UBS AG v THE MAURITIUS COMMERCIAL BANK LTD

2016 SCJ 43

Record No. 112173

THE SUPREME COURT OF MAURITIUS

UBS AG

Applicant

v.

The Mauritius Commercial Bank Ltd

Respondent

JUDGMENT

In an action entered by the respondent against the applicant before the Commercial Division of the Supreme Court, the applicant made a 'Section 5 claim' for stay of Court proceedings in favour of arbitration, contending that the action entered by the respondent was the subject of an arbitration agreement. Consequently, pursuant to section 5 (1) of the International Arbitration Act 2008 (the Act), the Commercial Division transferred the matter to this Court, as constituted under section 42 of the Act.

The respondent's action before the Commercial Division was directed against the applicant (there defendant No. 2), together with the applicant's Singapore Branch (there defendant No. 1), for contractual negligence and *faute*, claiming, inter alia, damages in an amount of USD 13,031,218.

The applicant's case

The applicant's case is that the respondent's action before the Commercial Division is the subject of an arbitration agreement contained in a Facility Agreement and must therefore be referred to arbitration.

The respondent's case

From the affidavit evidence, the respondent's case is in substance as follows:

(a) the dispute is not under the Facility Agreement but is in respect of an undertaking given by the applicant in a Side Letter which is "outside of" and distinct from the Facility Agreement and the arbitration clause in the Facility Agreement does not extend to the dispute between the parties under the Side Letter;

(b) the arbitration clause under the Facility Agreement is

(i) inoperative; and

(ii) manifestly inapplicable.

The contentions of both parties are set out with more details under the heading "Consideration of the present matter".

The 'Section 5 claim'

The 'Section 5 claim' was made before the Commercial Division on 2nd February 2015 and the matter was mentioned for the first time before this Court on 21st September 2015.

Automatic Transfer from the domestic jurisdiction to the adjudicating Court

Section 5 of the Act governs referrals to international arbitration, irrespective of whether or not the juridical seat is in Mauritius. Section 5 (1) provides as follows:

> (1) *Where an action is brought before any Court, and a party contends that the action is the subject of an arbitration agreement, that Court shall automatically transfer the action to the Supreme Court, provided that that party so requests not later than when submitting his first statement on the substance of the dispute*.

The manner in which a 'Section 5 claim' is made is governed by the **Supreme Court (International Arbitration Claims) Rules 2013 (the Rules)**, Rule 13 (1) in particular, which the legal advisers should follow. Under section 5 of the Act, where a party contends in an action before a Court that the action is the subject of an arbitration agreement, the Court should deal with the matter without delay. After verifying that the procedural condition provided in section 5(1) has been satisfied, it should automatically transfer the matter to the adjudicating Court.

Degree of scrutiny under section 5 (2) of the Act

Following a transfer under section 5(1), the extent of the examination that the adjudicating Court will undertake is provided under section 5 (2) of the Act as follows:

> "*(2) The Supreme Court shall, on a transfer under subsection (1), refer the parties to arbitration unless a party shows, on a prima facie*

> *basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed, in which case it shall itself proceed finally to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed.*

The *prima facie* basis

Initially, the degree of examination allowed to the Court is a ***prima facie*** one only, where the Court will act on the affidavits or witness statements placed before it. The principle is that the Court must refer the matter to arbitration, that is, it must give the arbitrator the opportunity to decide the jurisdictional issue first, unless the party who is objecting to the matter being referred to arbitration discharges the burden, which has been placed squarely on him, by showing that there is **a very strong probability** of the arbitration agreement being null and void, inoperative or incapable of being performed, in which case the Court will then have to proceed to finally determine whether the arbitration agreement is in fact so. The burden put in this way means that the hurdle has been set high since the objecting party has to satisfy, on a *prima facie* basis, the very high threshold imposed by the "*very strong probability*" standard.

The fact that the "*very strong probability*" test is "*a very high one*" was also remarked in **Mall of Mont Choisy Limited v Pick 'N' Pay Retailers (Proprietary) Limited & Ors** [2015 SCJ 10]. However the Court in that case further said: "*The judgment of the Supreme Court of Canada in the case of **Dell Computers [Dell Computer Corporation v Union des Consommateurs and Olivier Dumoulin (2007) 2. S.C.R. 801]** indicates that this test may be satisfied when 'the challenge to the arbitrator's jurisdiction is based solely on a question of law'"*. It is important at this juncture to make an observation regarding the 'general rule of referral' (the **Dell** test) designed by the Supreme Court of Canada in **Dell Computer (supra)**, which was referred to with agreement in the **Mall of Mont Choisy** (supra). It must be emphasised that the **Dell** test is not the test that is provided under our law.

It was submitted before us on behalf of the applicant that the respondent "appears" to have raised issues of fact or mixed issues of fact and law and therefore, "*following the approach in **Mall of Mont Choisy***", this Court is not the proper forum in that respect as the respondent's challenge is not based solely on a question of law.

The "**very strong probability**" ***prima facie*** test under section 5 (2), which this Court must apply when dealing with a 'Section 5 claim', is specific to our law

and is not the test formulated in **Dell** for reviewing an application to refer a dispute to arbitration**.**

In **Dell**, points of law were raised relating to the application of the Quebec private international law and as to whether the class action in question was of public order. The **Dell** test was developed, having regard to the provisions of *articles 940.1 and 943* of the Quebec Code of Civil Procedure, the study of the Quebec case law on arbitration and "*the prima facie analysis test*" that was said to be "*increasingly gaining acceptance around the world*". It is stated at paragraph 87 of the judgment in **Dell** that "*As for the exception under which a court may rule first on questions of law relating to the arbitrator's jurisdiction, this power is provided for in art. 940.1 C.C.P., which in fact recognizes that a court can itself find that the agreement is null rather than referring this issue to arbitration*". It is however noteworthy, as pointed out in the UNCITRAL 2012 Digest of Case law on the Model Law on International Commercial Arbitration (the UNCITRAL 2012 Digest) at pages 45-46, that some Courts in Canada have not always followed the *prima facie* approach and have in certain cases continued to undertake a full review.

Unlike the '*prima facie*' examination provided under our section 5 (2), the **Dell** test is intrusive as it provides that the arbitral tribunal should generally be allowed to rule on the challenge to its jurisdiction first, unless the challenge raises a question of law or a mixed question of fact and law requiring only a superficial consideration of the evidence. The *prima facie* approach of **Dell** with regard to the power of the Court and the arbitrator is referred to in *E. Gaillard* and *Y. 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 (E. Gaillard & D. di Petro, eds.) (2008 Cameron May, London)**, p257 et. sec, where it is said that

> "*Although this decision, which lays down a 'general rule of referral', is considered as having clearly adopted the negative effect of competence-competence, the limitation of the arbitrators' power to rule on their jurisdiction to the sole facts of the case, and the upholding of the courts' power to 'rul[e] on the arbitrator[s'] jurisdiction' in relation to questions of law narrow the recognition of the rule of priority in favour of the arbitrators."*

In contrast to the "*prima facie*" test formulated in the **Dell** case**,** our law, by virtue of section 5 (2) of the Act, has not provided any such restriction.

A party can, in a variety of scenarios, rely on the facts and the law to argue that the arbitration agreement is null and void, inoperative or incapable of being performed. The *prima facie* "very strong probability" test under section 5 (2) has to be

satisfied irrespective of whether the party's opposition to referral is based purely on a question of law or whether it is based on factual evidence or a mixture of law and fact, as our law does not make any such distinction. The party objecting to the matter being referred to arbitration must show on a *prima facie* basis that there is a very strong probability of the arbitration agreement being null and void, inoperative or incapable of being performed.

This Court must adhere to the legal framework provided in section 5 (2) of the Act governing referral matters. When dealing with international arbitration cases, it is of vital importance for the sake of legal certainty that the Court applies the provisions of section 5(2) so that parties may be able to predict the outcome of a challenge under that section before deciding what course of action to take, having regard to various matters, including the issue of costs. The Court will thereby also be able to easily detect if resort has been had to delaying tactics.

The stage of finally determining the issue of nullity, inoperativeness or incapability of being performed

In view of the heavy burden placed on a party to satisfy the initial stage on a *prima facie* basis, it is evident that only in very rare cases will the Court have to finally decide the issue whether the arbitration agreement is actually null and void, inoperative or incapable of being performed.

The Act does not specify whether the Court will then finally determine the issue on the material already placed before it at the initial stage or after hearing evidence. At the relevant time, depending on the circumstances, the Court will take the appropriate course in order to do justice.

If at that final stage the Court reaches the conclusion that the arbitration agreement is in fact null and void, inoperative or incapable of being performed, it will then not refer the matter to arbitration and will return the action to the competent Court to be proceeded with, as provided under section 5 (3) of the Act:

> *(3) Where the Supreme Court finds that the agreement is null and void, inoperative or incapable of being performed, it shall transfer the matter back to the Court which made the transfer".*

The competent Court will then resume its proceedings in accordance with Rule 13 (6) (a) after discharging the stay order it had made under Rule 13 (2).

However, if at the final stage the adjudicating Court determines that the arbitration agreement is not null and void, inoperative or incapable of being

performed, it will, just as where the respondent has not discharged the *prima facie* burden at the first stage, refer the parties to arbitration.

Respondent's submissions

1. The application and interpretation of the Act

Mr Sauzier SC for the respondent submitted that by virtue of **section 2B** of the Act, when applying and interpreting the Act and in developing the law applicable to international arbitration in Mauritius, recourse may be had to international materials, such as case law, articles and commentaries relating to the UNCITRAL Model Law, but that in dealing with this case "*relevance to French law is to be completely bypassed*" by this Court.

Mr Sauzier SC has not elaborated on his submission to explain the point he wanted to make and what was the purpose of referring to the "*relevance to French law*", which he said this Court should not consider in this matter. **Section 2B(b)** of the Act provides that in applying and interpreting the Act and developing the law applicable to international arbitration in this country unsettled questions **on matters governed by the Amended Model Law** shall be considered in conformity with the general principles on which **that law** in based.

It is relevant to point out that section 5 (2) of the Act is a modified version of the provision of Article 8 of the Model Law and is specific to our law on International Arbitration. As far as the Court's scrutiny in respect of referral to arbitration is concerned, the provision of Article 8(1) of the Model Law is different from that of section 5 (2) of the Act. The relevant part of Article 8(1) provides that "*A court before which an action is brought in a matter which is the subject of an arbitration agreement shall…..refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed*." [Emphasis added]. The plain meaning of this provision indicates that the Court must in all cases decide whether the arbitration agreement is null and void, inoperative or incapable of being performed. This is in fact the principle on which Article 8 of the UNCITRAL Model Law is based. This is apparent in ***Howard M. Holtzmann and Joseph E. Neuhaus*, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, (Kluwer Law International 1989) pp. 301-302** where it is stated that:

> "*the scope of the court's inquiry into the validity of the arbitration agreement is the same as under Article II(3) of the New York Convention: the court may decline to refer the parties to arbitration only if it finds that the agreement is "null and void, inoperative or incapable of being performed." The Working Group declined to make three proposed changes in this*

language. First, it refused to add the term "manifestly" before "null and void." This would have limited the court to a prima facie finding that the arbitration agreement was valid. It was felt that the issue should be "settled" by the court before referring the parties to the arbitral tribunal."

Whereas the Act, while adopting the Model Law, has not adopted the same provisions of Article 8(1) so that the adjudicating Court would not fully verify the validity of the arbitration agreement except in rare cases where the respondent would have satisfied the *prima facie* "very strong probability" high burden. Therefore, by virtue of section 5 (2), where in particular, a very high burden is thrust on the party objecting to arbitration, the Act has modified Article 8(1) of the Model Law to create and give effect to our application of the "negative effect" of the Competence-Competence principle. The Court would refer the parties to arbitration save in the exceptional circumstances where the respondent satisfies the "very strong probability" test at the *prima facie* stage and the Court finds that the arbitration agreement is in fact null and void, inoperative or incapable of being performed.

2. The arbitration agreement is "inoperative" and "manifestly inapplicable".

The respondent has in its affidavit asked the Court to find that the action is "***outside of***" the scope of the arbitration agreement and that the clause cannot be extended to it [point (a)]. However, the ground relied on by the respondent in its prayer is that the arbitration clause is "**inoperative**" [point (b) (i)], and in the submission offered on its behalf it was stated that the arbitration clause is "**manifestly inapplicable**" to the action which cannot be referred to arbitration [point (b) (ii)].

With regard to the above, the Court has considered the oral submissions of Mr Sauzier SC as we have not received his written submissions. Mr Pursem SC for the applicant has, in his written submissions and in Court, stated that the dispute in the Side Letter is inextricably linked with the Facility Agreement and the arbitration agreement found therein. Whereas Mr Sauzier SC has not expounded or made any difference between his submission that the arbitration agreement is "*manifestly inapplicable*" to the dispute in the Side Letter, which he says is a stand-alone letter, and the point raised in the respondent's affidavit that the arbitration agreement is "*inoperative*". This has required the Court to take a closer look at the provisions of section 5 of the Act compared to the provisions of Article 8 of the Model Law. Under Article 8 of the Model Law, a matter will not be referred to arbitration unless the Court is also satisfied that it is "*the subject of an arbitration agreement*". This means that the Court will have to look at the scope of the arbitration agreement to see whether it is applicable to the dispute in question. This is the generally accepted interpretation of that provision of Article 8 of

the Model Law. For instance, it is stated in **G. B. Born, "International Commercial Arbitration" (Second Edition),** (Kluwer Law International 2014) pp 1318-1319 that

> "*Article 8 of the Model Law provides for the dismissal or suspension of litigation of "a matter which is the subject of an arbitration agreement," referring to matters falling within the arguable scope of the parties' arbitration agreement*."

In that context, it is also worth mentioning that in France which is famous for its application of the negative effect of Competence-Competence, in circumstances where the judge is empowered to make a *prima facie* verification, the manifest inapplicability of the arbitration agreement to the dispute has to be considered. This is clear from ***article 1448 alinéa 1*** of the French ***Code de Procédure Civile*** (2015 edition), which provides as follows:

> "*Lorsqu'un litige relevant d'une convention d'arbitrage est porté devant une juridiction de l'Etat, celle-ci se déclare incompétente sauf si le tribunal arbitral n'est pas encore saisi et si la convention d'arbitrage est manifestement nulle ou manifestement inapplicable*." [Emphasis added].

Compared to the provisions of Article 8 of the Model law, it is provided under section 5 (1) of the Act that if a party contends that the action is the subject of an arbitration agreement the action is transferred to the adjudicating Court. The Court then acts in accordance with the provisions of section 5 (2) and (3).

On a transfer under section 5 (1) of the action where a party has contended that the action is the subject of an arbitration agreement, section 5 (2) of the Act requires the adjudicating Court to refer the parties to arbitration if the respondent who is objecting to the referral has not been able to satisfy the Court, on a *prima facie* basis, that there is a very strong probability of the arbitration agreement being null and void, inoperative or incapable of being performed. There is no specific provision under section 5 (2) as to how, if at all, the adjudicating Court is to approach an applicant's contention that the action is the subject of an arbitration agreement. The Court will deal with this aspect below under the heading "Challenge of applicant's contention under section 5 (1)".

Before dealing with this aspect, and in relation to the present case, the Court has to consider whether by arguing that the arbitration agreement is "*manifestly inapplicable*" to the dispute and also contending that the arbitration agreement is "*inoperative*", the respondent is saying that both terms have the same meaning with regard to referral to arbitration in respect of an international arbitration. It is a fact

that section 5 (2) has retained the phrase "*null and void, inoperative or incapable of being performed*" in Article 8 of the Model Law, which also appears in Article II (3) of the New York Convention. However, under these texts, that is Article 8 of the Model Law and Article II (3) of the New York Convention, the condition of "applicability" of the arbitration agreement to the subject matter of the action is one of the conditions that have to be satisfied for referral to arbitration.

Even under an interpretation pursuant to section 2B of the Act in conformity with the general principles on which the Model Law is based, the phrase "null and void, inoperative or incapable of being performed" would not, in this Court's view, encompass "inapplicability" of the arbitration agreement to the dispute. The Court's view is reinforced when considering the following extract from **F. Bachand, F. Gélinas "The UNCITRAL Model Law After Twenty-Five Years: Global Perspectives on International Commercial Arbitration" (2013)** at page 40**:**

> *"A Canadian court has decided the term 'null and void, inoperative or incapable of being performed' as a reflection of the common law concepts of void or voidable contracts ("null and void"), unenforceable contracts ("inoperative"), and frustrated contracts ("incapable of being performed"). **Courts in Model Law jurisdiction have thus far given the term a more restrictive meaning**".*[Emphasis added].

Examples of how the Courts have interpreted the term 'null and void, inoperative or incapable of being performed' were given in the above work showing the trend in the Model Law jurisdictions. We also find examples in the UNCITRAL 2012 Digest.

In **Jean Charbonneau v. Les Industries A.C. Davie Inc**, **14 March 1989 (Clout Case 66)**, where under the arbitration clause one of the parties to the dispute had to act as arbitrator, it was held that the arbitration clause was "inoperative" as the party could not act as an impartial arbitrator, being a party to the contract.

In ***Charles Njogu Lofty v. Bedouin Enterprises Ltd.*, Court of Appeal at Nairobi, Kenya, 16 September 2005**, referred to in UNCITRAL 2012 Digest at p 48 FN 228, the case involved two related actions that raised similar issues and involved the same parties. The Court held that the failure of the party seeking a referral order to invoke Article 8 in a timely manner in one action prevented it from seeking the referral of the other action to arbitration, the arbitration agreement having become "inoperative" as regards the disputed issues.

A case that is referred to in the UNCITRAL 2012 Digest at page 42, FN 186, amongst examples where the arbitration clause was found to be incapable of being performed, is the German case **(CLOUT Case 557)** of **[Bayerisches Oberstes Landesgericht, Germany, 4 Z SchH 13/99, 28 February 2000]**. The arbitration clause was ambiguous as to the arbitral tribunal chosen by the parties. The Court found that it was impossible to determine the competent tribunal and declared the arbitration proceedings inadmissible.

Since the respondent has also used the term "*inoperative*" in its contention against the arbitration agreement, together with the terms "*manifestly inapplicable*" and "*outside of*", this Court has tried to see whether "inapplicable" is meant to be covered by the term "null and void, inoperative or incapable of being performed" in section 5 (2). The Court does not find that literally these words encompass the notion of "inapplicability" of the arbitration agreement to the dispute in question. In the Concise Oxford English Dictionary (10th Ed) the meaning of the word "*inoperative*" is given as "*not working or taking effect*". The meaning of "inapplicable" from the same dictionary is "*not relevant or appropriate*". This Court is of the view that a clause is "inoperative" when it is so rendered by inherent or acquired procedural defect that the clause itself cannot operate or take effect; it does not have the same meaning as where a clause is "inapplicable", that is "*not relevant or appropriate*" to the action because the dispute, subject matter of the action, does not come within the ambit of the clause. Similarly, a clause is "*incapable of being performed*" when there is a failing or deficiency in itself that prevents it from being executed. There tends to be some overlapping between the ground that the clause is "*incapable of being performed*" and the ground that it is "*inoperative*", but this Court takes the view that they do not mean that the clause is "*inapplicable*" to the action. The Court considers that it would be inappropriate to stretch the meaning of these widely adopted terms in this sense. The Court therefore holds that the term "*null and void*, *inoperative or incapable of being performed*" in section 5 (2) does not cover "*inapplicable*" to the dispute, subject matter of the action.

Now, in view of the submission of Mr Sauzier SC, the Court understands the main argument of the respondent, in raising the points that the arbitration agreement is "*inoperative*" and that the Side Letter is "*outside of*" the ambit of the arbitration agreement, to be that the arbitration agreement is "*manifestly inapplicable*" to the dispute, subject matter of the action.

3. Challenge of applicant's contention under section 5 (1).

The respondent is challenging the contention of the applicant that the action is the subject of the arbitration agreement relied on by the applicant. That is, according to the respondent, the action it has entered is not the subject of the arbitration agreement as contended by the applicant so that the Court cannot refer the matter to arbitration. As pointed out earlier, it is not specifically provided under section 5 (2) how, if at all, the adjudicating Court should approach the contention of the applicant that the action is the subject of an arbitration agreement. However, the very purpose why the action has been referred to this Court is precisely because the applicant has contended under section 5 (1) that the action is the subject of an arbitration agreement. The core issue in the case raised by the applicant is that there is an arbitration agreement, which the applicant contends is applicable to the dispute to which the action relates. Where the respondent, in response to that, challenges the contention of the applicant that the action is the subject of an arbitration agreement, the question that arises is how will the Court deal with it. The Court takes the view that it could not have been the intention of the legislator within the scheme of the Act that once the applicant has contended under section 5 (1) that the action is the subject of an arbitration agreement, the Court will invariably, in all circumstances, have to refer the parties to arbitration. For instance, where it is shown, on a *prima facie* basis, that there is a very strong probability of the arbitration agreement being inapplicable to the dispute in question, subject matter of the action, the Court would proceed to the final determination as to whether the arbitration agreement is applicable or not. The Court therefore holds that where the respondent challenges the applicant's contention that the action is the subject of an arbitration agreement, the Court will not proceed to examine the challenge unless the respondent shows, on a *prima facie* basis, from the material placed before the Court at the initial stage, that there is a very strong probability of the arbitration agreement being inapplicable to the dispute in question, subject matter of the action.

Consideration of the present matter

The affidavit evidence reveals that it is not disputed that the applicant, as the arranger of a USD 100 million secured term loan facility ("the Facility") to Ammalay International Pte Ltd, approached the respondent to participate with it in the Facility as a lender of record. The respondent accepted the terms and conditions set out in the applicant's letter dated 31st July 2012 (the Side Letter) and funded a sum of USD 20m in the Facility. A Facility Agreement dated 16 August 2012 in respect of the Facility was executed between the applicant, the respondent and other Banks as parties, including the Bank of New York Mellon, Singapore Branch, as the "agent". Under the Facility Agreement, the applicant and the respondent were named as

"Original Lenders" in the amounts of US$ 80 million and US$ 20 million respectively, and Ammalay International Pte Ltd as the "Borrower".

It is not disputed that the undertaking given by the applicant in the Side Letter was not to reduce its risk exposure in the Facility without first informing the respondent in order to allow it to make use of the option to reduce its participation amount proportionately.

While not disputing that there is an arbitration agreement in the Facility Agreement but not in the Side Letter, the applicant avers that: the Side Letter would be meaningless in the absence of the Facility Agreement since it exists as a Side Letter to the Facility Agreement, and forms part of the same transaction; the alleged obligations under the Side Letter are inextricably linked with the rights and obligations of the Lenders under the Facility Agreement; and the alleged breaches of the Side Letter are grounded on the parties' obligations under the Facility Agreement.

Although the respondent does not dispute the fact that the parties negotiated prior to the signing of the Facility Agreement, it contends that the parties did not intend to refer any dispute in relation to the Side Letter to arbitration, and there is no evidence of any form of consent to that effect.

Whereas, according to the applicant, a draft facility agreement of the expected terms to give effect to the Facility, including SIAC arbitration as the dispute resolution mechanism, was sent to the respondent on 19 July 2012 for vetting, that is more than a week before the Side Letter was signed. Articles 38 and 39 of that draft stipulated that the Facility would be governed by English law and that any dispute arising in any way out of or in connection with the said agreement would be resolved by arbitration in Singapore. The dispute resolution provisions of the draft was in substantially the same terms as those found in Clauses 39.1 and 39.2(b) of the Facility Agreement that was eventually signed by the parties. The relevant parts of Clauses 39.1 and 39.2(b) of the Facility Agreement provide as follows:

> ***"39.1 Arbitration***
>
> *Subject to Clause 39.5 (Agent's option), any dispute, controversy or claim arising in any way out of or in connection with this Agreement (including:(1) any contractual, pre-contractual or non-contractual rights, obligations or liabilities; and (2) any issue as to the existence, validity or termination of this Agreement) (a "Dispute"), shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules (the "Rules") of the Singapore International Arbitration Centre ("SIAC") for the time being in force, which Rules*

are deemed to be incorporated by reference in this Clause 39."

..

"39.2 Formation of arbitral tribunal, seat and language of arbitration …

(b) the seat of the arbitration shall be Singapore."

Mr Sauzier's submission against the applicant's contention that the action is the subject of an arbitration agreement is on the ground that clause 39.1 is "manifestly inapplicable" to the dispute to which the action relates. Bearing in mind the disputed issues between the parties in the light of the wording of clause 39.1 set out above, this Court finds that the respondent has not shown, on a *prima facie* basis, that there is a very strong probability of the arbitration agreement being inapplicable to the dispute, subject matter of the action. Regarding the respondent's contention that the arbitration agreement cannot be extended to the Side Letter, this is an issue that would in the circumstances be best left for the arbitrator, whose decision would be subject to review by the Supervisory Court of Singapore as the seat of the arbitration is in Singapore. Mr. Sauzier's submission is therefore rejected.

The Court further finds that the respondent has not shown on a "*prima facie*" basis under section 5 (2) that there is a very strong probability of the arbitration agreement being null and void, whether for lack of consent, as the respondent seems to be suggesting in the affidavit, or otherwise. It has also not been shown on a "*prima facie*" basis that there is a very strong probability of the arbitration agreement being inoperative or incapable of being performed.

Having reached the above conclusions, the Court refers the parties to arbitration pursuant to section 5 (2) of the Act. Further, the respondent is to bear the costs of this application.

S Peeroo
Judge

A A Caunhye
Judge

D Chan Kan Cheong
Judge

5 February 2016

Judgment delivered by Honourable S Peeroo, Judge

For Applicant	**:**	**Mr Rishi Pursem, Senior Counsel** **together with Ms A Daby, of Counsel** **Mrs Dya Ghose-Radhakeesoon, Attorney**
For Respondent	**:**	**Mr Maxime Sauzier, Senior Counsel** **Mr Thierry Koenig, Senior Attorney**