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A. INTRODUCTION

1. Exclusive jurisdiction clauses ("**EJC**") are common contractual provisions where parties agree to a specific jurisdiction to resolve their disputes, should they arise out of or in connection with the agreement. At common law, where a claim is commenced in Singapore in breach of an EJC in favour of another jurisdiction, the Singapore Courts apply a two-step "strong cause" test to determine if the claim ought to be stayed in favour of that foreign jurisdiction: *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 ("***Vinmar***"):

(a) **First**, the stay applicant must show a "good arguable case" that the EJC exists and governs the dispute in question.

(b) **Second**, once a "good arguable case" has been shown, the Court will stay the proceedings unless the respondent can demonstrate strong cause for the stay to be refused.

2. This position has now changed, since the promulgation of the Hague Convention on Choice of Court Agreements on 1 October 2005 ("**Hague Convention**"), and its ratification by Singapore on 2 June 2016 by way of the Choice of Court Agreements Act 2016 ("**CCAA**"). Whereas under the common law the Courts retain a discretion to refuse a stay despite an EJC, under the Hague Convention, the Court is mandated to grant the stay should the requisite conditions be fulfilled.

3. This has significant ramifications on Singapore court proceedings involving EJCs in favour of Hague Convention Contracting States – these include the United Kingdom, as well as jurisdictions in the European Union.

4. The Singapore High Court has, in a recent case of ***6DM (S) Pte Ltd v AE Brands Korea Ltd and others and another matter*** **[2021] SGHC 257** ("***6DM v Asahi***") made some important observations on the application of the CCAA. This note explores the key findings made by Justice Mavis Chionh in *6DM v Asahi*.

B. KEY FACTS IN *6DM V ASAHI*

5. The plaintiff, 6DM (S) Pte Ltd ("**6DM**") was a company in the business of the wholesale of liquor, soft drinks and beverages. The first to third defendants were AE Brands Korea Ltd ("**AEBK**"), Asahi Beer Asia Ltd ("**ABA**") and Asahi Premium Brands Ltd ("**APB**") respectively (collectively, the "**Asahi Entities**"). The Asahi Entities are part of the Asahi Group, a Japanese conglomerate in the primary business of production and sale of alcoholic beverages, including the eponymous

Asahi beer. The fourth defendant ("**Mr Bogna**") was the Regional Markets Development Manager with one of the Asahi Entities.

6. Pursuant to three distribution agreements, the Asahi Entities appointed 6DM to be the exclusive distributor of the Peroni brand of alcoholic products in Singapore:

(a) The 2016 Distribution Agreement which was governed by English law and provided for the exclusive jurisdiction of "*the local courts*";

(b) The 2017 Distribution Agreement which was governed by English law and provided for the exclusive jurisdiction of the Courts of England and Wales; and

(c) The 2020 Distribution Agreement which was governed by English law and provided for the exclusive jurisdiction of the Courts of England and Wales.

7. It was disputed whether the term "*local court*" in the 2016 Distribution Agreement referred to the Courts of England and Wales, or to the Courts of Singapore.

8. It was the Asahi Entities' case that 6DM had consistently neglected and/or failed to make payments of invoices under the Distribution Agreements dating back to as early as 2017. Accordingly, in July 2020, the Asahi Entities terminated the Distribution Agreements on this ground.

9. On 2 October 2021, 6DM commenced proceedings against the Asahi Entities and Mr Bogna ("**Suit 951**") for, *inter alia*, misrepresentation, conspiracy, and breach of implied and/or collateral agreement. The gist of 6DM's allegations is that the defendants had induced 6DM, through its agent Mr Bogna, to invest in promoting, marketing and distributing more of the Asahi Entities' beer products by representing that the Asahi Entities would acquire shares in 6DM and/or partner with 6DM to set up a joint venture company to distribute the said products in Singapore (the "**Arrangement**"). 6DM alleged that in exchange, the Asahi Entities had assured 6DM through Mr Bogna that the debts owed to the Asahi Entities under the Distribution Agreements need only be paid when the Arrangement was finalised. The Asahi Entities denied the existence of any such representations or Arrangement.

10. 6DM applied for and obtained leave on 4 December 2020 to serve the Writ and Statement of Claim in Suit 951 out of jurisdiction (the "**Leave Order**").

11. On 22 January 2021, the Asahi Entities, together with one Asahi Brands Germany GmbH, issued and served a statutory demand on 6DM in respect of the unpaid invoices under the Distribution Agreements.

12. On 10 February 2021, the Asahi Entities filed HC/SUM 665/2021 ("**SUM 665**") to challenge the jurisdiction of the Singapore Courts to try 6DM's claims in Suit 951. Among other things, the Asahi Entities argued in SUM 665 that:

(a) **First**, the service of the Writ in Suit 951 ought to be set aside on the following grounds: (i) 6DM had breached their duty of full and frank disclosure when they had applied *ex parte* for the Writ in Suit 951 to be served out of jurisdiction on the Asahi Entities; (ii) there was no factual merit and therefore no serious issues to be tried in respect of the dispute; and (iii) in any event, Singapore was not the proper forum for the dispute to be heard.

(b) **Second**, and in the alternative, even if the Writ in Suit 951 was not set aside for the aforesaid grounds, the Singapore courts must stay or dismiss the proceedings in Suit 951 on the basis of Section 12 of the CCAA.

(c) **Third**, and in the alternative, even if Section 12 of the CCAA was not operative, the Singapore Courts ought to nevertheless stay Suit 951 on the basis of the EJC under common law principles, as 6DM cannot demonstrate strong cause why Suit 951 should proceed despite the presence of the EJC in favour of the Courts of England and Wales.

13. On 15 February 2021, 6DM commenced HC/OS 138/2021 ("**OS 138**"), seeking an injunction to restrain the Asahi Entities and Asahi Brands Germany GmbH from commencing winding up proceedings against 6DM on the basis of the statutory demand.

14. OS 138 and SUM 665 were heard and disposed of together in *6DM v Asahi*.

C. KEY FINDINGS IN *6DM V ASAHI*

15. The Court allowed the Asahi Entities' jurisdictional challenge (i.e. SUM 665), finding that:

(a) The claims made by 6DM in Suit 951 arose under or in connection with the Distribution Agreements, all of which (including the 2016 Distribution Agreement) provided for the exclusive jurisdiction of the Courts of England and Wales;

(b) Section 12(1) of the CCAA mandates that the Singapore Court grants a dismissal or stay of Suit 951, and none of the exceptions set out in the CCAA were made out.

(c) Further and in the alternative, service of the Writ out of jurisdiction ought to be set aside on grounds that:

(i) 6DM had breached its duty to give full and frank disclosure in the *ex parte* application for leave to serve the Writ and Statement of Claim out of jurisdiction; and

(ii) 6DM had failed to show that Singapore is the proper forum for the trial for the dispute.

16. However, the Court also allowed OS 138, granting an injunction to restrain the Asahi Entities from commencing winding up proceedings against 6DM on the basis that there were triable issues arising in the debt owed by 6DM to the Asahi Entities.

17. This note focuses on the key observations made by the Court in respect of SUM 665.

D. FINDINGS ON THE HAGUE CONVENTION AND THE CHOICE OF COURT AGREEMENTS ACT (CCAA)

18. The CCAA was enacted on 1 October 2016 to give effect to the Hague Convention which was ratified by Singapore on 2 June 2016.

(a) Sections 11(1) and (2) of the CCAA provide that:

"**Jurisdiction of Singapore chosen**

11.—(1) A Singapore court, designated in an exclusive choice of court agreement for the purposes of deciding a dispute, has jurisdiction to decide the dispute, unless the agreement is null and void under the law of Singapore.

(2) A Singapore court that has jurisdiction under subsection (1) cannot decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State."

(b) Section 12(1) of the CCAA provides that:

"**Where Singapore court is not chosen court**

12.—(1) Despite any other written law or rule of law, if an exclusive choice of court agreement does not designate any Singapore court as a chosen court, a Singapore court must stay or dismiss any case or proceeding to which the agreement applies, unless the Singapore court determines that —

(a) the agreement is null and void under the law of the State of the chosen court;

(b) a party to the agreement lacked the capacity, under the law of Singapore, to enter into or conclude the agreement;

(c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of Singapore;

(d) for exceptional reasons beyond the control of the parties to the agreement, the agreement cannot reasonably be performed; or

(e) the chosen court has decided not to hear the case or proceeding."

I. SECTION 12 OF THE CCAA

19. The High Court held that the application of section 12 of the CCAA involves a **two-stage test**. First, the Court must consider whether there exists an EJC which does not designate Singapore as a chosen court, and which applied to the proceedings at hand. Second, if the EJC is found to be applicable, the Court must then consider whether any of the five exceptions apply to justify the Court's refusal to order a stay or dismissal of proceedings.

20. In the **first** stage of analysis, the High Court considered two possible standards of review – the *prima facie* standard, applied by the Court of Appeal in *Tomolugen Holdings Ltd and anor v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 in respect of arbitration agreements; or the *good arguable case* standard, which was applied in *Vinmar*. The High Court ultimately found in favour of the *good arguable case* standard – i.e. **the party applying under section 12(1) of the CCAA must show a *good arguable case* that an EJC exists and governs the dispute in question**. In coming to its decision, the Court considered that:

(a) First, the Court of Appeal in *Tomolugen* had applied the *prima facie* standard of review because allowing the Court seised of jurisdiction to make a full determination on the existence and scope of the arbitration clause would deprive the putative arbitral tribunal of its *kompetenz-kompetenz*. The Court of Appeal had observed that the arbitral tribunal should be the "*first arbiter of its own jurisdiction, with the court having the final say*". In contrast, there is no such *kompetenz-kompetenz* principle operating in the context of an EJC, and neither is it possible to say that the chosen court's determination of its jurisdiction may be appealed by way to the court seised. Given that the court is being invited not to exercise its otherwise valid jurisdiction over the dispute, a relatively **robust** test is necessary to establish the existence of the EJC.

(b) Second, as the issue to be considered in the first stage of the application under section 12 of the CCAA is similar to the issue to be considered under the first stage of the *Vinmar* test, it would make sense if both approaches were aligned.[1]

21. In the **second** stage of analysis, the Court must consider whether any statutory exceptions apply to justify the Court's refusal to order a stay or dismissal of proceedings. In this regard, the grounds on which it may choose not to stay or dismiss the case or proceedings (to which the EJC applies) are **closed** – i.e. limited only to the five exceptions set out in section 12(1). The Court **has no discretion to refuse to order a stay or dismissal** if none of the five stated exceptions in section 12(1) applies.[2]

22. The five exceptions stated in section 12(1) of the CCAA are as follows:

(a) the agreement containing the EJC is null and void under the law of the State of the chosen court;

(b) a party to the agreement lacked the capacity, under the law of Singapore, to enter into or conclude the agreement;

(c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of Singapore;

(d) for exceptional reasons beyond the control of the parties to the agreement, the agreement cannot reasonably be performed; or

(e) the chosen court has decided not to hear the case or proceeding.

23. In this regard, 6DM argued that giving effect to the EJCs would result in "*manifest injustice*", or would be "*manifestly contrary to the public policy of Singapore*". It argued that the grant of a stay or dismissal of Suit 951 vis-à-vis the Asahi Entities would lead to multiple sets of proceedings in more than one jurisdiction, because the EJC did not govern the claims by 6DM against Mr Bogna. This would lead to the fragmentation of the dispute, as there was a lack of certainty as to whether the English Courts would assume jurisdiction over Mr Bogna.[3] The High Court, however, was not persuaded:

(a) First, 6DM had not articulated any "*coherent formation*" of the specific "*public policy*" that would be "*manifestly*" contravened in the event that the dispute was fragmented.[4]

(b) Second, that the dispute would be fragmented is purely speculative.[5] Among other things, the phrase "*would lead to or be*" in the wording of section 12 of the CCAA meant that the manifest injustice or the violation of the public policy was **highly probable** in the particular case; the exception cannot be invoked on a **speculative possibility** that something undesirable might happen.[6]

(c) Third, and in any event, 6DM had failed to show how any injustice would be "*manifest*": (i) the proceedings against Mr Bogna in Singapore were still in their preliminary stage (Mr Bogna having just entered his appearance and no substantive steps have been taken against him yet); (ii) if Mr Bogna cannot be joined to the proceedings in the English Courts, any risk of parallel proceedings and inconsistent findings may be mitigated via a limited stay of the Singapore proceedings against Mr Bogna pending the resolution of the English proceedings.[7]

As 6DM could not prove the applicability of any of the exceptions in section 12(1) of the CCAA, the High Court held that it was bound to either stay or dismiss the proceedings under Suit 951.

24. As to whether the proceedings under Suit 951 ought to be stayed or dismissed, the Court observed that:[8]

(a) a stay of proceedings would make sense in cases where part of the dispute falls outside the scope of the EJC – in such cases, it would be sensible to stay that part which falls within the scope of the EJC while allowing the remainder of the dispute to proceed in the Singapore Courts;

(b) on the other hand, where the entirety of the dispute falls within the EJC, there does not appear to be any principled reason to stay the proceedings in Singapore instead of dismissing them.

25. As the entire dispute in Suit 951 fell within the relevant EJCs in the Distribution Agreements, the Court

[1] See paragraph 1 above. Under the *Vinmar* test, an applicant who applied for a stay of proceedings on the basis of an EJC must show a "good arguable case" that an EJC existed and governed the dispute in question.

[2] See *6DM v Asahi* at [38]. For the purpose of Section 12(1) of the CCAA, it does not suffice for the party resisting a stay of the Singapore proceedings to show that there is "strong cause" to refuse a stay, or that the applicant had submitted to the jurisdiction of the Singapore courts pursuant to section 16(1)(b) of the Supreme Court of Judicature Act.

[3] *6DM v Asahi* at [67].

[4] *6DM v Asahi* at [67].

[5] *6DM v Asahi* at [67].

[6] *6DM v Asahi* at [61].

[7] *6DM v Asahi* at [68].

[8] *6DM v Asahi* at [91].

dismissed the entire proceedings under Suit 951 as against the Asahi Entities.[9]

II. SECTION 11 OF THE CCAA

26. The High Court in *6DM v Asahi* also made certain remarks in obiter on the application of section 11 of the CCAA.[10]

27. In this respect, 6DM had sought to argue that the phrase "*local courts*" referred to in the 2016 Distribution Agreement was a reference to the Singapore Courts. On this basis, they argued that the EJC in the 2016 Distribution Agreement ought to be enforced "*at the expense of the EJCs in the* [2017 and 2020 Distribution Agreements]", because once a Singapore Court is found to have jurisdiction under Section 11(1) of the CCAA (by virtue of being the court designated by the EJC) then section 11(2) of the CCAA would also apply – i.e. the Singapore court "*cannot decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State*".[11]

28. The Court disagreed with 6DM's argument, finding that Section 11(2) of the CCAA does not apply to this case, even if the EJC in the 2016 Distribution Agreement is found to be in favour of the Singapore Courts. The Court took the view that section 11(2) only concerns situations where a Singapore Court may consider "*that the dispute should be decided in a court of another State*", **i.e. where the Singapore court is faced with arguments of improper forum**. The Court considered that Section 11(2) cannot be the basis for ignoring the EJCs in the 2017 and 2020 Distribution Agreements, given that section 12(1) is framed in mandatory terms. The Court cited the Hartley-Dogauchi Report[12] on Article 5(2) of the Hague Convention,[13] which expressly state that there "*are two legal doctrines on the basis of which a court might consider that the dispute should be decided in a court of another State*": the first is the doctrine of *forum non conveniens*, the other is the doctrine of *lis pendens*. Neither doctrine was engaged in the application.

III. ANCILLARY REASONS FOR THE HIGH COURT'S DISMISSAL OF SUIT 951

29. As the proceedings under Suit 951 were dismissed pursuant to Section 12(1) of the CCAA, there was strictly no need for the Court to deal with the remaining prayers in SUM 665. However, the Court made it clear that it would have in any event have granted the prayer for the setting aside of the Leave Order and the service out of jurisdiction effected on the Asahi Entities.[14]

(a) Lack of full and frank disclosure

30. In addition to the reasons concerning the CCAA, the High Court found that 6DM had breached its duty to make full and frank disclosure in their *ex parte* application for leave to serve the Writ in Suit 951 out of jurisdiction.

31. Pertinently, the Court found that while copies of the Distribution Agreements were exhibited to the affidavit filed by 6DM in support of the aforesaid leave application (the "**Supporting Affidavit**"), it was not stated anywhere in the said affidavit that the EJCs were either in favour of "*the courts of England and Wales*" or "*the local courts*". No written submissions were filed in respect of the application, nor did counsel attend before the Assistant Registrar who granted the Leave Order.[15]

32. Given the abovementioned facts, the Court found that 6DM had not fulfilled its duty of full and frank disclosure.

(a) 6DM had merely mentioned in one inconspicuous paragraph in a 234-page affidavit (i.e. paragraph 42 of the Supporting Affidavit) that there are EJCs "*providing that the* [Distribution] *Agreements are governed by English law*". Paragraph 42 does not state that these EJCs are either in favour of "*the courts of England and Wales*" or the "*local courts*". The statement thus "*conflates and confuses the issue of the exclusive jurisdiction agreement and that of the governing law clause*".[16] Mere disclosure of material facts without more or devoid of the proper context is in itself insufficient to constitute full and frank disclosure. 6DM ought to have reproduced the relevant EJC for each distribution agreement *in full* and **it should have explained why it said the disputes in Suit 951 did not "*arise under*" or "*in connection*" with these agreements**.[17]

(b) Further, the Supporting Affidavit merely glossed over the contents of the EJCs. The fact that 6DM may have been "*advised*" by its lawyers that the dispute in Suit 951 did not arise "*under*" or "*in connection with*" the Distribution Agreements is neither here nor there: materiality is to be decided by

[9] *6DM v Asahi* at [92].
[10] *6DM v Asahi* at [93].
[11] *6DM v Asahi* at [94].
[12] The Explanatory Report on the 2005 Hague Choice of Court Agreements Convention (2013) published by the Hague Conference on Private International Law.
[13] The article in the Hague Convention on which section 11(2) of the CCAA was based
[14] *6DM v Asahi* at [106].
[15] *6DM v Asahi* at [19].
[16] *6DM v Asahi* at [112].
[17] *6DM v Asahi* at [113].

the Court and not by the applicant or its legal advisors.[18]

(c) 6DM therefore ought to have appreciated that the existence of the EJCs in the Distribution Agreements, the full contents of these EJCs, and the applicability of section 12 of the CCAA were factors that would carry substantial weight in the Court's consideration of whether to grant the Leave Order. 6DM's silence on these matters could not have been anything but "*selective, deliberate, and ultimately, misleading*".[19]

(b) Connecting factors do not point to Singapore as the proper forum

33. In any event, the High Court would have set aside the Leave Order since 6DM had failed to show that Singapore was the proper forum for the trial of the dispute.[20] In determining so, the Court had regard to the following factors:[21]

(a) Although 6DM is incorporated in Singapore, the Asahi Entities are incorporated in South Korea, Hong Kong and UK;[22]

(b) Insofar as 6DM has argued that it can garnish account receivables from the Asahi Entities' Singapore distributors or apply for seizure and sale of stocks belonging to the Asahi Entities warehoused in Singapore, the same can be said of any country where the Asahi Entities distribute alcoholic products;[23]

(c) While 6DM argued that there were two crucial witnesses (i.e. Mr Sim and Mr Choo) who were located and compellable in Singapore, it was sworn on affidavit that Mr Choo had relocated permanently to Hong Kong (where Mr Bogna is also based). Further, the Asahi Entities' other key witness, Mr Naritsuka, was based in Japan;[24]

(d) A substantial part of the parties' communication was documented by way of WhatsApp messages and emails – thus, insofar as 6DM alleges that the breaches were committed in Singapore, that was factually incorrect;[25]

(e) The governing law of the dispute is English law, not Singapore law;[26] and

(f) The EJCs in the Distribution Agreements are in favour of the Courts of England and Wales.[27]

E. OTHER USEFUL OBSERVATIONS

34. Another interesting issue that arose in the proceedings is whether the service of a statutory demand in Singapore by a foreign defendant against a plaintiff, after the plaintiff has filed and served the Writ on the defendant, constitutes a submission by the foreign defendant to the jurisdiction of the Singapore Courts in respect of that Writ.

35. In this regard, 6DM had sought to argue that the service of the statutory demand for unpaid invoice debts arising under the Distribution Agreements constituted a submission by the Asahi Entities to the jurisdiction of the Singapore Courts.

36. The Court disagreed. It considered that:

(a) The statutory demand was not an "*application*" made in Suit 951 and was therefore not a "step" within Suit 951 – this is <u>even if</u> the debts claimed under the statutory demand may arise out of the Distribution Agreements under consideration in Suit 951.

(b) The issuance of the statutory demand is not premised on the Singapore Courts having jurisdiction over the dispute in Suit 951, and cannot be said to be a submission to the jurisdiction of the Singapore Courts to determine Suit 951.

(c) There was a reservation in the statutory demand that nothing in the statutory demand shall constitute a submission to the Singapore Courts of any dispute arising under or in connection with the Distribution Agreements.

(d) The issuance of the statutory demand and the Asahi Entities' pursuit of the Singapore Court's winding up jurisdiction <u>does not involve a determination of the merits of parties' disputes</u>. A finding that there are triable issues, i.e. whether there is a substantial and *bona fide* dispute that ought to be heard in the proper forum rather than in a winding up application, is <u>not</u> a substantial finding of fact on the merits of the dispute in the suit itself.

[18] *6DM v Asahi* at [115].
[19] *6DM v Asahi* at [120].
[20] *6DM v Asahi* at [121].
[21] *6DM v Asahi* at [133].
[22] *6DM v Asahi* at [124].
[23] *6DM v Asahi* at [125].
[24] *6DM v Asahi* at [126].
[25] *6DM v Asahi* at [128].
[26] *6DM v Asahi* at [130].
[27] *6DM v Asahi* at [132].

F. KEY TAKEAWAYS AND CONCLUSION

37. With the enactment of the CCAA on 1 October 2016, this has supplanted the common law test on the stay of proceedings on grounds of EJCs vis-à-vis contracting states.

38. The Singapore Courts no longer possess a discretion (that it once had under the *Vinmar* test) to decide whether a stay of proceedings should be ordered on the basis of an EJC.

39. Once an EJC has designated a foreign court of a contractual state under the Hague Convention as the chosen court, then under section 12 of the CCAA the Singapore Courts has **no discretion and must stay or dismiss** the proceedings in Singapore in favour of the chosen court unless one of the five exceptions under section 12(1) of the CCAA applies. The exceptions are narrow and will not be lightly invoked by the Court. With regard to the public policy exception, it is critical for the party seeking to invoke the exception to: (i) articulate a clear public policy that will be contravened, (ii) demonstrate how it is "*highly probable*" that such policy would be contravened, and (iii) show how the contravention would be "*manifest*", i.e. clear or extremely serious. Short of attaining such a high threshold, a Court is unlikely to find that an exception is invoked.

40. Litigants should also be aware that if they intend to apply for *ex parte* leave in Singapore to serve an originating process on a foreign defendant despite a foreign EJC, it is not sufficient to merely draw the Court's attention to the foreign EJC. The applicant must go further in the supporting affidavit to explain why the EJC is not operative, *e.g.* whether it does not apply to the dispute at hand or whether and why it does not trigger the application of the CCAA.

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The Asahi Entities were represented by TKQP, which team was led by Siew Guo Wei (Partner) and comprises Joseph Lim (Associate) and Foo Zhi Wei (Associate).

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