Oei Hong Leong *v* Goldman Sachs International
[2014] SGHC 128

Case Number : Suit No 834 of 2013, (Registrar's Appeal No 32 of 2014)
Decision Date : 01 July 2014
Tribunal/Court : High Court
Coram : Lee Seiu Kin J
Counsel Name(s) : Siraj Omar and Joanna Chew (Premier Law LLC) for the plaintiff; Andre Maniam SC, Lim Wei Lee and Daniel Chan (WongPartnership LLP) for the defendant.
Parties : Oei Hong Leong — Goldman Sachs International

Arbitration – Stay of court proceedings

1 July 2014

Lee Seiu Kin J :

1 This is an appeal against the decision of the assistant registrar ("AR") allowing the defendant's application for a stay of all further proceedings in the action pursuant to s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). The essential question in this case is which of the competing dispute resolution clauses set out in two different contracts, one favouring arbitration and the other favouring the non-exclusive jurisdiction of the English courts, should this court apply. On 16 April 2014, I heard the parties and I agreed with the AR that the arbitration clauses applied. I therefore dismissed the appeal with costs and now state the grounds for my decision.

The facts

2 The action has been brought by the plaintiff against the defendant in respect of alleged fraudulent representations made by an employee of its sister company, Goldman Sachs (Asia) LLC ("GSA"). On 14 May 2013, the plaintiff met with two GSA employees regarding investment in currency options involving the Brazilian Real ("BRL") and the Japanese Yen ("JPY"). It was alleged that one of the two GSA employees made false representations to the plaintiff, *viz* (a) that BRL was a stable currency because it was anchored to the United States Dollar ("USD") in the same way that the Hong Kong Dollar was pegged to the USD, (b) that BRL/JPY option trades therefore behaved very similarly to USD/JPY option trades, (c) that BRL/JPY option trades could be executed at any time, and (d) that BRL/JPY option trades were sufficiently liquid to enable the trades to be executed and unwound at any time. [note: 1] The representations were allegedly repeated and/or continued by the GSA employee in subsequent emails to the plaintiff on 15 May 2013. [note: 2]

3 Shortly after the receipt of those emails, the plaintiff entered into two BRL/JPY option trades with the defendant as the counterparty. [note: 3] Unfortunately for the plaintiff, from 20 May 2013 onwards, the BRL/JPY rate fell significantly. On 17 June 2013, the plaintiff gave instructions to unwind the BRL/JPY option trades, and this was done so at a loss. [note: 4]

4 The plaintiff then commenced this action on 20 September 2013 to claim compensation for the losses that he had sustained as a result of entering into the BRL/JPY option trades. The defendant, however, applied to stay all further proceedings pursuant to s 6 of the IAA on the basis that the

plaintiff's claims are properly the subject of an arbitration agreement. [note: 5] The plaintiff disagreed. According to the plaintiff, the arbitration clauses that the defendant referred to are inapplicable to the subject-matter of the dispute, and a non-exclusive jurisdiction clause should apply instead.

5 At the heart of these proceedings therefore are competing jurisdiction and arbitration clauses in two contracts between the plaintiff and the defendant. The non-exclusive jurisdiction clause is contained in an International Swap Dealers Association Inc ("ISDA") Master Agreement dated 29 May 2001. The ISDA Master Agreement is a standard agreement made between the plaintiff and the defendant to govern the derivative transactions (including currency options) that they have entered into and/or anticipated entering into. Under cl 13(b) of the ISDA Master Agreement, it is stated that:

> ***Jurisdiction*** **.** With respect to any suit, action or proceedings relating to this Agreement ("Proceedings"), each party irrevocably –
>
> (i) submits to the jurisdiction of the English courts if this Agreement is expressed to be governed by English law …

Part 4(h) of the Schedule to the ISDA Master Agreement provides for the agreement to be governed by English law. It is common ground that cl 13(b) is a non-exclusive jurisdiction clause in favour of the English courts.

6 The arbitration clauses, on the other hand, are contained in a Goldman Sachs Private Wealth Management Client Agreement Pack ("Account Agreement Pack"). The Account Agreement Pack is made between the plaintiff and four Goldman Sachs entities, namely (a) GSA, (b) the defendant, (c) Goldman Sachs & Co, and (d) Goldman Sachs Bank (Europe) PLC. It was described, in a cover letter from GSA to the plaintiff dated 9 September 2011, as "[including] the applicable agreements for the various Goldman Sachs entities that may provide services to [the plaintiff], [describing] the roles and responsibilities of each entity that provides services to [the plaintiff] and [constituting] legally binding terms of business". The plaintiff and the defendant accept that the pertinent arbitration clauses are cl 13.3 of Part D and/or cl 12.3 of Part E of the Account Agreement Pack, which state almost identically that:

> Any dispute arising out of or connected with the Agreement, between [the plaintiff] and [GSA/the defendant] and/or you and any Third Party Beneficiary … shall be referred to and finally be resolved by arbitration with its seat in England conducted in English by three arbitrators pursuant to the LCIA Rules …

The only difference between the two arbitration clauses is that cl 13.3 of Part D pertains to GSA, and cl 12.3 of Part E pertains to the defendant.

7 As mentioned, there was a cover letter to the Account Agreement Pack that the plaintiff received. It notified the plaintiff that:

> … *the [Account Agreement Pack] will supersede all the prior account agreements (including addenda and supplements thereto) in relation to your Account* (whether included in the Old Pack or otherwise). For the avoidance of doubt, any prior specific security arrangements (including cross-collateralisation documents or *trading arrangements (including ISDA documentation) in connection with your Account, however, shall remain effective*. [emphasis added]

8 On 27 March 2012, the plaintiff signed and returned an acknowledgement receipt containing a

similar statement:

> … *the [Account Agreement Pack] … shall supersede all the prior account agreements (including addenda and supplements thereto) in relation to your Account* whether included in the Old Pack (as defined in the Letter) or otherwise, *save for any prior* specific security arrangements including cross-collateralisation documents or *trading arrangements including ISDA documentation in connection with your Account(s) … which will continue to be effective* … [emphasis added]

9 It was about a year after the signing of the acknowledgment receipt that the plaintiff met with the two employees from GSA and the aforesaid events leading to the present dispute unfolded.

The decision below

10 Faced with two potentially applicable agreements, the AR stated that the correct approach for the courts was to consider the terms of the agreements in their respective contexts to determine if the parties only intended one and not the other to apply to their dispute. [note: 6] This would involve an ascertainment of *which agreement is at the commercial centre of the dispute* or *where the centre of gravity of the dispute is*. [note: 7]

11 The AR determined that the Account Agreement Pack was at the commercial centre of the dispute based on the following factors: (a) the alleged fraudulent misrepresentations were made in the course of the plaintiff's private banking relationship with GSA, which is governed by the Account Agreement Pack, [note: 8] (b) the plaintiff would need to rely on clauses in the Account Agreement Pack to demonstrate that the GSA employees were acting as agents for the defendant, and (c) the defendant would need to rely on clauses in the Account Agreement Pack to defend against the plaintiff's claims. [note: 9] Furthermore, the AR found that the parties could not have reasonably intended for fragmentation in the resolution of disputes, as would be the case if the same alleged misrepresentations were being litigated against various Goldman Sachs entities in multiple jurisdictions. [note: 10]

12 In these circumstances, the AR found that parties intended for the arbitration clauses in the Account Agreement Pack to apply. A stay of proceedings in favour of arbitration was accordingly ordered.

The parties' submissions

13 The plaintiff was dissatisfied with the AR's decision and appealed before me. The plaintiff's primary case is that the ISDA Master Agreement is at the commercial centre of his claims and not the Account Agreement Pack. The plaintiff submitted that the supporting factors are as follows: [note: 11]

(a) the transactions that lie at the heart of the plaintiff's claims are the two BRL/JPY option trades, and the BRL/JPY option trades are undoubtedly subject to the ISDA Master Agreement;

(b) the ISDA Master Agreement is specifically tailored to reflect the relationship of the parties in respect of derivative transactions, whereas the Account Agreement Pack is an umbrella document relating to a whole range of services that Goldman Sachs entities (not just the defendant) may provide the plaintiff; and

(c) the cover letter and acknowledgement receipt clearly reflects the parties' intention that

the earlier ISDA Master Agreement is to co-exist with the later Account Agreement Pack and, that being so, the parties are *ad idem* that:

(i) any dispute relating to the ISDA Master Agreement would be resolved in accordance with the non-exclusive jurisdiction clause in the ISDA Master Agreement; and

(ii) all other disputes would be resolved in accordance with the applicable arbitration clauses in the Account Agreement Pack.

14 I note, at this juncture, that the plaintiff's last point does not assist him in showing that the *present dispute* relates to the ISDA Master Agreement and that therefore the non-exclusive jurisdiction clause in the ISDA Master Agreement should apply. The plaintiff had not gone as far as to say that the implication of the later Account Agreement Pack expressed as *not superseding* the earlier ISDA Master Agreement was that the ISDA Master Agreement *prevailed* over the Account Agreement Pack. In fact, the plaintiff rightly conceded that the parties' intention was only for the ISDA Master Agreement to continue in force. Thus, the overall effect of the cover letter and the acknowledgement receipt was this: the Account Agreement Pack swept clean all past relationships, except for certain agreements, such as the ISDA Master Agreement, which were preserved. The status of these preserved agreements was not elevated any higher by the cover letter and the acknowledgement receipt. Notwithstanding this, the plaintiff submitted that the non-exclusive jurisdiction clause should prevail because the ISDA Master Agreement *is* at the commercial centre of the plaintiff's claims. As such, the plaintiff is entitled to commence and continue the action against the defendant and the AR should not have stayed the proceedings.

15 The defendant, however, asserted that the circumstances plainly showed that the parties intended for the Account Agreement Pack to apply. The defendant highlighted that the plaintiff's claim of fraudulent misrepresentations is in substance concerned with the relationship of the parties leading to the BRL/JPY option trades rather than the BRL/JPY option trades in and of themselves. [note: 12] Not just that, the plaintiff's claims are focussed on alleged misrepresentations by GSA employees, which occurred *before* the BRL/JPY option trades were executed, thus the identity of the defendant as the contractual counterparty to the BRL/JPY option trades as well as the execution of the BRL/JPY option trades by the defendant are immaterial to the substance of the plaintiff's claims. [note: 13]

16 A comparison between the Account Agreement Pack and the ISDA Master Agreement was drawn to further show that the plaintiff's claims are more closely connected to the former rather than the latter: [note: 14]

(a) the Account Agreement Pack is the only contractual arrangement which ties in GSA, the defendant and their affiliates, and addresses in the round:

(i) the nature of the *relationship* between GSA and the plaintiff; and

(ii) the *services provided pursuant to that relationship* by GSA, the defendant and their affiliates, *including the BRL/JPY option trades which GSA arranged for the defendant to act as counterparty*; whereas

(b) the ISDA Master Agreement governs the specific *operation* of over-the-counter derivative transactions, *which the present dispute is not concerned with*.

17 Lastly, the defendant submitted that the plaintiff's own pleadings are revealing: the plaintiff did

not even cite the ISDA Master Agreement in his statement of claim ("SOC"), nor did he seek any relief thereunder. [note: 15] In contrast, the plaintiff had relied on cl A4 of Part B of the Account Agreement Pack to show that GSA is an agent of the defendant. In seeking *ex parte* leave to serve the writ of summons and the SOC on the defendant out of jurisdiction, the plaintiff had also admitted, as a matter of full and frank disclosure, that "there may be provisions within the documents listed … that the defendant may rely on to oppose this Application". [note: 16] The defendant submitted that one of these provisions is cl 10 of Part D of the Account Agreement Pack (which provides that Goldman Sachs entities do not give investment advice to the plaintiff). [note: 17]

The applicable test

18 Under s 6 of the IAA, a stay must be granted if the current proceedings are "in respect of any matter which is the subject of the [arbitration] agreement". The question before this court therefore is whether the plaintiff's claims are the subject of the arbitration clauses in the Account Agreement Pack or the non-exclusive jurisdiction clause in the ISDA Master Agreement.

19 However, before this court can proceed to analyse which of the competing dispute resolution clauses to apply, it must first address the defendant's contention that there is a low threshold for ordering a stay of proceedings. The defendant submitted that, if it is *at least arguable* that the plaintiff's claims are the subject of a binding arbitration agreement, then a stay must be granted. [note: 18] This is said to be consistent with the principle of *kompetenz-kompetenz* and the principle of judicial non-intervention in arbitration. Given that the tribunal has competence to rule on its competence, the defendant submitted that the courts should leave the jurisdictional issue to be properly dealt with by the tribunal by staying the proceedings once it is shown that there is an *arguable* case that the tribunal has jurisdiction over the matter, *ie*, the plaintiff's claims are the subject of the arbitration clauses.

20 The defendant cited the Court of Appeal decision in *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*") in support of its submission. In that case, parties were similarly at odds with whether the appellants' claim was embraced by an arbitration clause, though, unlike the present case, there was only one relevant dispute resolution clause (*ie*, the arbitration clause). At [24], V K Rajah JA recognised that there was a preliminary point on "whether the court has the jurisdiction to decide whether there is a matter which is the subject of the arbitration agreement". There appeared to be a tension between the courts respecting the authority of an arbitral tribunal to determine its own jurisdiction and examining for themselves the jurisdiction of the arbitral tribunal. V K Rajah JA said, at the same paragraph:

> … Unfortunately, there is no silver bullet that can resolve this tension and the best approach to resolving this conceptual difficulty is the robust application of judicial common sense, whilst always bearing in mind the limited role that the courts are expected to play in matters that appear to have been referred to arbitration. We noted that both Woo J in *Dalian* … and Lightman J in *Nigel Peter Albon v Naza Motor Trading Sdn Bhd (No 3)* [2007] EWHC 665 (Ch) (in the context of whether an arbitration agreement had been concluded) took the position that it is the court that determines whether the arbitration agreement applies; although Woo J was quick to add the important caveat that if it was at least arguable that the matter is the subject of the arbitration agreement, then a stay of proceedings should be ordered. We agree with the measured approach taken by Woo J since the question of whether a matter is the subject of an arbitration agreement is the very threshold to the application of s 6 of the IAA itself. However, it is only in the *clearest* of cases that the court ought to make a ruling on the inapplicability of an arbitration agreement. … [emphasis in original]

21 Thus, it would seem that the defendant's "at least arguable" test finds affirmation in the Court of Appeal in the context of a claim which arose out of a share and purchase agreement containing a broadly-worded arbitration clause. In a single-contract situation, like in *Tjong Very Sumito*, this makes eminent sense. The parties had freely entered into an agreement to arbitrate their disputes. There was no other competing dispute resolution clause that could apply. Therefore, as a matter of holding the parties to their agreement on the mode of dispute resolution, the court ought to order a stay of proceedings and allow the arbitrators to determine whether or not they had jurisdiction if there was an arguable case before the court that the dispute was the subject of the parties' arbitration agreement.

22 The defendant also cited several Canadian and Hong Kong cases in support of its submission that the test for granting a stay of proceeding is an *arguable* case that the dispute is the subject of an arbitration agreement. I note, at the outset, that all these cases are also concerned with a single contract containing an arbitration clause. Four of the seven cases involved the *scope* of the arbitration clause. In *Agrawest Investments Limited and another v BMA Nederland BV* 2005 PESCTD 36, *David John Cooper and others v Paul Deggan* 2003 BCCA 395 and *Gulf Canada Resources Ltd v Arochem International Ltd* (1992) 66 BCLR (2d) 113, the issue can be framed as either whether the parties have agreed to arbitrate the particular matter or whether the matter falls within the terms of their arbitration agreement. The fourth case, *PCCW Global Ltd v Interactive Communications Service Ltd* [2007] 1 HKLRD 309, is more interesting in that the contract contained two dispute resolution clauses; nevertheless, the issue was essentially about the scope of the arbitration clause as the court viewed at [59] that "the only remaining question [to be] whether a billing dispute falls within the ambit or scope of [the arbitration clause]" in spite of another clause which specifically dealt with billing disputes in a different way.

23 The other three cases are concerned with the *existence* of an arbitration agreement between parties. In *Pacific Crown Engineering Ltd v Hyundai Engineering & Construction Co Ltd* [2003] 3 HKLRD 440, each party claimed a different version of the contract and therefore could not agree whether the contract which bound them contained an arbitration clause. In *Pacific International Lines (Pte) Ltd and another v Tsinlien Metals and Minerals Co (HK) Ltd* [1993] 2 HKLR 249, the defendant had signed a document with a third party that was faxed by the plaintiffs to the third party, and the issue was whether there was an arbitration agreement between the plaintiffs and the defendant. In the last case, *Star (Universal) Co Ltd and another v Private Company "Triple V" Inc* [1995] 2 HKLR 62, the issue was whether an underlying agreement to arbitrate still subsisted despite the existence of a subsequent agreement.

24 The common thread amongst these cases is that the dispute was only ever referable to a single contract which contained an arbitration clause. The arbitral tribunal was intended to have primacy in the sense that parties expected all their questions (even jurisdictional questions about the scope or existence of the arbitration agreement) arising out of their contract to be comprehensively decided by arbitration. In general, the principle of *kompetenz-kompetenz* is necessary to surmount the conceptual paradox of arbitrators having the jurisdiction to determine their own jurisdiction, which includes making a finding that they lack jurisdiction: see *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard and John Savage eds) (Kluwer Law International, 1999) at p 396. The principle of judicial non-intervention ensures that the courts do not assume jurisdiction over matters which are intended to be arbitrated. Both principles work in tandem to give effect to the commercial expectations of the parties to have their questions settled by arbitration.

25 Turning back to the present case, which involves, not one, but two competing modes of dispute resolution, the issue takes on a different complexion. In a situation where there is only one contract containing an arbitration clause, I agree that the principle of *kompetenz-kompetenz* and the

principle of judicial non-intervention are applicable. However, in the present situation where there are competing arbitration clauses and non-exclusive jurisdiction clauses, and parties cannot agree on which to apply, I find that there is a separate question of which dispute resolution clause the parties objectively *intended* to apply.

26 What is the parties' intention with regards to the competing dispute resolution clauses? The cases thus far have taken parties to have intended to apply the dispute resolution clause in the contract *out of which the claim arose* or that is *closer in connection to the claim*. In *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821 ("*Transocean*"), Andrew Ang J had to consider two contracts with competing dispute resolution clauses, much like the present case. One had a non-exclusive jurisdiction clause in favour of the Singapore courts and the other had an arbitration clause. In holding that the non-exclusive jurisdiction clause prevailed over the arbitration clause in respect of the plaintiff's claim, the judge said at [26]:

> … 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.* … [emphasis added]

27 This decision would go *against* the defendant's submission that an "at least arguable" test applies in the context of competing dispute resolution clauses. If all that was required was an *arguable* case, then in *Transocean*, it would have been unnecessary to find out which contract had the closer connection to the claim or out of which contract the claim arose. An arguable case that the claim was subject to an arbitration agreement would have been made out on the ground that the arbitration clause was "wide enough to cover the claim". The outcome could only be that the court must stay the proceedings so that the *arbitrators* could decide which contract had the closer connection to the claim or out of which contract the claim arose, and whether therefore they had jurisdiction over the claim. This, of course, raises the following question: why should the courts *not* be allowed to decide which dispute resolution clause parties intend to apply to a dispute. The courts are in no worse position than the arbitrators to decide. One needs only to look at *Transocean* as well as *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal and another* [2011] EWHC 1842 (Comm) ("*PT Thiess*"), which approved of the approach in *Transocean*, for examples of courts deciding with finality whether an arbitration clause or a different dispute resolution clause applies to the dispute.

28 For the sake of completeness, I will say a few words on *PT Thiess.* In *PT Thiess*, the first contract provided for mediation, followed by expert determination, and then arbitration. The last stage of arbitration was reached by the time the case was heard by the court. The second contract provided for the non-exclusive jurisdiction of the English courts. Significantly, the court rejected the first defendant's submission that a stay should be imposed simply because there may be a degree of overlap between the dispute resolution clauses. The essential question was instead whether the substance of the dispute *arose under or in connection with* the first contract so as to attract the mandatory statutory stay. In that case, it did not, and so Blair J refused the stay application.

29 I am therefore not persuaded that the defendant's "at least arguable" test is appropriate in the present case. The first reason, as can be evinced from above, is that it is inconsistent with the test that is applied in *Transocean* and *PT Thiess*. For ease of reference, I shall hereafter call this test the "objective intention" test. The second reason is that adopting the "at least arguable" test will effectively result in arbitration clauses carrying more weight. For instance, in the present case, by

the plaintiff's admission that the dispute *could* fall within the ambit of the arbitration agreement in the Account Agreement Pack, [note: 19] an arguable case would in fact be made out and proceedings therefore ought to be stayed. However, there is no presumption that an arbitration resolution clause, even if drafted very broadly, should apply. *The issue is one of ascertaining the parties' intention*, which is achieved by applying the "objective intention" test. In my view, the principle of *kompetenz-kompetenz* does not apply in the present context where the court is required to make a determination between an arbitration clause in one contract and a jurisdiction clause in another. In such a situation, there is a separate step of ascertaining the parties' intentions as to the manner of resolving their disputes. When it comes to *enforcing* their agreement, it follows that a stay of proceedings should only be granted where it is shown that the matter is the subject of an arbitration agreement, and not merely arguably so.

Applying the "objective intention" test

30 To recapitulate, the central task in determining which of the competing dispute resolution clauses apply to the plaintiff's claims is a "careful and commercially-minded construction" of the two contracts: see to *Dicey, Morris and Collins on The Conflict of Laws* (Sir Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed with 4th Cumulative Supplement, 2010) at para 12–094. Various terms are used to describe this exercise. They are essentially one and the same. In *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998; [2011] 1 Lloyd's Rep 106, it is referred to as locating the "centre of gravity of the dispute", whereas in *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585; [2009] 2 Lloyd's Rep 272 ("*UBS AG*"), it is a search for the "the agreements which are at the commercial centre of the transaction".

31 In any case, this exercise goes beyond a contemplation of the literal wording of the dispute resolution clauses. This is because, *even if the dispute resolution clauses overlap*, there is a presumption that parties would act commercially and would not intend for similar claims to be subject to inconsistent clauses: *UBS AG* per Lord Collins of Mapesbury at [95].

Relevance of each contract

32 I find it useful to begin by assessing the relevance of each contract to the present dispute. There are three salient points here and they all favour a finding that the arbitration clauses in the Account Agreement Pack ought to be applied.

33 Firstly, the claim against the defendant hinges upon GSA acting as the agent for the defendant. Pertinently, cl A4 of Part B of the Account Agreement Pack provides:

> You acknowledge and agree that [GSA] acts as your agent in dealing with [the defendant] … in connection with the Services provided by [the defendant] … (e.g. arranging for your Transactions to be executed and settled by [the defendant] …) and that [GSA] also acts as the agent of [the defendant] … in their provision of Services to you (e.g. committing [the defendant] … to executing and settling Transactions for you …).

As far as the plaintiff was concerned, he was dealing with GSA and its employees. Clause A4, however, forged the necessary connection between the plaintiff and the defendant by providing that GSA acted as the defendant's agent. One might say *that it is only because of the agency clause in the Account Agreement Pack that the ISDA Master Agreement between the plaintiff and defendant became relevant to the dispute.* In this sense, the ISDA Master Agreement is one step removed from the present dispute.

34 Secondly, a possible defence against the plaintiff's claims arises under cl 10 of Part D of the Account Agreement Pack. It provides, generally, that the information made available by GSA and its affiliates is not to be considered as "investment advice", and GSA and its affiliates shall not be liable for the information on which the plaintiff relied to make any investment decision. I find that the non-advice clause places the dispute closer to the Account Agreement Pack.

35 Thirdly, plaintiff has not relied on any provision in the ISDA Master Agreement, whether to show a breach or to rebut a defence.

Pith and substance of the dispute

36 More importantly, the court must consider the pith and substance of the dispute as it appears from the circumstances in evidence (and not just the particular terms in which the claims have been formulated in court): *PT Thiess* at [35].

37 What then is the pith and substance of dispute? First and foremost, it revolves around the alleged fraudulent misrepresentations made to the plaintiff that led him to execute the BRL/JPY option trades. These alleged misrepresentations were made in the course of the plaintiff's banking relationship with the Goldman Sachs group of companies. I accept the defendant's argument that the present dispute has little to do with the ISDA Master Agreement because it primarily governs the operation of derivative transactions. If, for example, the dispute was about a default in meeting a margin call, then the ISDA Master Agreement would apply. However, the present dispute is not about either parties' performance under the ISDA Master Agreement. It is therefore not surprising that none of its provisions were relied upon by the parties. The Account Agreement Pack, on the other hand, has a closer connection to the present dispute because it governs the parties' bank-customer relationship. This is highlighted by the applicability of cl A4 of Part B and cl 10 of Part D of the Account Agreement Pack to the dispute.

38 Secondly, the identity of the defendant as the counterparty to the BRL/JPY option trades is not at the centre of the dispute. The weight of the evidence leans towards a finding that the plaintiff was not concerned about who the actual counterparty to the option trades was: (a) he addressed his initial complaint about the alleged misrepresentations to GSA and the Hong Kong regulators of GSA, (b) he was unaware of the identity of the counterparty when the option trades were entered into, because he had not been provided with any term sheet prior to the entry into the transactions, and (c) it appeared that he would have made the same complaint irrespective of whichever entity ultimately acted as counterparty, because everything would come back to what was said to him by the GSA employee. [note: 20] The fact that the defendant was the counterparty was merely incidental. It was GSA that decided which Goldman Sachs entity was to be the counterparty to execute the option trades, and it could well have been any of the other Goldman Sachs entities that was arranged to be the counterparty to the plaintiff's option trades.

39 Relatedly, the agency between GSA and the defendant revealed the nature of the banking business; GSA was responsible for fronting the transactions to be executed with banking clients and selecting counterparties for these transactions, and the defendant was responsible for actually executing these transactions. Thus, insofar as communications to the plaintiff are concerned, GSA appears to be the more closely related party. In fact, I would venture to say that the bank-customer relationship (between GSA and the plaintiff) forms the substance of the present dispute. I also find that the dispute regarding the alleged misrepresentations *arises* out of the GSA-plaintiff relationship. Correspondingly, the dispute ought to be governed by the Account Agreement Pack.

Conclusion

40 For the reasons above, I found that the present dispute is more closely related to the Account Agreement Pack and that the arbitration clauses in the Account Agreement Pack apply. I was satisfied that the AR's decision in staying the proceedings was correct and therefore dismissed the appeal with costs.

[note: 1] statement of claim dated 20 September 2013 ("SOC"), p 3, para 7

[note: 2] plaintiff's written submissions ("PWS") dated 16 April 2014, p 4, para 12

[note: 3] SOC, p 9, para 13

[note: 4] SOC, p 12, para 20

[note: 5] defendant's written submissions ("DWS") dated 2 January 2014, p 3, para 5

[note: 6] *Oei Hong Leong v Goldman Sachs International* [2014] SGHCR 2 ("*Oei Hong Leong*") at [20]

[note: 7] *Oei Hong Leong* at [24]

[note: 8] *Oei Hong Leong* at [24], [27]

[note: 9] *Oei Hong Leong* at [25]

[note: 10] *Oei Hong Leong* at [28]

[note: 11] PWS, pp 16, 20-21, paras 37, 47

[note: 12] DWS, p 23, para 52

[note: 13] DWS, p 29, para 67

[note: 14] DWS, pp 30-31, para 68

[note: 15] DWS, p 32, para 68(f)

[note: 16] Oei Hong Leong's affidavit evidence-in-chief ("AEIC") dated 26 September 2013, pp 12-13, para 34

[note: 17] Jeremy Philip Herman's AEIC dated 6 November 2013, pp 8-9, para 21

[note: 18] defendant's skeletal submissions dated 14 April 2014, p 3, para 9

[note: 19] PWS, p 10, para 22

[note: 20] David Joseph's AEIC dated 19 December 2013, pp 17-18, paras 35-37