Case Note

MEANING OF "DISPUTE" IN ARBITRATION AGREEMENTS

Tjong Very Sumito v Antig Investments
[2009] 4 SLR(R) 732

In *Tiong Very Sumito v Antig Investments*, the Court of Appeal went into depth in laying down the parameters of what would constitute a "dispute" under an arbitration agreement. While previous local decisions largely applied similar principles as the Court of Appeal in this case, this decision is much welcomed as it put to rest any confusion over what constitutes a dispute and reiterates the primacy of judicial non-intervention where parties have chosen to settle their dispute via the arbitration mechanism.

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I. Introduction

1 The question of whether a "dispute" exists is one of the hurdles that a party seeking a stay in favour of arbitration has to overcome.

2 The general definition of "dispute" requires the making of a claim by one party and the rejection of it by the other.[1] However, until the Court of Appeal's decision, there appears to have been some confusion among the common law courts on the correct test as to what constitutes "dispute" in the arbitral community.

1 Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) at p 21.

3 The Court of Appeal recently delivered an important judgment on this question in *Tjong Very Sumito v Antig Investments*[2] ("*Tjong Very Sumito*"), in which it attempted to provide a clearer understanding of what constitutes a "dispute" for the purpose of enforcing an arbitration agreement. It also set out a number of propositions that should form the broad canvas against which an application for a stay of proceedings ought to be evaluated.

4 This note focuses on the subject matter of what constitutes a "dispute" in an arbitration agreement and considers if the court succeeded in injecting the much-needed clarity into this area of law.

II. Facts

5 The appellants and the respondent entered into a shares sale and purchase agreement ("SPA") under which the appellants agreed to sell and the respondent agreed to buy a certain percentage of the entire paid-up share capital of an Indonesian company.

6 The SPA included an arbitration clause, providing, *inter alia*, that:

> (2) Arbitration
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> (a) Any and all disputes, controversies, and conflicts between the parties in connection with this Agreement shall, so far as is possible, be settled amicably between the parties through negotiation.
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> (b) Failing such amicable settlement, any and *all disputes, controversies and conflicts arising out of or in connection* with this Agreement or its performance (including the validity of this Agreement) shall be settled by arbitration by a three (3) member arbitration board which will hold its sessions in Singapore in English under the SIAC (Singapore International Arbitration Centre) Rules. The tribunal of three (3) arbitrators shall be appointed by each party with the third member appointed by the Chairman of the SIAC.
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> [emphasis added in judgment]

7 The parties entered into four further agreements ("supplemental agreements"), the last of which provided that on a designated date, the respondent would pay a certain amount to a third party, Aventi Holdings Ltd ("Aventi"), who was authorised to receive the same for and on behalf of the appellants. The last three supplemental agreements expressly stated that they were "supplemental to and an integral part of the SPA and the terms of the SPA are hereby amended,

2 [2009] 4 SLR(R) 732.

modified, added to and/or varied accordingly to the extent herein provided".

8 Prior to the specified time of payment, Aventi requested an early settlement of the amount due in return for a discount on the payment amount. The respondent agreed and released the amount to Aventi.

9 The appellants then informed the respondent that payments were to be made to them directly and not to Aventi. The respondent refused to do so.

10 The appellants commenced proceedings for an injunction to restrain the respondent from effecting payment to any party other than the appellants, as well as for damages.

11 The respondent entered appearance and applied to stay the court proceedings under s 6 of the International Arbitration Act[3] ("IAA") or, alternatively, under the court's inherent jurisdiction. The appellants resisted the stay application on the ground that there was no "dispute" and that the respondent had no defence to the appellants' claim.

III. Decisions below

12 The Assistant Registrar dismissed the respondent's stay application on the ground that there was no dispute in connection with the SPA. The High Court, on the other hand, allowed the respondent's appeal on the ground that a dispute existed, and stayed the court proceedings.

13 The views of Choo Han Teck J, the judge sitting at the High Court hearing, on the interpretation of the word "dispute" were succinctly summarised by the Court of Appeal:[4]

> 16 At the outset, the judge restated the principles set out by Woo J in *Dalian*, emphasising in particular … that '*if the defendant at least makes a positive assertion that he is disputing the claim … then there is a dispute even though it can be easily demonstrated that he is wrong*' … The judge then rightly distinguished the present case from the facts in *Dalian* …:
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> > *Dalian* involved two separate and distinct contracts. There, the defendant's defence in relation to the plaintiff's claim under the Armonikos contract was that it had a right of set-off under the Hanjin Tacoma contract. On the other hand,

3 Cap 143A, 2002 Rev Ed.

4 [2009] 4 SLR(R) 732 at [16]–[18].

> the defendant in the present case refers to the fourth supplementary agreement which states that the US$3.7m '*shall be paid to Aventi*' and that '*[Aventi] is authorised to receive the same*'. Its case was that the payment to Aventi extinguished its liabilities under the SPA and they aver that this was collaborated by the first plaintiff's letter dated 12 November 2007. While it could be said that the early payment arrangement between Aventi and the defendant constitutes a 'side agreement', I was of the view that this side agreement could not be seen as separate and distinct from the SPA. In fact, it was one which was inextricably linked to the SPA, *ie*, in the absence of the SPA, the side agreement would never have materialised. There was therefore a dispute referable to the SPA. Of course, the issue of whether the payment made under the side agreement extinguished the defendant's liability under the SPA would be a matter reserved for the arbitrator(s) to decide …
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> 17 Further, the judge noted … that 'far from admitting the claim, the defendant asserted that "the plaintiffs" claim is clearly devoid of any merit'". Citing the proposition in *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 WLR 726 ('*Halki*') at 761, that 'there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable', the judge held …:
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> > [W]hile there are some minor differences between the English position and the position elucidated by the High Court in *Dalian* (especially in relation to silence on the part of the defendant), the common ground remains that a positive assertion by the defendant that he is disputing the claim would suffice for the purposes of s 6(2) of the IAA. This would be so even if it can be easily demonstrated that the defendant was wrong. Further, it bears mention that '*[t]he court is not to consider if there is in fact a dispute or whether there is a genuine dispute*': *Dalian* at [75] …
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> 18 Thus, the judge concluded … that a dispute referable to the SPA existed; and that the respondent had made a positive assertion challenging the appellants' claim, albeit after the commencement of court proceedings. Since either of these grounds would justify a stay of proceedings in favour of arbitration, the judge allowed the appeal.
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> [emphasis in original]

IV. Decision of the Court of Appeal in *Tjong Very Sumito*

14 The Court of Appeal dismissed the appeal and held that there was a dispute referable to the SPA that would justify stay of court proceedings. In coming to its conclusion, it laid down a number of propositions that should form the broad canvas against which an application for a stay of proceedings ought to be evaluated, the ones relating to the subject of a "dispute" are as follows:

(a) If the arbitration agreement provides for arbitration only if "disputes" or "differences" or "controversies" exist, then the subject matter of the proceedings would *fall outside* the terms of the arbitration agreement if there is no "dispute", "difference" or "controversy" or if the alleged "dispute" is unrelated to the contract which contains the arbitration agreement.[5]

(b) In line with the prevailing philosophy of judicial non-intervention in arbitration, the court will interpret the word "dispute" broadly.[6] A dispute exists unless the defendant has unequivocally admitted that the claim is due and payable.[7]

(c) The court will not assess the merits of a "dispute" since these matters should properly be left for assessment by the arbitrator.[8]

(d) An unequivocal admission must be one extending to both liability and quantum in order to exclude the existence of a "dispute". Where a defendant makes a clear and unequivocal admission as to liability but not to quantum then there *is* a dispute referable to arbitration.[9]

(e) In addition to an express denial or rejection of the claim, the court can also infer that the claim is not admitted from the previous inconclusive discussions between the parties, prevarication or even silence.[10] In the case of prevarications, where a defendant unequivocally admits the claim, but then later purports to deny the claim, there may well be a "dispute" and the matter should ordinarily be referred to arbitration. Silence is also insufficient to constitute the clear and unequivocal admission necessary to exclude the existence of a "dispute".

15 The above propositions by the Court of Appeal will now be considered *in seriatim*.

A. "Dispute" to be given wide interpretation

16 The Court of Appeal decided that the term "dispute" must be given a wide interpretation.[11] In arriving at this decision, it cited Mustill

5 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [23].
6 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [28]–[29], [33]–[34].
7 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [56], [59].
8 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [40].
9 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [63]–[64].
10 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [61]–[62].
11 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [33].

and Boyd's *The Law and Practice of Commercial Arbitration in England*,[12] which said that the "dispute" must be construed by reference to the subject matter of the contract in which they are included.

17 If the arbitration agreement provides for arbitration only if "disputes" or "differences" or "controversies" exist, then the subject matter of the proceedings would fall outside the terms of the arbitration agreement if:[13]

> (a) there is no "dispute", "difference" or "controversy", as the case may be; or
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> (b) the alleged "dispute" is unrelated to the contract which contains the arbitration agreement.

18 The court will readily find that a "dispute" exists unless the defendant has unequivocally admitted that the claim is due and payable.[14]

19 The decision to construe the term "dispute" broadly by the Court of Appeal is in line with the policy that Singapore has adopted towards arbitration. The court held that it ought to give effect to the parties' contractual choice as to the manner of dispute resolution unless it offends the law. Acknowledging that arbitration and other forms of alternative dispute resolution, such as mediation, help to effectively unclog the arteries of judicial administration, the court also stated that alternative dispute resolution mechanisms offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with.

20 The court examined the motivations behind parties choosing to resolve disputes by arbitration rather than litigation:[15]

> The learned authors of Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th Ed, 2004) ('*Redfern and Hunter*') offer two principal reasons: first, the opportunity to choose a 'neutral' forum and a 'neutral' tribunal (since parties to an international commercial contract often come from different countries); and second, international enforceability of arbitral awards under treaties such as the New York Convention. Under these treaties, an arbitral award, once made, is immediately enforceable both nationally and internationally in all treaty states. One would imagine that parties might be equally motivated to choose arbitration by other crucial considerations such as confidentiality, procedural flexibility and the choice of arbitrators with particular

12 Butterworths, 2nd Ed, 1989.
13 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [23].
14 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [56].
15 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [29].

> technical or legal expertise better suited to grasp the intricacies of the particular dispute or the choice of law. Another crucial factor that cannot be overlooked is the finality of the arbitral process. Arbitration is not viewed by commercial persons as simply the first step on a tiresome ladder of appeals. It is meant to be the first and only step.

21 With this is mind, courts should therefore be slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitration. Singapore's arbitration regime has been intended to promote minimal court intervention in matters that the parties have agreed to submit to arbitration.[16] The authors are of the opinion that the court was right in adopting the above views on how "dispute" was to be construed as such would rightly give effect to the goals of Singapore's arbitration regime.

B. Merits not to be delved into

22 The court stated that the merits of the "dispute" were irrelevant to the question of whether there exists a dispute or not.[17] This is in line with the holdings of Woo J in *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd*[18] ("*Dalian*").

23 However, despite this, from the approaches adopted by some of the decisions of the Singapore courts, it appears that there might have been some misapprehension that the stay provisions under the IAA[19] were similar to the English Arbitration Act 1950.[20] Pre-1996, English courts were able to consider in each case whether there was a dispute before allowing a stay application because of the specific extending words in the relevant section of the English Arbitration Act 1950 which directed the court to stay proceedings "unless satisfied … that there is not in fact any dispute between the parties with regard to the matter agreed to be referred". These extending words have never been in the IAA and the English Arbitration Act 1996[21] has since deliberately omitted these extending words. Following the omission, English courts have since taken the view that whether or not there is a dispute is a matter to be considered by the arbitral tribunal and not the courts. *Halki Shipping Corp v Sopex Oils Ltd*[22] ("*Halki*") is one such case where the court ruled that if the defendant contests liability, then, whether or not he has an arguable case on the merits for doing so, there is a dispute

16 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [29].
17 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [40].
18 [2005] 4 SLR(R) 646.
19 Cap 143A, 2002 Rev Ed.
20 Arbitration Act 1950 (c 27) (UK). Lawrence Boo, "Arbitration" (2004) 5 SAL Ann Rev 47 at 55–56, para 3.22.
21 Arbitration Act 1996 (c 23) (UK).
22 [1998] 1 WLR 726.

and the court must stay its own proceedings, as the existence or otherwise of a valid defence is a matter for the arbitrators.

24 As such, the approach adopted by the Court of Appeal would effectively clear up any doubts that the High Court decision of *Merrill Lynch Pierce, Fenner & Smith Inc v Prem Ramchand Harjani*[23] ("*Merrill Lynch*") might have created over whether the courts would be permitted to examine the merits of a claim in deciding whether there are "disputes" within the scope of the arbitration agreement.

25 The court in *Merrill Lynch* had held that in an application for a stay of court proceedings pursuant to an arbitration agreement, the court would not determine the merits of the dispute.[24] However, it appears to have done exactly that when it rejected the second "dispute", *ie*, the second defendant's reliance on its counterclaim for damages by way of a set-off.

26 It seems that the court's rejection of this second "dispute" was not because it was not a dispute but rather because, amongst other reasons, the factual sequence of events relied upon by the defendants did not make sense,[25] and that, in any event, a provision within the relevant contract prohibited the use of a counterclaim as a set-off against a debt due to the plaintiff.[26] In doing this, the court was effectively going into the merits of the claim as whether the facts made sense or how a contractual provision ought to be read were issues which would ordinarily be a big part of the very "dispute" itself. In light of the Court of Appeal's decision in *Tjong Very Sumito*, this portion of *Merrill Lynch* should no longer be good law.

27 While holding that the merits of the dispute were irrelevant in determining its existence, the court in *Tjong Very Sumito* also recognised the tension between the efficient disposal of apparently indefensible claims and "rigorous and scrupulous" enforcement of arbitration agreements.[27] Nonetheless, it tilted the scale in favour of the enforcement of arbitration agreements.

28 A case is made for the rigorous enforcement of arbitration agreements when you take into consideration that arbitrations are not necessarily slow processes. It has been argued that arbitrators have ways

23 [2009] 4 SLR(R) 16.

24 *Merrill Lynch Pierce, Fenner & Smith Inc v Prem Ramchand Harjani* [2009] 4 SLR(R) 16 at [19].

25 *Merrill Lynch Pierce, Fenner & Smith Inc v Prem Ramchand Harjani* [2009] SGHC 133 at [27].

26 *Merrill Lynch Pierce, Fenner & Smith Inc v Prem Ramchand Harjani* [2009] SGHC 133 at [30].

27 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [42].

and means (in particular by making interim awards) of proceeding as quickly as the courts. If a claimant can persuade the arbitral tribunal that in truth there is no defence to his claim, then there is no good reason why that tribunal cannot resolve the dispute in his favour without any delay at all.[28] However, the Court of Appeal was of the view that in "open-and-shut" cases, the above might not hold true given the necessity to appoint arbitrators to constitute the tribunal.[29]

29 Even if so, the efficient disposal of claims in unmeritorious cases will not necessarily be hindered in all cases where a "dispute" is found. Given the court's respect for party autonomy, parties can easily provide for such situations in the arbitration agreement should they require a meritorious dispute as a valid incident to trigger arbitration and form the basis for a stay of court proceedings. Instead of using the terms "all disputes" or "any dispute" in the arbitration, parties can stipulate for a "real" or "genuine" dispute.[30]

30 The Court of Appeal also accorded great weight to Saville J's reasoning in *Hayter v Nelson Home Insurance Co*[31] ("*Hayter*") which stood in favour of holding parties firmly to their arbitration agreement:

> … it must not be forgotten that by their arbitration clause the parties have made an agreement that in place of the Courts, their disputes should be resolved by a private tribunal. Even assuming that this tribunal is likely to be slower or otherwise less efficient than the Courts, that bargain remains – and I know of no general principle of English law to suggest that because a bargain afterwards appears to provide a less satisfactory outcome to one party than would have been the case had it not been made or had it been made differently, that bargain can be simply put on one side and ignored.
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> … if the Courts are to decide whether or not a claim is disputable, they are doing precisely what the parties have agreed should be done by the private tribunal. An arbitrator's very function is to decide whether or not there is a good defence to the claimant's claims – in other words, whether or not the claim is in truth indisputable. Again, to my mind, whatever the position in the past, when the Courts tended to view arbitration clauses as tending to oust their jurisdiction, the modern view (in line with the basic principles of the English law of freedom of contract and indeed International Conventions) is that there is no good reason why the Courts should strive to take matters out of the hands of the tribunal into which the parties have by agreement undertaken to place them.

28 *Hayter v Nelson Home Insurance Co* [1990] 2 Lloyd's Rep 265 at 268.
29 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [45].
30 See Warren B Chik, "Recent Developments in Singapore on International Commercial Arbitration" (2006) 10 SYBIL 363 at 366.
31 [1990] 2 Lloyd's Rep 265 at 268–269.

31 Undoubtedly, the above would be consistent with what has been regarded as the cornerstone underlying judicial non-intervention in arbitration; the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules to be applied) as well as the substantive law to govern the contract.[32]

C. Dispute does not exist where there has been an admission

32 The court will readily find that a "dispute" exists unless the defendant has unequivocally admitted that the claim is due and payable.[33] The court held that such an unequivocal admission must extend to both *liability* and *quantum*, and, in such a case, there is no dispute *mandatorily* referable to arbitration. The claimant thus has the recourse of summary judgment, but the court cautioned that the claimant must be prepared to show compelling evidence of the defendant's admission, because once that admission is challenged with any semblance of credibility, the court will ordinarily be inclined to decide that a "dispute" has arisen, and order a stay of proceedings for the arbitral tribunal to resolve the "dispute".[34]

33 The Court of Appeal referred to the case of *Getwick Engineers Ltd v Pilecon Engineering Ltd*[35] as an obvious example of where both liability and quantum were admitted. In that case, three cheques were issued to the plaintiff and one was dishonoured. The plaintiff sought summary judgment for, *inter alia*, its claim in the amount stated in the dishonoured cheque. Geoffrey Ma J ordered a stay of proceedings for all of the plaintiff's other claims but granted summary judgment for the amount in the dishonoured cheque. Ma J held that the dishonoured cheque was:

> … *to be regarded as a clear and unequivocal admission on the defendant's part of its liability and quantum (in that amount) under payment certificates*. This cheque was issued following the 28 April letter … It was one of three cheques sent to the plaintiff by the defendant as an acknowledgement of its liability under payment certificates which had been issued to the plaintiff … In reaching this conclusion, I have borne in mind that cheques are to be regarded as cash and save in exceptional circumstances, no set off or counterclaim will be permitted … *Two of the three cheques have been honoured. I see no reason why the third cheque should not be seen in the same light. I have not been referred to any case in which a cheque or bill of exchange has been regarded as constituting a clear and unequivocal admission of*

32 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [28].
33 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [56].
34 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [63].
35 [2002] 1020 HKCU 1.

> *liability and quantum, but in principle, I do not see why it cannot be so regarded*. [emphasis in original]

34 The court also noted that implicit in the holding that there is a "dispute" unless there has been an unequivocal admission, is the converse proposition that where there has been an admission, there is no longer any dispute and the claim falls outside the arbitration agreement:[36]

> [L]ogically, the arbitral tribunal would not have jurisdiction to hear the claim or make an award, and that a mischievous and recalcitrant defendant might use precisely the argument that its defence was hopeless to thwart the arbitration. As Saville J perceptively pointed out [in *Hayter*], the conundrum created by the analysis that the arbitration agreement does not apply to the claim at hand because the defendant has made a clear and unequivocal admission giving rise to often-inevitable summary judgment, is that, by the same token, the arbitral tribunal would have no jurisdiction and the claimant would only be able to commence litigation proceedings.

35 The court convincingly reasoned that where there has been an admission, the claimant could still prosecute its claim in arbitration as the arbitral tribunal has the competence to decide whether it has jurisdiction. Where faced with a recalcitrant defendant as envisaged above, the arbitral tribunal could rule that it has jurisdiction and make a summary award. The court stated that under the IAA,[37] such an award would not be impeachable for an error of law alone and it was hard to conceive of a court entertaining any challenge to such an award by a defendant who had admitted liability but refused to pay and then resisted arbitration on the ground that there was no dispute because of its own admission.[38]

36 Therefore, in order to uphold the policy of judicial non-intervention, it is necessary to regard the refusal to grant a stay as an exception only to be invoked in obvious cases where both liability and quantum have been admitted.

D. Significance of prevarication or silence

37 Apart from an express denial or rejection of the claim, the court can also infer that the claim is disputed from the previous inconclusive discussions between the parties, prevarication or even silence.

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36 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [56].
37 Cap 143A, 2002 Rev Ed.
38 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [59].

38 The court held that prevarication is where a defendant unequivocally admits the claim, but then later purports to deny the claim on the ground that the admission was mistaken, or fraudulently obtained, or was never made. It is to be regarded that there might well be a "dispute" before the court, both over the substantive claim as well as over whether the defendant can challenge the alleged earlier admission, and the matter should ordinarily be referred to arbitration.[39]

39 This must be the correct conclusion on the issue given that the defendant in resiling on his previous admission is resisting the claim and a "dispute" should still be considered to exist.

40 With regard to silence, Woo J in *Dalian* observed:[40]

> The more difficult question is when it can be said that a dispute exists. For example, *is there a dispute when the defendant simply refuses to pay or to admit the claim or remains silent? Although there have been statements that suggest that such conduct is sufficient to constitute a dispute I do not share that view. A defendant may refuse to pay or to admit a debt or remain silent because he has no money to pay or simply because he is intransigent. To my mind that is not a dispute.* It is different if the defendant at least makes a positive assertion that he is disputing the claim. [emphasis in original]

41 The Court of Appeal took a different view and stated that a defendant's silence, without more, may be insufficient to constitute the clear and unequivocal admission necessary to exclude the existence of a dispute, controversy or conflict. Silence, on its own, is often equivocal at best.[41] Notably, such an approach is in line with that under Art 25(b) of the UNCITRAL Model Law on International Commercial Arbitration; even if the respondent fails to submit its statement of defence, the arbitral tribunal is required to continue the proceedings "without treating such failure in itself as an admission of the claimant's allegations".[42]

42 The court enumerated various reasons as to why a party's silence would not constitute an admission:[43]

> [A] party may be silent because he has no money to pay or may even want to delay a just resolution of a claim. Even so, there may be good reasons why a party remains silent. A failure by a party to respond is equivocal, especially when there are unresolved issues or there has

39 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [62].
40 *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR(R) 646 at [75] as quoted in *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [39].
41 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [69].
42 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [61].
43 *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [61].

> been earlier prevarication … Further, in some cases, a party may think (rightly or wrongly) a claim so preposterous that 'silent treatment' is the most appropriate response. In other cases, a party may view the need to place its stand on record unimportant or even disadvantageous. For example, a defendant who adopts a policy of 'masterly inactivity' has not made an admission. Judges must also bear in mind that commercial persons usually do not accord the same importance and urgency to documenting responses as lawyers do. One must also be particularly mindful when dealing with cross border transactions, since there may even be cultural reasons for silence: in certain societies, a non-confrontational approach is prized. It is impossible to generalise on the effect of silence and each matter must be assessed contextually. *In essence, we are of the view that generally speaking, the court ought to be ordinarily inclined to find that there has been a denial of a claim in all but the clearest of cases. It should not be astute in searching for admissions of a claim.* [emphasis in original]

43 It is indisputable that these reasons hold true. Silence generally does not mean consent and certainly not an admission in the arbitral scenario. Certain Asian cultures shy away from confrontation, businesses might not be able to respond with the urgency required as they could be having discussions internally on the appropriate response and it is definitely usual for parties involved in disputes to want to "buy time" while they evaluate the situation. Indeed, it is impossible and even pointless to generalise on the effect of silence and the court has rightly held so.

V. Conclusion

44 *Tjong Very Sumito* is a long awaited clarification on what constitutes a "dispute" in an arbitration agreement. With the parameters of the subject matter laid down definitively there should be less confusion in this area of law. While questions could still be raised in the future when the principles are applied to more tricky factual matrixes, which undoubtedly will arise even in the most developed areas of law, the Court of Appeal has done the best it can now in providing a proper framework conducive to the resolving of such issues.