Prakash J of the Singapore High Court decides the arbitration "chicken and egg" dilemma

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By a recent judgment in *Malini Ventura v Knight Capital Pte Ltd and others* [2015] SGHC 225 ("***Malini***"), the Singapore High Court affirmed its commitment to the primacy of arbitration even in situations where the *existence* of the arbitration agreement is in question. In *Malini*, Prakash J decided that *prima facie* existence of an arbitration agreement is enough to stay court proceedings in favour of arbitration.

The *Malini* judgment has received significant attention not just for the implications that it will have on the way arbitration-related matters are argued before the Singapore Courts, but also for the elegance of its drafting style. Prakash J set the tone when she wrote that the issue before her was "*akin to the old and familiar brain teaser contained in the question: Which came first, the chicken or the egg?*"

Comparable elegance and brevity of judicial drafting can also be found in many Hong Kong judgments, in particular those of Kaplan J.. Twelve years prior to the *Malini* judgment, in *Lucky Goldstar International (HK) Ltd v NG MOO Kee Engineering Ltd* [1993] 1 HKC 404, Kaplan J addressed the "*valiantly attempted*" argument that no arbitration agreement existed between the parties. He found that despite the drafting flaws in the arbitration agreement, it was clear that the parties intended to arbitrate their disputes and granted a stay of court proceedings in favour of arbitration.

Dispute and Applications before Prakash J

In *Malini*, the underlying dispute arose out of a Personal Guarantee Deed (the "**Deed**") which contained an arbitration clause. Malini Ventura ("the "**Plaintiff**") claimed that the signature on the Deed was a forgery and that, therefore, no arbitration agreement existed between the parties. She further argued that the Singapore International Arbitration Act (the "**IAA**") did not apply in situations where there was no arbitration agreement and that it was thus for the Court, and not the arbitral tribunal, to decide whether the arbitration agreement existed. In response, Knight Capital *et al* (the "**Defendants**") invoked Section 6 of the IAA and Rule 25.2 of the SIAC Arbitration Rules 2013 to argue that it was exclusively within the jurisdiction of the arbitral tribunal to decide the issues of existence of the arbitration agreement.

As a result, Prakash J had two applications before her. The Plaintiff sought an injunction to restrain the Defendants from pursuing arbitration under the auspices of the SIAC, whilst the Defendants sought to

stay the Court proceedings in favour of arbitration.

The Court's Dilemma

Prakash J had no doubt that, as a matter of general law, the Court had the jurisdiction to decide issues relating to the existence of agreements, including that of arbitration agreements. Her main dilemma was whether, in the light of Section 6 of the IAA and Rule 25.2 of the SIAC Arbitration Rules, she should give way to the arbitral tribunal to decide the issues of existence of the arbitration agreement, or whether she should decide those issues herself. This inquiry eventually led to a question as to what burden of proof the Defendants had to satisfy in respect of the existence of the arbitration agreement so as to persuade the Court to give way to the arbitral tribunal.

The Defendants argued that it would be enough to demonstrate to the Court that *prima facie,* the arbitration agreement existed. The Plaintiff argued that the question of existence should be decided by the Court after a full trial as per "*the usual civil standards*", because, conceptually, if no arbitration agreement had been concluded, no tribunal could ever be validly constituted.

Prakash J decided the dilemma after taking into account the context of the international arbitration regime in Singapore. She noted that in Singapore, the Court's role in arbitration-related matters has been deliberately circumscribed so as to promote arbitration. She referred to Article 16 of the Model Law (incorporated as part of the law of Singapore by way of the IAA) to find that an arbitral tribunal has power to rule on its own jurisdiction, thus affirming the competence-competence principle. In the course of her analysis, Prakash J analysed the drafting history of the Model Law and referred to the Yearbook of the UN Commission on International Trade Law, 1985, and found that the intention behind Article 16 of the Model Law is to give way to the arbitral tribunal to decide the issues of its own jurisdiction first, after which a dissatisfied party may bring the question of jurisdiction to the Court. In this regard, Prakash J noted that the tribunal has a choice under the Model Law to rule on its own jurisdiction either as a preliminary matter or in its final award on the merits. A party wishing to challenge the tribunal's decision on jurisdiction is entitled to apply to the Court, but only *after* the tribunal has rendered its decision on jurisdiction.

Prakash J therefore agreed with the Defendants that the standard for the application of Section 6 of the IAA should be that of a *prima facie* existence of the arbitration agreement. She found that:

"If I were to hold that, in a situation where the conclusion of the arbitration agreement is in issue, the jurisdiction in s 6(2) to stay the court proceedings would not bite unless I could conclude, on the basis of the usual civil standard, that the arbitration agreement had been entered into, I would be imposing too high a burden on the party seeking the implementation of the arbitration agreement. I consider that it would satisfy the rights of both parties if the party applying for the stay was able to show on a prima facie basis that the arbitration agreement existed." [para 36]

Departure from the UK principles

An important part of Prakash J's analysis was a case of *Nigel Peter Albon (trading as N A Carriage Co) v Naza Motor Trading Sdn Bhd and anor* [2007] 2 All ER 1075 ("**Albon**"). In that case, Lightman J decided that if there was insufficient evidence before the court to decide whether an arbitration agreement had been concluded, there was no room to grant stay of the court proceedings in favour of arbitration. Prakash J read the Albon judgment as requiring the existence of the arbitration agreement to be proved on the usual civil standard of the balance of probabilities.

Prakash J declined to follow the Albon dictum because her dilemma concerned the application of the IAA, whilst Lightman J had decided Albon under the English Arbitration Act. She was cognizant of the

fact that the Model Law, as incorporated in Singapore through the IAA, limits judicial intervention in arbitral proceedings to strictly defined circumstances. On the other hand, the English Arbitration Act, whilst based on the Model Law, contains significant departures therefrom. For example, Section 30 of the English Arbitration Act grants arbitral tribunals the power to rule on their jurisdiction, but it allows parties to arbitration agreements to opt out from this provision. Further, Section 32 of the English Arbitration Act allows courts to determine questions of a tribunal's jurisdiction on the application of a party to arbitral proceedings.

Implications

The approach taken by Prakash J in *Malini* demonstrates that the Singapore Courts will favour arbitration agreements even in cases where the existence of the arbitration agreement is in question. The Singapore Courts are unlikely to conduct a full trial review to determine whether the arbitration agreement exists. Rather, they will give way to arbitral tribunals to determine issues of the existence of the arbitration agreement. All that is required in Singapore is that the party seeking to stay court proceedings in favour of arbitration will have to demonstrate *prima facie* that the arbitration agreement exists.