which included case law from an impressive number of Model Law jurisdictions and the *travaux préparatoires* of the Model Law, no doubt with a great deal of assistance from counsel, the assistant registrar, Shaun Leong, made the following observations:

> (a) The Model Law envisages the arbitral tribunal as having "priority ahead of the courts to decide whether there exists a valid arbitration agreement".[5]
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> (b) It is evident that the statutory framework of the IAA defers the decision of the tribunal's jurisdiction to the tribunal. In other words, the tribunal "is the first arbiter of its own

3 GA Res 17, UN GAOR, 61st Sess, Supp No 17, Annex 1, UN Doc A/61/17 (2006).
4 [2013] SGHCR 28.
5 *The Titan Unity* [2013] SGHCR 28 at [18].

jurisdiction", even if this decision is subject to challenge by the parties in court subsequently.[6]

(c) The court is to determine the question of the existence of the arbitration agreement in the context of a s 6 application on a "*prima facie* standard", as this is consistent with the "approach of having a full determination of the same question deferred to the arbitral tribunal".[7]

6 In Leong AR's view, there is a preference within the Model Law (and the IAA) for questions relating to the tribunal's own jurisdiction to be decided by the tribunal first. Full-scale curial intervention is impermissible, it seems, if the tribunal has not exercised its right of first refusal. For convenience, it might be helpful to label this principle the "tribunal first, court later" principle.

7 The focus of this commentary is whether *Titan Unity* is correct in suggesting that there is a "tribunal first, court later" principle under the Model Law which limits the court's determination of the question of the validity of the arbitration agreement in stay of court proceedings to a *prima facie* standard of review. In other words, the court may not engage in and make a full and final determination of the question of the validity of the arbitration agreement.

III. Commentary

8 The recognition of the "tribunal first, court later" principle has elevated *Titan Unity* into a seminal decision that has attracted widespread attention. To a large extent, the "tribunal first, court later" principle is justifiable at many levels. If the court is satisfied, albeit only on a *prima facie* standard of review, that there exists an arbitration agreement between the parties that also covers a dispute as to the existence of that very agreement, the court has diminished legal impetus to proceed to enter into the merits of the arguments on that same issue. The argument would be that parties should be held to their promises where those promises *appear* to have been made.

9 The decision in *Titan Unity*, however, may cause several key features of the Model Law, and by extension the IAA, to be elided. Specifically, the decision gives the impression that the Model Law affirms such a *prima facie* standard of examination of the question of the validity of the arbitration agreement, even though that is not borne out upon a complete review of the Model Law *travaux* materials.

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6 *The Titan Unity* [2013] SGHCR 28 at [31].
7 *The Titan Unity* [2013] SGHCR 28 at [29].

A. Position established in Dallah

10 Before embarking on a review of the *travaux* of the Model Law proper, the strongest support for an approach that is contrary to the "tribunal first, court later" principle can be found in the judgment of Lord Collins in *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan*[8] ("*Dallah*") in which the learned Law Lord said:[9]

> So also the principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction is no doubt a general principle of law. It is a principle which is connected with, but not dependent upon, the principle that the arbitration agreement is separate from the contract of which it normally forms a part. But it does not follow that the tribunal has the exclusive power to determine its own jurisdiction, *nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it*. Nor does it follow that the question of jurisdiction may not be re-examined by the supervisory court of the seat in a challenge to the tribunal's ruling on jurisdiction. Still less does it mean that when the award comes to be enforced in another country, the foreign court may not re-examine the jurisdiction of the tribunal. [emphasis added]

11 It would of course not go unnoticed to the seasoned arbitration practitioner that England is not a Model Law jurisdiction, and to that extent, *Dallah* is of limited purpose. That may be so, but only to some extent as the 1996 English Arbitration Act[10] is partly built upon the same principles found in the Model Law. Indeed, Lord Steyn described the Model Law as the "single most important influence in the shaping of the [1996 Arbitration Act]", and a yardstick by which the quality of England's existing arbitration legislation was judged and improved upon.[11] Where possible, the authors of the 1996 English Arbitration Act made use of the structure and language of the Model Law.[12]

12 Hence, *Dallah* cannot be sidestepped even with the cleverest of intellectual feints. Leong AR was careful to avoid this pitfall, which

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8 [2011] 1 AC 763.

9 *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763 at [84].

10 c 23.

11 Johan Steyn, "England's Response to the UNCITRAL Model Law of Arbitration" (1994) 10(1) *Arbitration International* 1 at 1.

12 Departmental Advisory Committee on Arbitration Law, *A Report on the UNCITRAL Model Law on International Commercial Arbitration* (HMSO, 1989) at p 3. See also Departmental Advisory Committee on Arbitration Law, "1996 Report on the Arbitration Bill" (1997) 13 *Arbitration International* 275 at 276 where it was stated that "at every stage in preparing a new draft Bill, very close regard was paid to the Model Law, and it will be seen that both the structure and the content of the July draft Bill, and the final draft, owe much to this model".

explains why he referred to *Dallah* with general approval,[13] notwithstanding an earlier caveat that jurisprudence from non-Model Law jurisdictions was not as helpful as that from Model Law jurisdictions.[14]

13 Some might point out that as the tribunal in *Dallah* had ruled on its jurisdiction, the impact of Lord Collins' statement that it does not "follow that the court of seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it" is somewhat diluted. That is, again, true to some extent. However, to the extent that Lord Collins was making a general observation of a general principle, it is an observation that cannot be ignored.

14 Parenthetically, it is also worth mentioning that at least three other English decisions – two High Court[15] and one Court of Appeal[16] – have affirmed the position that under English law, the court is permitted, as a matter of principle, to conduct and make a full determination of the question of the validity of the arbitration agreement.

B. *Model Law* travaux

15 Leaving English law for a moment and returning to the heart of the matter, the *travaux* to the Model Law is not the easiest of documents to decipher, not least because it comprises, in the main, five major documents, some of which have substantial sub-documents. The intention of the drafters is therefore scattered throughout many places. This makes tracking the evolution of intention part science, part art.

16 This difficulty, coupled with the penumbra of uncertainty inherent in any exercise of interpretation of words, might serve to explain the difference in opinions between the esteemed Gary Born and Leong AR on the scheme under the Model Law relating to the court's role in stay of court proceedings. Born had noted in his masterly treatise,[17] with reference to the *travaux*, that the drafters had intended for the courts to retain jurisdiction to make a full (in contradistinction to *prima facie*) determination of the validity of the arbitration agreement; whether the court chooses to exercise such jurisdiction is a separate matter altogether. At any rate, the drafters rejected the proposition that the tribunal shall have the right of first refusal.

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13 *The Titan Unity* [2013] SGHCR 28 at [29].
14 *The Titan Unity* [2013] SGHCR 28 at [21].
15 *Birse Construction Ltd v St David Ltd* [1999] BLR 194; *Claxton Engineering Services Ltd v TXM Olaj-és Gázkutató Kft* [2011] 1 Lloyd's Rep 252.
16 *Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522.
17 Gary Born, *International Commercial Arbitration* (Kluwer Law, 2009) at p 882.

17 Leong AR referred to but gently declined to follow Born's opinion. The reason he gave was that Born's analysis "relates to the *validity* of the arbitration agreement in the determination of whether it is null, void, inoperative or incapable of being performed" [emphasis added], and not to the *existence* of the arbitration agreement; whether an arbitration agreement is null and void, inoperative or incapable of being performed was a "separate question" that only arises if an agreement is found to exist in the first place.[18]

18 First, it is not altogether clear why Leong AR drew the distinction between issues of existence of the arbitration agreement and issues of the validity of the arbitration agreement. In both types of disputes, the court is asked to determine a substantive issue. While the topic of validity in general contract law doctrine is frequently directed at questions of vitiation after formation, validity is broad enough and sometimes regarded as encompassing issues of contract formation.[19] A contract that does not satisfy the requirements of offer and acceptance, for instance, would not be considered as a valid contract under common law contractual doctrine. It may be that Leong AR treated the existence of an arbitration agreement as an entirely factual issue, as may be inferred from another judgment that he issued subsequently.[20]

19 It is also unclear, on Leong AR's analysis, what the position would be *if* a plaintiff argues that the arbitration agreement is "null, void, inoperative or incapable of being performed" on the basis that it was not incorporated into the main contract (which is arguably a question of existence). Of the cases referred to by Leong AR in support of his conclusion, at least one, *Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd*[21] ("*Shin-Etsu*"), ostensibly considered the question of "existence" together with "validity". In Leong AR's own words:[22]

> The Supreme Court held that the enquiry on *whether there exists a valid arbitration agreement which is not null and void, inoperative or incapable of being performed* is limited to a *prima facie* standard. [emphasis added]

20 Second, a close examination of the *travaux* reveals that the drafters also drew no such distinction between existence and validity:[23]

> A suggestion was made that paragraph (1) should not be understood as *requiring the court to examine in detail the validity of an arbitration*

18 *The Titan Unity* [2013] SGHCR 28 at [15].
19 See *Vita Food Products, Incorporated v Unus Shipping Co, Ltd* [1939] AC 277 at 298.
20 See *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 at [6]–[8].
21 (2005) 7 SCC 234; (2005) 3 Arb LR 1.
22 *The Titan Unity* [2013] SGHCR 28 at [27].
23 *Report of the Working Group on International Contract Practices on the Work of its Fifth Session* (New York, 22 February–4 March 1983) (A/CN.9/233) at para 77.

> *agreement and that this idea could be expressed by requiring only a prima facie finding or by rephrasing the closing words as follows*: 'unless it finds that the agreement is *manifestly* null and void'. In support of that idea it was pointed out that it would correspond with the principle to let the arbitral tribunal make the first ruling on its competence, subject to later control by a court. However, the prevailing view was that, in the cases envisaged under paragraph (1) where the parties differed on the *existence of the arbitration agreement,* that issue should be settled by the court, without first referring the issue to an arbitral tribunal, which lacked jurisdiction. [emphasis added]

21 Therefore, Born's view that the Model Law contemplates disputes going towards the existence of the arbitration agreement as coming within the phrase "null and void" which is expressly carved out as a basis for refusing a stay under Art 8(1) of the Model Law[24] is probably more accurate and consistent with the source materials.

22 There is another crucial point of principle contained in the above extract of the *travaux* which relates to the court's power to make a full and final determination of the validity of the arbitration agreement. A suggestion was made by members of the drafting group to introduce language to clarify that the court's role is limited to a *prima facie* review of the validity of the arbitration agreement instead of the existing understanding which was a detailed examination. Tellingly, that suggestion was rejected. This, Born argues, is the "most direct evidence in the drafting history" that the *prima facie* approach was rejected.[25] Simply put, Born's point is that the *travaux* flatly contradicts the proposition that the court is only entitled to engage in a *prima facie* examination of the validity of the arbitration agreement. Born is probably on safe territory – as far as the *travaux* is concerned, there is no credible response to this argument.[26]

23 The appropriate calibration of the court's right to adjudicate the issue of the tribunal's jurisdiction continued to feature in the drafters' deliberations. In the Sixth Session of the Working Group, the drafters

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24 Article 8(1) reads:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

25 Gary Born, *International Commercial Arbitration* (Kluwer Law, 2nd Ed, 2014) at p 1084.

26 An argument might be made in relation to the deletion of draft Art 17 of the Model Law, as Leong AR did. However, for the reasons stated at paras 27–33 below, this argument does not meet, much less overcome, the force of the drafters' intentions as captured in the extract at para 20 above.

considered inserting the following as a fourth sub-paragraph into the present day Art 16(3) of the Model Law:[27]

> Where after arbitral proceedings have commenced, a party invokes before a court lack of jurisdiction of the arbitral tribunal, whether impliedly by bringing a substantive claim or expressly by requesting a decision on the jurisdiction of the arbitral tribunal directly from the court without first raising this plea before the arbitral tribunal, the arbitral tribunal may continue the proceedings while the issue is pending with the court.

24 The drafters refrained, at that meeting, from endorsing the insertion of this paragraph into Art 16(3) on the basis that the current wording could be made clearer. Nevertheless, they expressly affirmed two policies which were reflected in the aforementioned paragraph, one of which is that the tribunal is empowered to continue arbitration proceedings notwithstanding that the question of its jurisdiction was pending before a national court.[28] The corollary of this policy must be that a national court *can* determine the tribunal's jurisdiction notwithstanding the commencement of arbitration proceedings and in circumstances where the issue of jurisdiction could be or even is already before the tribunal.

25 This intention of the drafters never changed. The drafters' Final Report in 1985 noted the possibility of concurrent deliberations on the same issue by the tribunal and the court, and the pros and cons of such concurrency. Ultimately, they decided against adopting a proposal that Art 8 of the Model Law be amended to require the court to postpone its ruling on the tribunal's jurisdiction until after the tribunal had determined its own jurisdiction. The reason given was:[29]

> Permitting the arbitral tribunal to continue the proceedings, including the making of an award, while the issue of its jurisdiction was before the court contributed to a prompt resolution of the arbitration. It was [however] pointed out that expenses would be saved by awaiting the decision of the court in those cases where the court later ruled against the jurisdiction of the tribunal. *However (*sic*), it was for that reason not recommendable to provide for a postponement of the court's ruling on the jurisdiction of the arbitral tribunal.* Furthermore, where the arbitral tribunal had serious doubts as to its jurisdiction, it would probably either proceed to a final determination of that issue in a ruling on a plea referred to in article 16(2) or, in exercising the discretion accorded to it

27 *Report of the Working Group on International Contract Practices on the Work of its Sixth Session* (Vienna, 29 August–9 September 1983) (A/CN.9/245) at para 66.

28 *Report of the Working Group on International Contract Practices on the Work of its Sixth Session* (Vienna, 29 August–9 September 1983) (A/CN.9/245) at para 67.

29 See *Report of the UNCITRAL on the Work of its Eighteenth Session* (Vienna, 3–21 June 1985) (A/40/17) at para 92.

> by article 8(2), await the decision of the court before proceeding with the arbitration. [emphasis added]

26 Granted, the reasons given in the Final Report are not altogether clear or even strong. It may even be said that the language used by the drafters suggested that they were faced with a paradox for which they were unable to agree on a right or clearly satisfactory approach.[30] Nevertheless, whatever the motivation may be, the drafters committed, in the end, to the position that permitted the courts to determine the existence of a valid and binding arbitration agreement in stay applications under Art 8 of the Model Law. This determination, it should be added, must be taken to be a full determination on the merits, and not merely on a *prima facie* standard, given that the Final Report contemplated the possibility of inconsistent decisions; a court decision on a merely *prima facie* standard would not stand in direct opposition to the tribunal's decision on the merits.

27 In his judgment, Leong AR referred extensively to the discussions relating to the deleted draft Art 17 of the Model Law which provided for concurrent court control in relation to the question of validity of the arbitration agreement in these terms:

> (1) [Notwithstanding the provisions of article 16,], a party may [at any time] request the Court specified in article 6 to decide whether a valid arbitration agreement exists and [, if arbitration proceedings have commenced,] whether the arbitral tribunal has jurisdiction [with regard to the dispute referred to it].
>
> (2) While such issue is pending with the Court, the arbitral tribunal may continue the proceedings [unless the Court orders a stay of the arbitral proceedings].

28 One of those discussions referred to by Leong AR was the Seventh Session, at which the Working Group decided to delete draft Art 17 "because it was not in harmony with the principle underlying article 16 [namely] that it was initially and primarily for the arbitral tribunal to decide on its competence, subject to ultimate court control".[31] This remark appears to be the cornerstone of Leong AR's decision, in so far as the tribunal's initial and primary right to determine their jurisdiction must mean that the court should refrain from engaging in a full-blown examination of the issue of validity of the arbitration agreement.

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30 See *Report of the UNCITRAL on the Work of its Eighteenth Session* (Vienna, 3–21 June 1985) (A/40/17) at para 93.

31 *Report of the Working Group on International Contract Practices on the Work of its Seventh Session* (New York, 6–17 February 1984) (A/CN.9/246) at para 55.

29 There is no denying that the drafters were of the view that disputes as to the jurisdiction of the tribunal were, in their words, "initially" and "primarily" for the tribunal to determine.[32] But it does not follow that there is an irreconcilable tension between Art 8 and Art 16 of the Model Law.

30 Article 16 respects the tribunal's right to determine its own jurisdiction in the face of the same allegation. It recognises the tribunal's competence to determine its own jurisdiction – *kompetenz-kompetenz*. This principle has become so entrenched and trite that it is easy to miss the true focus of the principle, which is that a constituted tribunal retains the jurisdiction to settle its own jurisdiction (typically in the face of objections).[33] That is why Art 16 opens with the words "[t]he arbitral tribunal may rule on its own jurisdiction …".

31 Article 16 therefore serves a prorogation function in a very specific context.[34] It says nothing of the court's right to determine a dispute relating to the validity of an arbitration agreement that arises in a stay application or what some have referred to as the negative aspect of *kompetenz-kompetenz*.[35] What the court can or cannot do, in stay applications, is governed by an entirely separate provision, Art 8. The key to reconciling the two Articles is recognising, and accepting, that neither Article professes to overreach into the other's domain by prescribing what may or may not be done in the other proceedings.

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32 See also *Report of the Secretary-General: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (25 March 1985) (A/CN.9/264) at p 37.

33 See *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35 at [40], where the Supreme Court stated in no uncertain terms that: "[*Kompetenz-Kompetenz*] makes sense where a tribunal is asked to exercise a substantive jurisdiction and hears submissions at the outset as to whether it has such a jurisdiction … But the principle has no application where no arbitration is on foot or contemplated." That said, this case requires careful reading: see Nicholas Poon, "Enforcing the Negative Promise in an Arbitration Agreement" [2013] LMCLQ 432.

34 See Nicholas Poon, "The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore" (2013) 25 SAcLJ 244 at 280, para 71.

35 For a staunch advocacy of the negative effect of the *kompetenz-kompetenz* principle, see Emmanuel Gailliard & Yas Banifatemi, "Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators" in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Emmanuel Gailliard & Domenico Di Pietro eds) (Cameron May, 2008) at pp 257–273. It should be noted that the learned authors reached their conclusions not on a textual or intention-based analysis of the New York Convention, but in reliance of policy reasons as well as judicial decisions. There are some intractable problems with a full-blown recognition of the negative aspect of *kompetenz-kompetenz*, none more so than the bootstraps problem: in this regard, see Nicholas Poon, "The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore" (2013) 25 SAcLJ 244 at 253–256, paras 18–21.

32 A comment made by the drafters of the Model Law in their discussions at the Sixth Session may help to illustrate how they saw the distinction. At one point, they noted a distinction between a case "where lack of jurisdiction was invoked impliedly by bringing a substantive claim before the court" which they noted has already been legislated for through the present day Art 8, and another case "where the question of competence was expressly (and solely) brought before the court" which required a "more direct expression treatment" which eventually took the form of the deleted draft Art 17.[36]

33 Thus, the deletion of the draft Art 17 of the Model Law must be seen in that specific context, and when done so, takes on a meaning that is arguably different from that adopted in *Titan Unity*. The effect of the draft Art 17 was to permit parties to bring *pure* jurisdictional disputes before the court *at any time*, a right that the drafters eventually saw as having too much potential for abuse, particularly in the light of the then Art 16(3) which provided that a jurisdictional ruling made by a tribunal under that provision may be set aside *only* at the conclusion of arbitration proceedings together with the final award on the merits.[37] Article 16(3) was eventually worded to allow for challenges at an earlier stage if the tribunal rules on the jurisdictional challenge as a preliminary ruling.

34 In sum, *Titan Unity* is not wrong altogether in noting a "tribunal first, court later" principle encapsulated in the Model Law. It is, however, critical to recognise that this principle applies exclusively to attempts to outflank Art 16 jurisdictional challenges raised before the tribunal in arbitration proceedings that have been commenced. This philosophy does not extend to jurisdictional challenges raised before the court in the course of a substantive claim in court proceedings, a matter that is governed by Art 8 which is influenced by a different set of considerations. With the benefit of hindsight and experience, this compromise which might have seemed palatable then has turned out to be rather problematic.

C. Section 6 of the IAA

35 Turning then to s 6 of the IAA which also deals with the circumstances in which the court will stay its proceedings in favour of arbitration, it bears mentioning that the IAA makes no attempt to distance itself from the position adopted in Art 8(1). Although s 6(1) of the IAA begins with the words "[n]otwithstanding Article 8 of the Model Law", this qualification likely refers to the timing requirements for taking

36 *Report of the Working Group on International Contract Practices on the Work of its Sixth Session* (Vienna, 29 August–9 September 1983) (A/CN.9/245) at para 68.

37 *Report of the Working Group on International Contract Practices on the Work of its Seventh Session* (New York, 6–17 February 1984) (A/CN.9/246) at paras 55–56.

out an application to stay court proceedings in favour of arbitration. Under s 6(1), a stay application may be taken out "at any time after appearance and before delivering any pleading or taking any other step in the proceedings". This modifies the language in Art 8(1) which simply states that the court shall refer the matter to arbitration "if a party so requests not later than when submitting his first statement on the substance of the dispute".

36 Nothing else in s 6, or indeed in any other part of the IAA, suggests that the rejection by the drafters of the Model Law of the "tribunal first, court later" principle in relation to matters falling under Art 8 was reversed under the IAA. For the avoidance of doubt, there is no converse principle of "court first, tribunal later" even for matters falling under Art 8. The most that can be said of the implications from the *travaux* pertaining to Art 8 is that a court is *entitled* to proceed and fully determine, on the merits, whether there is a valid and binding arbitration agreement. The court may of course, as a master of its own procedure, elect *not* to exercise its right to adjudicate the issue.

37 Thus, in terms of practical consequences, the outcome in *Titan Unity* might have been different if the position adopted by the drafters of Art 8 was applied faithfully to the facts. As the plaintiff had commenced a substantive claim in the High Court for misdelivery of cargo, any jurisdictional dispute was arguably implied and incidental, and if so, the court was entitled to decide the merits of the plaintiff's assertion that there was no valid and binding arbitration agreement between itself and the demise charterer. Had the court exercised its discretion in favour of resolving that issue, a stay would then have been granted if the court concluded that there was a valid and binding arbitration agreement between the parties. That conclusion would also have given rise to an issue estoppel in relation to the issue of the validity of the arbitration agreement as far as Singapore law was concerned.

38 A brief comment on a couple of authorities on s 6 referred to by Leong AR is apposite, beginning with *Tjong Very Sumito v Antig Investments Ltd*[38] ("*Tjong Very Sumito*"), in which the Court of Appeal held that "if it was at least arguable that the matter [in the court proceedings] is the subject of the arbitration agreement, then a stay of proceedings should be ordered".[39]

39 On some levels, the reference to "at least arguable" may seem to support the *prima facie* standard of review for issues concerning the validity of the arbitration agreement. However, this pronouncement was made without the benefit of the issues and arguments proffered herein.

38 [2009] 4 SLR(R) 732.

39 *Tjong Very Sumito v Antig Investments Ltd* [2009] 4 SLR(R) 732 at [24].

Moreover, the court went on to say that a stay would not be ordered "if there was no binding arbitration agreement".[40] Such a conclusion, it would seem, can only be properly classified as a full and final determination. Looked at holistically, the fairest conclusion that one may draw from *Tjong Very Sumito* is that the decision is silent in relation to the topic at hand.[41]

40 The other notable authority cited is the Indian Supreme Court's decision in *Shin-Etsu* which Leong AR described as "highly instructive". It would seem that Leong AR was persuaded by the reasoning of Srikrishna J that a *prima facie* standard is the only way by which purpose would be given to the setting aside provisions in the Model Law, because the issue of validity of the arbitration agreement would *not* have been determined finally at the initial stage where a stay of proceedings was sought.[42] Naturally, the doctrine of *res judicata* features heavily in this line of reasoning.

41 Two responses may be made. First, if the application for a stay was brought before the supervisory court in question, leaving aside considerations of evidence, it is difficult to see what prejudice there can be since the supervisory court is the only court that can set aside the award in any event. Further, it is a rather sweeping conclusion to say that the setting aside provision has no purpose if jurisdictional objections are determined on the merits in stay applications. Some of the setting aside grounds apply only after an arbitration is concluded. Moreover, a respondent may deliberately choose not to participate in the arbitration and apply to have the award set aside subsequently.

42 The second point is that although Srikrishna J was in the majority together with Dharmadhikari J, the latter expressly caveated that he expressed no view on the issue because it was an issue that did not "directly arise on the facts of the present case … [and] should be left open for consideration in an appropriate case".[43] Indeed, this question was considered by the Indian Supreme Court subsequently in *Chloro Controls (I) P Ltd v Severn Trent Water Purification*[44] ("*Chloro*"), where a different coram basically agreed with the minority's decision in *Shin-Etsu*.

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40 *Tjong Very Sumito v Antig Investments Ltd* [2009] 4 SLR(R) 732 at [24].

41 See, however, *Zurich Australian Insurance Ltd T/A Zurich New Zealand v Cognition Education Ltd* [2014] NZSC 188 where the New Zealand Supreme Court held that where the *existence* of a dispute is in question, the court should grant a stay where it is satisfied that "it is not immediately demonstrable either that the defendant is not acting *bona fide* in asserting that there is a dispute or that there is, in reality, no dispute".

42 *The Titan Unity* [2013] SGHCR 28 at [29].

43 *Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd* (2005) 7 SCC 234; (2005) 3 Arb LR 1 at [112].

44 (2013) 1 SCC 641.

43 Leong AR was referred to *Chloro* but declined to follow it, on the ground that the decision was premised on a unique provision in the Indian Arbitration Act which had no analogue in Singapore.[45] Be that as it may, it is suggested that the following extract from the leading judgment of Kumar J (with whom Kapadia CJ and Patnaik J concurred) presents an arguably different picture of Indian arbitration law:[46]

> *It is expected of the Court to answer the question of validity of the arbitration agreement*, if a plea is raised that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed. *Such determination by the Court in accordance with law would certainly attain finality and would not be open to question by the arbitral tribunal*, even as per the principle of prudence. It will prevent multiplicity to litigation and re-agitating of same issues over and over again. …
>
> Another very significant aspect of adjudicating the matters initiated with reference to Section 45 of the 1996 Act, at the threshold of judicial proceedings, is that the finality of the decision in regard to the fundamental issues stated under Section 45 would further the cause of justice and interest of the parties as well … The issue of jurisdiction normally is a mixed question of law and facts. Occasionally, it may also be a question of law alone. It will be appropriate to decide such questions at the beginning of the proceedings itself and they should have finality … *Applying the analogy thereof will fortify the view that determination of fundamental issues as contemplated under Section 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent.*
>
> [emphasis added]

D. The New York Convention

44 For completeness, it is helpful to consider the position under Art II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[47] ("New York Convention"), which is the equivalent provision of Art 8 of the Model Law.

45 Like the Model Law, the New York Convention position is also not settled. However, there is much force in Born's view on this topic. He opines that the New York Convention makes it reasonably clear that "both arbitral tribunals and national courts may consider and decide jurisdictional disputes", though the New York Convention provisions "do

45 *The Titan Unity* [2013] SGHCR 28 at [28].
46 *Chloro Controls (I) P Ltd v Severn Trent Water Purification* (2013) 1 SCC 641 at [130]–[131].
47 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

not supply further guidance as to the allocation of tribunals' and courts' respective powers to address these issues".[48]

46 Born thus rejects the approach taken by the Swiss courts that imposes an obligation on national courts in certain circumstances to make an immediate, final determination of jurisdictional objections. Nor does Born approve of the converse approach, suggested by a number of commentators and courts,[49] that Art II(3) only permits what he calls a *prima facie* interlocutory judicial review.[50]

47 Born's view of Art II(3) is largely similar to the interpretation of Art 8 and Art 16 of the Model Law suggested above. Sceptics may understandably frown upon reliance of Born's analysis of Art II(3), given that Born also inclines towards the view that Art 8 does not prevent courts from undertaking a full examination of the question of the validity of an arbitration agreement. However, Born's interpretation of Art II(3) has been endorsed by several other notable commentators.[51] Indeed, one of the leading commentaries on the New York Convention concludes that "the letter of Article II(3) does not provide any guidance" on the question of allocation of jurisdiction between the courts and tribunals on the issue of the validity of the arbitration agreement prior to the making of the final award,[52] though it notes that there are authorities in support of both a full review and a *prima facie* review.

48 To the extent that the Model Law was inspired by and built upon the foundation established by the New York Convention,[53] if Born's view of Art II(3) of the New York Convention is to be understood as the correct interpretation, the interpretation suggested of Art 8 and Art 16 would be entirely consistent with the position under the New York Convention.

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48 Gary Born, *International Commercial Arbitration* (Kluwer Law, 2nd Ed, 2014) at p 1052.

49 See also Dorothée Schramm, ElliottGeisinger, *et al*, "Article II" in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Herbert Kronke, Patricia Nacimiento, *et al* eds) (Kluwer Law, 2010) at pp 108–109 and the authorities cited in footnote 272.

50 Gary Born, *International Commercial Arbitration* (Kluwer Law, 2nd Ed, 2014) at p 1054.

51 Julian Lew, "Control of Jurisdiction by Injunctions Issued by National Courts" in *International Arbitration 2006: Back to Basics?* (Albert Jan van den Berg ed) (Kluwer Law, 2007) at p 186; Jan Paulsson, "Interference by National Courts" in *The Leading Arbitrators' Guide to International Arbitration* (Lawrence W Newman & Richard D Hill eds) (Juris Publishing, 2004) at p 114; Nadja Erk, *Parallel Proceedings in International Arbitration: A Comparative European Perspective* (Kluwer Law, 2014) at p 27.

52 Dorothée Schramm, Elliott Geisinger *et al*, "Article II" in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Herbert Kronke, Patricia Nacimiento *et al* eds) (Kluwer Law, 2010) at pp 108–109.

53 See *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [57].

E. Further considerations

49 The suggested interpretation of the interaction between s 6 of the IAA and Art 8 on the one hand, and Art 16 on the other is, admittedly, far from satisfactory. A plaintiff may bring himself out of the "tribunal first, court later" principle applicable to Art 16(3) by framing his claim in court in a way that a dispute over the existence and validity of an arbitration agreement is implied and not the sole question in the claim before the court. If the interpretation suggested above is accepted, the court in such a claim would be entitled to proceed onto a full determination of any dispute over the existence and validity of the arbitration agreement.

50 This potential for abuse may be mitigated by a judicial policy to defer to an existing tribunal any issue of jurisdiction arising from a dispute as to the validity of the arbitration agreement that is already before the tribunal, even if the plaintiff can frame his claim in court in a way that renders any question of the validity of an arbitration incidental. If the court can conclude that the court proceedings were commenced for the collateral purpose of undermining an existing jurisdictional challenge before a constituted arbitral tribunal, it would be wholly justified in giving effect to the policy in Art 16 by giving the tribunal the first and primary opportunity to assess its jurisdiction. Admittedly, this solution has at least one limitation, which is where the respondent in the arbitration refuses to participate in the arbitration on the basis that there is no valid arbitration agreement, and instead counters by commencing court proceedings, it is difficult to say whether the dispute as to the validity of the arbitration agreement is before the tribunal such that Art 16 is engaged to the exclusion of Art 8.

51 There is another procedural quirk that arises from the suggested interpretation of s 6 of the IAA, Art 8 and Art 16. Applications for stay under s 6 are typically heard by assistant registrars exercising High Court jurisdiction, whose decisions are appealable to the High Court judge as of right. The High Court judge's decision on the registrar's appeal is, in turn, appealable with leave if the judge refuses to grant a stay, and appealable as of right if the judge grants the stay.[54] On the other hand, applications challenging the tribunal's decision on its jurisdiction – whether following a preliminary ruling under Art 16 or subsequently in setting aside or enforcement proceedings – are heard in the first instance by a High Court judge, whose decisions are *typically* appealable as of right. Under ss 10(4) and 10(5) of the IAA, an appeal from a decision of a High Court judge on an Art 16 challenge is appealable only with leave of the High Court judge, whose refusal to grant leave is unappealable to

54 See s 34(2)(*d*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) read with paras (*d*) and (*e*)(x) of the Fifth Sched.

the Court of Appeal. There are, therefore, a fair number of not insubstantial procedural differences.

52 It bears mentioning, on this note, that stay applications before the assistant registrars are usually conducted on the basis of affidavit evidence. Disputes of fact that may affect a full analysis of the existence of a valid arbitration agreement would generally not be adequately fleshed out at this early stage of the proceedings. Notwithstanding, there does not appear to be any rule of civil procedure against either the taking of evidence by assistant registrars or the elevation of the stay application to be heard by a High Court judge who may also elect to conduct a trial to resolve any disputes of fact.[55]

IV. Conclusion

53 It is hoped that this commentary has surfaced to the fore the myriad considerations inherent in this multi-faceted issue of the standard of curial intervention in stay of court proceedings. Satisfactory or otherwise, a compromise was struck between Art 8 (and s 6 of the IAA) and Art 16 of the Model Law to regulate the role of the court and the tribunal concerning jurisdictional disputes arising at various stages of proceedings. The question, now, is whether the internal logic of this compromise still holds. On one hand, the struggles that the drafters faced in balancing two equally fundamental principles – a party's right of access to the courts with the primacy of the *kompetenz-kompetenz* principle – remain no less daunting today than it did 30 years ago. On the other hand, the collective experience of *Titan Unity* in Singapore and the cases from Hong Kong,[56] India[57] and Canada[58] cited in *Titan Unity* strongly suggests that principle has yielded to pragmatism, for good reason and with minimal damage to the fundamental right of the courts to exercise final supervision.

54 Short of a new round of amendments to the Model Law which was last refreshed in 2006, it is therefore up to each national court to

55 See O 28 r 4(4) and O 38 r 2(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). See *AQZ v ARA* [2015] SGHC 47, as well as *Azov Shipping Co v Baltic Shipping Co* [1991] 1 Lloyd's Rep 68 where the court ordered cross-examination to be conducted in an application to challenge the tribunal's award that it has jurisdiction.

56 *PCCW Global Ltd v Interactive Communications Service Ltd* [2006] HKCA 434; *Pacific Crown Engineering Ltd v Hyundai Engineering and Construction Co Ltd* [2003] 3 HKC 659.

57 *Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd* (2005) 7 SCC 234; (2005) 3 Arb LR 1.

58 *Rio Algom Ltd v Sami Steel Co Ltd* (1993) XVIII YB Comm Arb 166; *Agrawest Investments Ltd v BMA Nederland BV* [2005] PEIJ No 48; *Morran v Carbone* [2005] OJ No 409; *ETR Concession Co v Ontario (Minister of Transportation)* [2004] OJ No 4516; *Cooper v Deggan* [2003] BCJ No 1638; *Gulf Canada Resources Ltd v Arochem Int'l Ltd* (1992) 66 BCLR (2d) 113.

decide if strict adherence to the intentions of the drafters or an extension of the philosophy behind the *kompetenz-kompetenz* principle is more consistent with the practice of international arbitration in their respective jurisdictions. This is no simple feat. *Titan Unity* has drawn the line, for Singapore, in favour of the latter which, though arguably the more pragmatic of the two options, is by no means the option that is more philosophically consistent with the Model Law.
