Heartronics Corporation
v
EPI Life Pte Ltd and Others

[2017] SGHCR 17

High Court — Suit No 192 of 2017 (Summons No 1372 and 1396 of 2017)
Teo Guan Kee AR
17 May; 9 June 2017

Arbitration — Mediation-Arbitration clause

17 October 2017 Judgment reserved.

Teo Guan Kee AR

1 The Plaintiff herein commenced these proceedings (Suit No. 192 of 2017, the "**Suit**") against the four Defendants on 1 March 2017.

2 On 25 March 2017, the first and second Defendants filed Summons 1372 of 2017 ("**SUM 1372**"), seeking, *inter alia*, an order that these proceedings be stayed as against the first and second Defendants. On 27 March 2017, the third and fourth Defendants filed Summons 1396 of 2017 ("**SUM 1396**"), similarly seeking an order that these proceedings be stayed but as against the third and fourth Defendants.

3 After hearing parties, I have decided that the applications in both SUM 1372 and 1396 (together, the "**Summonses**") for a stay of these proceedings are to be dismissed. I set out below the grounds for my decision.

Background

4 The Plaintiff is a company incorporated in Labuan, Malaysia and is a distributor of medical devices.

5 The first Defendant is a company, incorporated in Singapore, which, at all material times, carried on business as a wholesaler and distributor of medical devices.

6 The second Defendant is a company incorporated in Singapore and, since 11 October 2011, has been the sole shareholder of the first Defendant.

7 The third Defendant was at all material times a director of the first and second Defendants. The fourth Defendant, a practising cardiologist, was also a director of the second Defendant at all material times.

8 In this Suit, the Plaintiff seeks damages as well as the rescission of a License Agreement dated 7 October 2010 (the "**License Agreement**") and a Distribution Agreement (the "**Distribution Agreement**") dated 9 November 2010, both of which were entered into between the Plaintiff and the first Defendant.

9 Briefly, under the Distribution Agreement, the Plaintiff would, for consideration, be appointed as a distributor for a medical device carried by the first Defendant (the "**Product**") whereas under the License Agreement the Plaintiff would be licensed to use software and provide services related to the Product in India.

10 The Plaintiff alleges that it was induced into entering into the Agreements as a result of various false representations made to it by one or more

of the Defendants. In particular, it is alleged that one or more of the Defendants had falsely represented to the Plaintiff that:

(a) the first or second Defendant would launch a 3G-enabled version of the Product by the end of 2010;

(b) the Product had obtained certification ("**CE certification**") allowing it to be sold in France; and

(c) a data server and call centre (the "**Indian Infrastructure**") had been set up in India for the purpose of marketing the Product in India.

11 Purportedly in reliance upon the above representations, the Plaintiff entered into a number of downstream distribution agreements with third parties with a view to distributing the Product in France (the "**French Agreement**") as well as India (the "**Indian Agreements**").

12 The Plaintiff alleges that the representations set out in [10] above were false, in that the Product could not be marketed in France because CE Certification had not in fact been obtained for the Product, nor in India as the Indian Infrastructure had not in fact been established. The Plaintiff alleges that it had relied on these false representations and as a result suffered loss and damage.

The Applications

13 By way of SUM 1372, the first Defendant sought a stay of these proceedings pursuant to s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed, the "**IAA**"). For ease of reference, in the remainder of these Grounds, I shall refer to this application as the "**IAA Stay Application**".

14 By way of other prayers in SUM 1372 and by way of SUM 1396, and subject to the Suit being stayed as against the first Defendant, each of the second to fourth Defendants sought a stay of the Plaintiff's claim against it pursuant to the court's

> inherent powers of case management pursuant to Order 92 Rule 4 of the Rules of Court (Cap 322).

15 For ease of reference, in the remainder of these Grounds, I shall refer to the application described in the preceding paragraph as the "**Case Management Stay Application**".

16 For reasons which will be explained below, the second to fourth Defendants accepted that the Case Management Stay Application could not succeed if the first Defendant was unsuccessful in its IAA Stay Application.

The applicable dispute resolution clauses

17 The dispute resolution clauses contained in the License Agreement and the Distribution Agreement state as follows:

> License Agreement
>
> 6.2 The law applicable to this agreement, including issues of the validity of the agreement and/or any of the Clauses set out in this agreement shall be the laws of Singapore. *All disputes, controversies or differences arising out of or in connection with this agreement shall be submitted to the Singapore Mediation Centre and the Singapore International Arbitration Centre for resolution by med-arb in accordance with the SMC-SIAC Med-Arb Procedure for the time being in force, which procedure is deemed to be incorporated by reference into this clause.* [Emphasis added]
>
> Distribution Agreement

> 23 Mediation-Arbitration, Choice of law and jurisdiction
>
> The law applicable to this agreement, including issues of the validity of the agreement and/or any of the Clauses set out in this agreement shall be the laws of Singapore. *All disputes, controversies or differences arising out of or in connection with this agreement, including any issue regarding the validity of this Agreement and/or any clause in this Agreement, shall be submitted to the Singapore Mediation Centre and the Singapore International Arbitration Centre for resolution by med-arb in accordance with the SMC-SIAC Med-Arb Procedure for the time being in force, which procedure is deemed to be incorporated by reference into this clause.* Any award granted / settlement reached as a result of this Med-Arb Procedure shall be fully binding on the parties. For the avoidance of doubt, if there is no settlement reached during the mediation process and the matter has to proceed for arbitration the provisions of the International Arbitration Act (Cap 143A) (or any subsequent changes/amendments/revisions/updates) shall be applicable to the arbitral proceedings. [Emphasis added]

18 It will be apparent, upon a review of the clauses reproduced above (together the "**ADR Clauses**"), that those portions of the two clauses requiring the parties to proceed to mediation-arbitration ("**med-arb**") in the event of a dispute are in essence identical and the submissions made by the parties in the Summonses proceeded on this basis.

19 The parties agree that the reference to the "SMC-SIAC Med-Arb Procedure for the time being in force" in the ADR Clauses was a reference to the version of the procedure jointly promulgated by the Singapore Mediation Centre (the "**SMC**") and Singapore International Arbitration Centre (the "**SIAC**") dated 27 September 2007. For ease of reference, this version of the procedure will be referred to in the remainder of these Grounds of Decision as the "**SMC-SIAC Procedure**".

The IAA Stay Application

20 It is not disputed that the IAA applies in respect of the ADR Clauses.

21 S 6(1) and s 6(2) of the IAA form the basis of the first Defendant's application in SUM 1372. The material portions of these provide as follows:

> **Enforcement of international arbitration agreement**
>
> **6**.—(1) … where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

22 In ***Tomolugen Holdings Ltd v Silica Investors Ltd*** [2015] SGCA 57 ("**Tomolugen**") at [63], the Court of Appeal held that a court hearing a stay application under s 6 of the IAA should grant a stay in favour of arbitration if the applicant is able to establish a *prima face* case that:

> (a) there is a valid arbitration agreement between the parties to the court proceedings;
>
> (b) the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and
>
> (c) the arbitration agreement is not null and void, inoperative, or incapable of being performed.

23 For the purpose of the IAA Stay Application, and with reference to conditions (a) and (b) reproduced in the preceding paragraph, the parties in these proceedings agreed that:

> (a) each of the ADR Clauses contains an arbitration agreement (although, as will be explained below, the parties disagreed as to the precise terms of the arbitration agreement in question);

(b) subject to one qualification which I will deal with below, the dispute between the Plaintiff and the first Defendant which is the subject matter of this Suit falls within the scope of the arbitration agreement.

24 Dealing first with the qualification referred to in [23(b)] above, in its initial set of written submissions for SUM 1372, the Plaintiff submitted that its claims against the first Defendant for the loss of profits which the Plaintiff would have made on the French Agreement and the Indian Agreements fall outside the scope of the arbitration agreements contained in the ADR Clauses.

25 This is because, the Plaintiff submitted, the ADR Clauses refer only to disputes between the Plaintiff and the first Defendant which arise out of or in connection with the License Agreement and the Distribution Agreement. Therefore, since the Indian Agreements and the French Agreement have no connection with the first Defendant, having been entered into between the Plaintiff and third parties, a dispute in relation to the Indian Agreements and the French Agreement would not fall within the scope of the ADR Clauses.

26 At the hearing on 17 May 2017, I asked Plaintiff's counsel for further submissions as to why the Plaintiff's position was that the Plaintiff's claims for loss of profit on the French Agreement and the Indian Agreements did not arise "in connection with" (to use the term in the ADR Clauses) the License Agreement or the Distribution Agreement, bearing in mind the Plaintiff's case was that it had entered into the French Agreement and the Indian Agreements as a direct consequence of its entering into the License Agreement and the Distribution Agreement. In response to this, the Plaintiff's counsel indicated he would not press the point.

27 The ADR Clauses cover "all disputes, controversies or differences arising out of or in connection with" the License Agreement or the Distribution Agreement. The term "in connection with" is a broad one and in my view, insofar as the French Agreement and the Indian Agreements were entered into by the Plaintiff as a direct consequence the Plaintiff entering into the License and Distribution Agreements, the Plaintiff's claim for loss of profit could be said to have arisen, at least, "in connection with" the License and Distribution Agreements and accordingly fall within the scope of the ADR Clauses.

28 I will therefore proceed on the basis that the entirety of the dispute between the Plaintiff and the first Defendant herein falls within the scope of the ADR Clauses.

29 The remaining issue is, therefore, whether the arbitration agreements contained in the ADR Clauses were null and void, inoperative or incapable of being performed. This was also the issue on which the parties to SUM 1372 focussed most of their efforts.

The Plaintiff's submissions in summary

30 The Plaintiff submits that each of the ADR Clauses in its entirety (the significance of this will become clear in light of the Defendants' counsel's submissions) contains the "arbitration agreement" that needs to be considered for the purpose of the first Defendant's application for a stay of these proceedings under s 6 of the IAA.

31 The Plaintiff's argument, in resisting the IAA Stay Application, is that a stay should not be granted in this case because the arbitration agreement in question is either "inoperative" or "incapable of being performed" within the meaning of s 6(2) of the IAA.

32 The Plaintiff submits that the first Defendant's conduct in response to the Plaintiff's attempts to commence med-arb in accordance with the ADR Clauses amounted to a repudiatory breach of the arbitration agreements in question, which breaches have been accepted by the Plaintiff, with the consequence that the arbitration agreements (as encapsulated in the ADR Clauses) are to be treated as having been discharged. These arbitration agreements, having been discharged, the Plaintiff submits, are thus "inoperative" within the meaning of s 6(2) of the IAA and cannot be relied upon in support of an application for a stay under s 6 of the IAA.

33 Alternatively, the Plaintiff submits that the financial circumstances of the first Defendant have made it impossible for the med-arb proceedings to now be set in motion, thereby rendering the arbitration agreements "incapable of being performed".

The first Defendant's submissions in summary

34 In response to the Plaintiff's submissions, the first Defendant submitted:

(a) in relation to the question of whether the arbitration agreement is "inoperative", that the first Defendant's conduct is not of such a nature that it can be characterised as the breach of any obligation contained in the ADR Clauses. Alternatively, even if the first Defendant's conduct amounted to a breach of obligations contained in the ADR Clauses, because each ADR Clause contains two *separate and distinct* agreements (one to mediate and another to arbitrate), the first Defendant has only breached the agreement to mediate and not the "arbitration agreement" – the arbitration agreement therefore continues to be valid and binding on the Plaintiff.

(b) in relation to the question of whether the arbitration agreement is "incapable of being performed", that the Plaintiff has not adduced sufficient evidence of facts that would justify such a finding.

Burden of proof

35 The parties agree that it is the Plaintiff which bears the burden of establishing that an arbitration agreement is inoperative or incapable of being performed.

36 As Vinodh Coomaraswamy J recognised in *Dyna-Jet Pte Ltd v Wilson Taylor Pte Ltd* [2016] SGHC 238 ("***Dyna-Jet (HC)***") at [26], what this means is that

> …it is for the party resisting the stay to establish that an arbitration agreement is within the proviso to s 6(2) rather than for the party applying for the stay to establish that it is not…To meet its burden on this issue, **the party resisting the stay must establish that no other conclusion on this issue is arguable**… (Emphasis added)

37 Before me, both parties proceeded on the basis that Coomaraswamy J's statement above, as well as his statements on the circumstances under which arbitration agreements may be found to be "inoperative" or "incapable of being performed" (which will be referred to later), were not affected by the Court of Appeal's decision in the appeal from Coomaraswamy J's decision.

38 It is necessary to describe in further detail events following the Plaintiff's discovery that it would not be able to market the Product in India or in France as these form the basis of the parties' respective submissions on the key issues in the IAA Stay Application.

The Plaintiff's attempts to initiate med-arb

39 It will be recalled that the License Agreement and the Distribution Agreement were entered into in or around late 2010 and that shortly thereafter the Plaintiff purportedly entered into the French Agreement as well as the Indian Agreements.

40 The Plaintiff's case is that it discovered, in 2011, that the Product could not marketed in France because it did not, contrary to the Defendants' representations, have the necessary certification and that there was no functional Indian Infrastructure.

41 The first time the Plaintiff made claims against the first Defendant was in a letter dated 13 June 2014 from the Plaintiff's then solicitors, Khattarwong LLP ("**Khattarwong**"). In this letter, the Plaintiff made a number of claims against the first Defendant and also invited the first Defendant to submit to med-arb in the following terms:

> If you dispute any of our client's claims and allegations set out in this letter herein, our client is prepared to have all such disputes submitted to the Singapore Mediation Centre and the Singapore International Arbitration Centre for resolution by mediation-arbitration in accordance with clause 6.3 of the License Agreement and clause 23 of the Distribution Agreement. Please let us know in writing **by 30th June 2014** if you wish to submit any such disputes for mediation-arbitration. (emphasis original)

42 The first Defendant's then solicitors, Templars Law LLC ("**Templars**") responded on 30 June 2014 offering to meet on a "without prejudice" basis but did not agree to submit the dispute to med-arb in accordance with the ADR Clauses.

43 Thereafter, by way of a letter dated 8 September 2014, Khattarwong on behalf of the Plaintiff made a number of claims against the second Defendant and, notwithstanding that the second Defendant was not a party to the License Agreement or the Distribution Agreement, invited the second Defendant to submit to mediation.

44 Templars replied to this letter on 19 September 2014, indicating that it was writing on behalf of both the first and second Defendants. In this letter, Templars pointed out, quite correctly, that the first and second Defendants were distinct legal entities and that the request to mediate would be considered by the first Defendant only.

45 Thereafter, on 22 September 2014, Khattarwong wrote again to Templars. This letter stated that the SMC and the SIAC no longer administered med-arb proceedings. As an alternative to med-arb, by way of this letter, Khattarwong asked Templars to indicate by 3 October 2014:

> … if [the first Defendant] would like to proceed to arbitration straightaway in the SIAC without first going through mediation in the SMC, or whether [the first Defendant] would still want to have mediation in the SMC first and only if the mediation is unsuccessful will our client commence arbitration against both [the first Defendant] and [the second Defendant] in the SIAC.

46 In this letter, Khattarwong also stated that if no response was received by 3 October 2014, the Plaintiff would

> commence mediation with [the first Defendant] in the SMC with a view to commencing arbitration against [the first Defendant] and [the second Defendant] thereafter if the mediation with [the first Defendant] is unsuccessful.

47 Templars responded to the aforementioned letter on 9 October 2014, indicating that the first Defendant would only be able to provide instructions by the end of October 2014.

48 As this was not a substantive response to its letter of 22 September 2014, Khattarwong wrote to the SMC on 13 October 2014 enclosing a request for mediation.

49 On 18 October 2014, the SMC wrote to both Khattarwong and Templars with instructions on how parties ought to proceed to mediation. In particular, SMC stated that each party was required to pay to the SMC a filing fee of S$267.50 within 3 working days from the receipt of this letter.

50 It appears that the first Defendant did not take the steps required for the mediation to move forward, as the SMC emailed parties again on 28 October 2014 stating, *inter alia*:

> As there is *no agreement from [the first Defendant] to proceed with mediation* at SMC at the moment, we will put this matter on hold until further instructions from the parties. [emphasis added]

51 In light of the SMC's email, Khattarwong wrote to Templars on 28 October 2014 as well, asking Templars to clarify by 5 November 2014

> …whether [the first Defendant] wishes to have mediation in the [SMC], failing which [the Plaintiff] shall take it that [the first Defendant] does not wish to mediate and [the Plaintiff] shall commence arbitration against [the first Defendant] and other parties as [the Plaintiff] deems fit, including but not limited to [the second Defendant], without further reference to you.

52 Templars replied to the above letter on 12 November 2014, indicating that its client would only consider mediation after December 2014. Notwithstanding this, it sent another letter on 13 November 2014 to Khattarwong indicating that it now had firm instructions to propose mediation in December 2014.

53 Alas, this appears to have been an empty promise; On 19 January 2015, the SMC wrote to both Khattarwong and Templars. This letter is significant because it referred to earlier correspondence between the parties and records that as of 19 January 2015, the Plaintiff had confirmed its availability to attend mediation in February that year but that the first Defendant had not done the same.

54 In the premises, the SMC asked that Templars confirm, by 6pm on 27 January 2015, its client's ability to attend a mediation (Khattarwong having already confirmed the same on behalf of the Plaintiff) scheduled for 11 February 2015. The SMC's letter further stated that

> If we do not receive the confirmation in writing by the time stipulated above, we will take it that the matter is not proceeding on 11 February 2015 and will release the venue reservation.

55 Parties were also required to make payment of S$5,443.50 each before 27 January 2015.

56 On 27 January 2015, the SMC emailed Mr Arunachalam Nellian, by then a director of the first Defendant, stating that it understood from Templars that Templars would not represent the first Defendant in the proposed mediation and that the SMC would not be

> … able to proceed with further arrangements for this date unless we receive the payment for the mediation fee by 30 January 2015.

57 It will be apparent from the foregoing that by 27 January 2015, the first Defendant still had not made payment of the necessary SMC fees. In the event, the first Defendant failed to make the requisite payment by 30 January 2015 as requested by the SMC as well.

58 By 15 June 2015, new solicitors, Dodwell & Co. LLC ("**DNC**"), had been appointed to act on behalf of the Plaintiff. On 15 June 2015, DNC wrote to the first Defendant seeking, *inter alia*, the first Defendant's confirmation by 29 June that it was still

> …agreeable to mediation so our client can submit its Request for Mediation and Notice of Arbitration in accordance with the SMC-SIAC Med-Arb Procedure.

59 In this letter, DNC also recorded its understanding that the first Defendant's director had informed the SMC that the first Defendant was unable to pay the necessary fees to the SMC as the first Defendant had "cash flow problems", thereby leading to the failure of earlier attempts at commencing mediation. The letter also made the point that cash flow difficulties could be an excuse to curtail the Plaintiff's rights under the ADR Clauses.

60 Accordingly, by way of the same letter, the Plaintiff took the position that time was of the essence and that the first Defendant had to pay the SMC and the SIAC for its share of the necessary administrative fees in order to proceed with med-arb. At the end of the letter, DNC included the following notice:

> We put you on NOTICE that if we do not receive any response from you by 29 June 2015, within 30 days of this letter, time being of the essence or in any case, to pay up the needful fees within 30 days of this letter, you will be deemed to have waived your rights to have these disputes resolved by the SMC-SIAC Med-Arb Procedure and our client will commence legal proceedings without further reference to you.

61 The first Defendant did not respond positively to DNC's letter of 15 June 2015. Instead, on 29 June 2015, Mr Nellian emailed DNC to state that the first Defendant could only proceed with mediation in October 2015.

62 In response to Mr Nellian's email, DNC wrote to the first Defendant on 13 July 2015, stating that:

> Your wilful refusal to prioritise the resolution of this matter via the prescribed SMC-SIAC Med-Arb Procedure is clearly a repudiation of the [ADR Clauses] and shall be deemed as a waiver of [the first Defendant's] rights to rely on the [ADR Clauses].
>
> In the circumstances, and as a result of [the first Defendant's] conduct, our client will have no other choice but to seek redress from the Courts of Singapore.

63 In this letter, the Plaintiff made one last overture to the first Defendant, stating that

> …if [the first Defendant] is still interested in resolving our client's claims via the SMC-SIAC Med-Arb Procedure, this course of action has to be pursued forthwith with no further delays. If [the first Defendant] is still interested in proceeding with the SMC-SIAC Med-Arb Procedure, kindly let us know within 7 days of this letter, time being of the essence, and let us have [the first Defendant's] suitable dates for mediation in July and August 2015 so that we can contact the SMC to do the necessary.

64 The first Defendant did not respond at all to DNC's letter of 13 July 2015 or otherwise indicate, until after the commencement of this Suit, that it is still inclined to comply with the provisions of the ADR Clauses.

Are the arbitration agreements inoperative?

65 In *Dyna-Jet (HC)*, Coomaraswamy J opined (at [162]) that

> An arbitration agreement is inoperative, at the very least, when it ceases to have contractual effect under the general law of contract. That can occur as a result of a number of doctrines of the law of contract such as *discharge by breach*, by agreement or by reason of waiver, estoppel, election or abandonment. (Emphasis added)

66 More specifically, Coomaraswamy J recognised that an arbitration would be inoperative, *inter alia*,

> where a party has committed a *repudiatory breach* of the arbitration agreement and that repudiation has been *accepted* by the innocent counterparty…
>
> [emphasis added]

67 The Plaintiff submits that the first Defendant's conduct in response to the Plaintiff's attempts to initiate med-arb amounts amounted to a repudiatory breach of the arbitration agreement, which the Plaintiff was entitled to and did accept.

68 The consequence of this, says the Plaintiff, was the discharge of the arbitration agreement by breach and in this manner it is said that the arbitration agreement between the Plaintiff and the first Defendant was rendered inoperative.

Identifying the "arbitration agreement"

69 Before me, the parties disagreed as to which portions of the dispute resolution mechanism, as encapsulated in the ADR Clauses, constituted the "arbitration agreement" for the purpose of s 6 of the IAA.

70 The first Defendant submits that for the purposes of the IAA Stay Application, each of the ADR Clauses contains not one but two separate dispute resolution agreements, comprising an agreement to mediate and a separate agreement to arbitrate (upon the failure of mediation).

71 Accordingly, even if the first Defendant is found to have committed repudiatory breaches of the ADR Clauses, such breaches would only entitle the Plaintiff to treat the *mediation* agreements contained in the ADR Clauses as

having been discharged and would not entitle the Plaintiff to treat the arbitration agreements contained within the ADR Clauses as having been discharged. If the arbitration agreements have not been discharged, it follows there is then no question of the same having been rendered inoperative, with the consequence that the IAA Stay Application must be allowed.

72 The Plaintiff's counsel took a contrary view and submitted that the "arbitration agreement" is simply each ADR Clause construed as a unitary dispute resolution mechanism. On this view, a repudiatory breach of the obligation to mediate would amount to a breach of the wider "arbitration agreement", entitling the Plaintiff to treat the entire arbitration agreement as having been discharged upon acceptance of the breach.

73 In *Dyna-Jet (HC)*, Coomaraswamy J referred (at [46] of the judgment) to the modern approach of interpreting arbitration agreements as

> simply, as far as possible, to determine and advance the parties' *commercial intention*, objectively ascertained from their arbitration agreement… [emphasis added]

74 An arbitration agreement, for the purpose of the IAA, is defined in s 2A(1) of the IAA as

> an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

75 The text of the ADR Clauses has been set out in [17] above. There is no express reference in the ADR Clauses themselves to separate mediation and arbitration proceedings. Instead the only references in the ADR Clauses are to

> med-arb in accordance with the SMC-SIAC Med-Arb Procedure for the time being in force, which procedure is deemed to be incorporated by reference into this clause.

76 The SMC-SIAC Procedure is therefore of relevance to the issue under consideration.

77 In support of his submission that the mediation and arbitration obligations contained in the ADR Clauses are not severable from one another, the Plaintiff's counsel highlighted the following features of the SMC-SIAC Procedure:

(a) The SMC-SIAC Procedure envisions the commencement of both mediation and arbitration at the same time, with *arbitration* being deemed to commence "in accordance with the applicable SIAC Arbitration Rules" on the date a copy of both the Notice of Arbitration and Request for Mediation (which may be incorporated in a single document) are received by the SMC, but stayed pending the outcome of the mediation.

(b) Thereafter, a mediator is appointed by the SMC and is concurrently appointed by the parties as an arbitrator, so that any settlement reached in the mediation can be recorded as an arbitral or consent award "accordance with the applicable SIAC Arbitration Rules".

(c) The arbitration commenced under the SMC-SIAC Procedure resumes if and when the mediation has ended unsuccessfully and the parties have the option of appointing as their arbitrator the same person who acted as the mediator (subject to the latter's consent). I should also note, in this regard, that the SMC-SIAC Procedure does *not* give parties the option of proceeding directly to arbitration without attempting mediation.

(d) For the purposes of the resumed arbitration proceedings, the mediator may continue to act as the arbitrator, although this requires the consent of the parties.

78 Having regard to the provisions of the SMC-SIAC Procedure, it is clear that mediation and arbitration proceedings commenced pursuant to this med-arb procedure are closely intertwined. Accordingly, to view mediation and arbitration as processes which can be separated from one another, even when they take place within the med-arb framework, would be inconsistent with the commercial intentions of the parties who expressly agreed to this hybridized dispute resolution mechanism.

79 Further, acceptance of the first Defendant's submission (as summarised at [70] and [71] above) would also mean that if a stay is granted, the Plaintiff could in effect be compelled (through the first Defendant's refusal to participate in mediation) to adopt a dispute resolution procedure materially different from that to which it had agreed, in that the Plaintiff would be compelled to have the dispute referred to an arbitral tribunal as if the ADR Clauses had not provided for mediation at all.

80 I am fortified in the views expressed above by judicial decisions in which multi-tier dispute resolution clauses, many of which do not provide for a level of inter-relatedness between their various tiers equivalent to that found in the ADR Clauses here, were treated as unitary "arbitration agreements" rather than multiple discrete dispute resolution agreements. I turn now to consider a few of these by way of illustration.

*Westco Airconditioning Ltd v Sui Chong Construction & Engineering Co Ltd ("**Westco**")*

81 *Westco* was a decision of the High Court of the Hong Kong Special Administrative Region.

82 In *Westco*, the plaintiff commenced court proceedings against the defendant on the basis of an agreement described as a "construction sub-contract". There appeared to be a dispute between the parties as to whether this or another agreement was the operative agreement, but in any event both putative agreements contained arbitration clauses that provided that any dispute of the nature raised in *Westco*

> …shall be referred to the architect, and, if either of the parties is unhappy with the architect's decision, or if the architect fails to make a decision within 90 days, it may require the matter to be referred to arbitration.

83 In reliance upon the arbitration clause described above, the defendant in *Westco* applied to the courts of Hong Kong seeking a stay of the court proceedings. The basis of this application was section 6 of the Hong Kong Arbitration Ordinance, which incorporated Article 8 of the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**"). Article 8 provides as follows:

> A court before which an action is brought in a matter which is the subject of the arbitration agreement shall, if a party so request not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

84 It appears that, in *Westco*, neither party had referred their dispute to the Architect before the court proceedings were commenced by the plaintiff. The plaintiff in ***Westco*** therefore resisted the defendant's application for a stay of

the court proceedings on the ground that because the dispute had yet to be referred to the Architect for a decision (or to abide the passing of the 90 day period provided for in the arbitration clause), the arbitration agreement was therefore inoperative for the purpose of Article 8 of the Model Law.

85 This argument was rejected by the Findlay J in his judgment in *Westco*, who held that a stay of the court proceedings should instead be granted. In arriving at this conclusion, the Judge made the following observations:

> There is, therefore, as I see it, a clear "agreement by the parties to submit to arbitration" their disputes. It matters not, it seems to me, that the parties must, firstly, take some other step before this is done. It cannot possibly have been the intention of the parties that, if one of them issues a writ before that step is taken, their joint wish to avoid proceedings at law is frustrated.
>
> …
>
> In my view, *what the statute means when it says "refer the parties to arbitration" is not "refer the dispute to the arbitrators"…but refer the parties to the process of arbitration that the parties have agreed to undertake, and, if this involves a preliminary step that the parties have agreed, to complete that step.* [Emphasis added]

86 It is apparent from the foregoing that Findlay J did not, therefore, view the dispute resolution clause which he was called upon to consider to be comprised of two discrete dispute resolution mechanisms, being an initial reference of the dispute to the Architect followed by a separate reference to an arbitral tribunal. Instead, to "refer the parties to arbitration" was to refer the parties to the dispute resolution mechanism, *culminating in arbitration*, which they had agreed between themselves.

87 Put differently, in expressing the view that the stay was for the purpose of referring the dispute to the "process of arbitration" including "any preliminary step" (by which it is clear the Honourable Judge was referring to

the reference to the Architect), it appears the judge treated the entire dispute resolution mechanism, including the reference to the Architect, as falling within the meaning of the "arbitration agreement" for the purposes of the Hong Kong statute.

*ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd ("**ZAQ Construction**") [2014] 10 MLJ 633*

88 The approach adopted by Findlay J in *Westco* was repeated in the decision of the Malaysian High Court decision of *ZAQ Construction*.

89 The pertinent dispute resolution clause in *ZAQ Construction* provided as follows:

> 63.1(a) If any dispute or difference shall arise between the Employer and the Contractor, either during the performance or after completion of the Design or the Works, or after the termination of the Contractor's employment, or breach of this Contract, as to:
>
> (i) the construction of this Contract; or
>
> (ii) any matter or thing of whatever nature arising under this Contract; or
>
> (iii) the withholding by the E.R. of any certificate to which the Contractor may claim to be entitled,
>
> then such dispute or difference shall be referred to the E.R. for a decision.
>
> (c) If the E.R. fails to give a decision for a period of forty-five (45) days, after being requested to do so by the Contractor or if the Contractor being dissatisfied with any decision of the E.R., then in any such case the Contractor may within forty-five (45) days after the expiration of forty-five (45) days after he had made his request to the E.R. or forty-five (45) days after receiving the decision of the E.R., as the case may be, require that such dispute or difference be referred to arbitration and final decision of a person to be agreed between the parties to act as the Arbitrator. The arbitration shall be held at the Regional Centre for Arbitration at Kuala Lumpur using the facilities and assistance available at the centre.

90 Counsel for the plaintiff, in seeking to resist an application by the defendant for the court proceedings to be stayed in favour of arbitration, argued, *inter alia*, that because neither party had referred any dispute to the E.R., the arbitration clause cited above had to be regarded as inoperative or incapable of being performed (*vide* [23] of the Judgment in *ZAQ Construction*).

91 The Judge, Mary Lim J, rejected this argument and, as in the *Westco*, granted a stay of the proceedings. She approved of the distinction between referring a dispute to "arbitration" and referring a dispute to "arbitrators" which had been drawn in the *Westco* decision (*vide* [98] of the judgment in *ZAQ Construction*).

92 The reasons given by Lim J for preferring the broad interpretation in *Westco* are instructive. At [99] of the judgment, the Judge remarked that this was because

> …having regard to the whole agreement in which this arbitration agreement is housed, it is quite apparent that the parties intended the resolution of any of their dispute or difference through a process other than recourse to the court. If the plaintiff 's arguments were to be accepted, it can be seen that it may be open to abuse. Parties may avoid their contractual obligations by simply not complying with its terms. It is in this regard that a more robust approach needs to be taken.

93 Before moving on to consider the next authority, I would explain that whilst I have relied on the two foregoing decisions in fortification of my view that the ADR Clauses should not be regarded as containing separate mediation and arbitration agreements, I have reached a different conclusion as to whether a stay of these proceedings should be granted because there is a crucial distinction in the factual circumstances present in this Suit and those found in *Westco* and *ZAQ Construction*.

94 In both *Westco* and *ZAQ Construction*, no arguments were framed so as to impute a breach of the arbitration agreement by either the plaintiff or defendant. One imagines this was because in each of those decisions, *both* the defendant (which was seeking a stay of the court proceedings) and the plaintiff (which was resisting the stay) had failed to refer the dispute to the relevant authority who, under the agreed dispute resolution framework prevailing in *Westco* and *ZAQ Construction*, should have been seized of the dispute before the same was referred to an arbitral tribunal.

95 Apart from this common failure, and unlike the case before me, there was no suggestion that the party seeking a stay in favour of arbitration had conducted itself in a manner amounting to a breach of the arbitration agreements under consideration in those decisions. In this regard, it bears noting that in both *ZAQ Construction* and *Westco*, it was the plaintiff (seeking to resist the grant of a stay) which had carried out an act which was openly inconsistent with the arbitration agreement by commencing proceedings in court. Perhaps somewhat understandably, under these circumstances the plaintiffs in *ZAQ Construction* and *Westco* did not seek to argue that the arbitration agreements had been discharged by breach.

96 The parties seeking to argue that the arbitration agreements in those cases were inoperative appeared therefore to have been compelled, given the factual circumstances in play, to rely on the failure to take the requisite preliminary step on its own as rendering the arbitration agreement inoperative.

97 Given that there was no imputation of breach of the arbitration agreement, it follows there was no room, in *Westco* or *ZAQ Construction*, for any analysis as to whether the arbitration agreements in those cases had been rendered inoperative by reason of a discharge of the arbitration agreements by

breach. To this extent, the *outcome* of the two aforementioned decisions, therefore need not have a bearing on my decision as to the IAA Stay Application, which is founded upon an alleged breach of the arbitration agreement by the first Defendant herein.

98 I should add that the statutory provisions under consideration in both *Westco* and *ZAQ Construction* were not, strictly speaking, *in pari materia* with s 6 of the IAA. This is because the applicable statutory provisions in each of those decisions expressly required the courts therein to "refer the parties to arbitration", whereas s 6 of the IAA requires only the grant of a stay. The differences between the provisions at issue in *Westco* and *ZAQ Construction* and that under consideration in this Suit do not however, preclude me from relying upon the reasoning adopted in these two decisions as to how multi-tier dispute resolution clauses should be treated. To the contrary, in the lead judgment of the House of Lords in *Channel Tunnel Group v Balfour Beatty Ltd* [1993] 1 All ER 664, the fact that the English Arbitration Act 1975 provided for a stay (as opposed to a "compulsory reference" to arbitration), was a consideration which Lord Mustill opined made it easier for him to conclude that a dispute resolution clause requiring disputes to be first referred to a panel of experts *before* being referred, if necessary, to arbitrators, could nevertheless be regarded in its entirety as an "arbitration agreement" (*vide* 678j to 679j of that judgment). The learned judge expressed the view, in this regard, that a "deliberate choice" had been made by the legislature not to make a reference to "arbitration" compulsory upon the grant of a stay, and suggested this could have been done with a view to accommodating stay applications involving multi-tier dispute resolution clauses (which would typically not provide for arbitration as the first step in dispute resolution proceedings).

*Hercus v Hercus [2001] O.J. No. 534 ("**Hercus**")*

99 This decision is significant because it was the only authority tendered by parties which involved a med-arb clause.

100 *Hercus* is a decision of the Superior Court of Justice of Ontario, Canada. In this case, the applicant, Mrs Price (formerly Mrs Hercus), sought an order seeking to set aside two arbitral awards granted in favour of Mr Hercus. The awards had been granted by one Mr Robert McWhinney.

101 The applicant and respondent in *Hercus* were married in 1984. They separated in 1993 and on 18 November 1997, the applicant and respondent signed a consent providing (as described in [7] of the judgment), *inter alia*, that

> 1. they would attend for mediation/arbitration to resolve the issues of custody, access and child support.
>
> 2. the mediation/arbitration decision as arbitrator would be made pursuant to the Arbitration Act and would be binding on the parties pending judicial review.
>
> 3. the parties would be equally responsible for the costs of mediation/arbitration and would provide retainers as requested by the mediator/arbitrator.

102 In addition, on 8 January 1998, the parties also entered into a "Mediation/Arbitration Agreement" which formed the basis of a consent order by the court directing the parties to attend med-arb to resolve outstanding issues such as custody and access. The precise procedure to be followed for the med-arb is not recorded in the judgment, although it appears from [89] of that judgment that there was a section in "Mediation/Arbitration Agreement" governing this.

103 In due course, one Mr McWhinney was appointed to act as mediator/arbitrator. The parties thereafter began to communicate with Mr

McWhinney on the various outstanding issues between them and Mr McWhinney made determinations, some by way of arbitral decisions, in relation to the same.

104 Sometime thereafter (likely in or around the latter half of 2000), the applicant applied to the courts for an order setting aside two arbitration awards which Mr McWhinney had granted in favour of the respondent as well as an order removing Mr McWhinney as arbitrator.

105 One of the grounds for the aforementioned application was an allegation that Mr McWhinney had purported to make a number of arbitral decisions without first engaging the parties in mediation on the subject matter of the arbitral decisions.

106 This was a line of argument which was eventually accepted by the Canadian court hearing the application for Mr McWhinney to be removed as mediator/arbitrator.

107 For present purposes, what is noteworthy are Templeton J's comments on the nature of mediation/arbitration. The judge noted that there was no indication in the Mediation/Arbitration Agreement that mediation was a pre-requisite to arbitration. Nevertheless, he thought it reasonable to *infer* (*vide* [85] of the judgment) that

> …the parties expected that mediation would be drawn upon first and, failing mediation, resort would be had to the process of arbitration.

108 Later on in his written grounds (*vide* [142] of the judgment), the judge went as far as to comment that

> By virtue of the wording of the [Mediation/Arbitration Agreement], the two processes for dispute resolution could not be severed.

109 Accordingly, Templeton J was of the view that if the parties or Mr McWhinney wished to depart from the mandatory mediation provided for in the agreed dispute resolution agreements pursuant to which Mr McWhinney had been appointed,

> …a **new** agreement between the parties would be required. [Emphasis added]

110 In my view, the comments of Templeton J as to the nature of the med-arb made in *Hercus* can be applied with at least equal, if not greater force, to the provisions of the SMC-SIAC Procedure, in view of the features of the SMC-SIAC Procedure highlighted at [77] above.

111 Accordingly, I reject the first Defendant's submission that the obligations to mediate and arbitrate contained within the SMC-SIAC Procedure can be severed or viewed as two distinct agreements. Instead, the correct approach is to view the ADR Clauses (incorporating the SMC-SIAC Procedure) as a *unitary* dispute resolution mechanism, the entirety of which must therefore be considered to be the "arbitration agreement" to be considered for the purpose of s 6(2) of the IAA.

112 This conclusion is entirely consistent, I might add, with the principle that arbitration is grounded in party autonomy. As Coomaraswamy J recognised in *Dyna-Jet (HC)*, the Singapore courts have generally espoused an approach to arbitration which allows

> …contractual parties the widest autonomy in agreeing *how* they are to have access to arbitration in the event of a dispute. [Emphasis added]

Inoperative arbitration agreements: discharge by breach

113 I turn now to consider whether the first Defendant's actions in response to the Plaintiff's attempts to commence med-arb should be regarded as repudiatory breaches of the ADR Clauses.

114 In its judgment in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] SGCA 39 ("***RDC Concrete***"), the Court of Appeal dealt with situations in which an innocent party to a contract may elect to treat a contract as having been discharged. The Plaintiff's counsel submitted that for present purposes, two distinct situations mentioned by the Court of Appeal in *RDC Concrete* could form the basis for a finding that the first Defendant herein has committed a repudiatory breach of the arbitration agreements between the parties such that the Plaintiff is entitled to treat the same as having been discharged. These situations are:

> At [93] of the *RDC Concrete* judgment:
>
> where a party, by his words or conduct, simply *renounces* its contract inasmuch as it clearly conveys to the other party to the contract that it *will not perform its contractual obligations at all*, that other party (*viz*, the innocent party to the contract) is entitled to terminate the contract.
>
> At [99] of the *RDC Concrete* judgment:
>
> where the breach in question will "give rise to an *event* which *will deprive* the party not in default [*viz*, the innocent party] of *substantially the whole benefit* which it was *intended* that he should obtain from the contract" [emphasis added], then the innocent party is entitled to terminate the contract.

115 Before turning to consider whether either of the two above situations exists on the facts of this case, as a preliminary point, I highlight that the Plaintiff's counsel did not seek to argue, by reference to a third situation mentioned by the Court of Appeal in RDC Concrete (*vide* [97] of that judgment)

that the first Defendant had, by its actions, breached a *condition* of the arbitration agreements such that the Plaintiff was entitled to treat the arbitration agreements as having been discharged regardless of the consequence of the breach. Accordingly, it is not necessary for me to consider whether any of the terms allegedly breached by the first Defendant were in the nature of a condition.

Did the first Defendant's conduct deprive the Plaintiff of the benefit of the arbitration agreements?

116 Dealing first with the second of the two situations described in the preceding paragraph, in my view the first Defendant's actions amounted to breaches of the applicable arbitration agreements and did deprive the innocent party (ie. the Plaintiff) of "substantially the whole benefit which" the Plaintiff should have derived from these agreements.

117 I set out below two pertinent paragraphs of the SMC-SIAC Procedure:

> 3. Any party may initiate the med-arb process by delivering to the SMC and the other party or parties a Request for Mediation (in accordance with the SMC Mediation Procedure) and a Notice of Arbitration (in accordance with the applicable SIAC Arbitration Rules). The Request for Mediation and the Notice of Arbitration may be incorporated in the same document or contained in separate documents.
>
> 4. Upon the initiation of the med-arb process, the dispute shall first be submitted to the SMC for resolution by mediation in accordance with the Mediation Procedure. The parties shall participate in the mediation in good faith and undertake to abide by the terms of any settlement reached.

118 By virtue of paragraph 4 of the SMC-SIAC Procedure, an obligation to mediate in good faith was therefore imported into the dispute resolution procedure agreed between the Plaintiff and the first Defendant.

119 The Court of Appeal, in *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* [2012] SGCA 48 ("***Toshin***"), provided guidance on such "negotiate in good faith clauses". In this regard, the Court of Appeal opined that

> Even though agreement cannot be guaranteed, it does not mean that the parties concerned should not try as far as reasonably possible to reach an agreement. In principle, there is no difference between an agreement to negotiate in good faith and an agreement to submit a dispute to mediation.

120 The Court of Appeal in *Toshin* made the following comments on the concept of good faith at [45]:

> At its core, the concept of good faith encompasses the threshold subjective requirement of acting honestly, as well as the objective requirement of *observing accepted commercial standards of fair dealing in the performance of the identified obligations*. This encompasses a duty to act fairly, having regard to the legitimate interests of the other party.

121 Applying the above-cited standards to the conduct of the first Defendant following the Plaintiff's attempts to engage it in the med-arb process, the first Defendant's actions fell short, in my view, of what was required for it to "participate" in good faith.

122 The conduct of the first Defendant in this regard has been described elsewhere in these Grounds. For present purposes, I would highlight that:

(a) the first Defendant failed to make payment of the necessary fees to the SMC, notwithstanding repeated correspondence from the SMC indicating that such payments had to be made before the mediation could proceed; and

(b) over a sustained period (from June 2014 to July 2015), the first Defendant continually sought to postpone the commencement of the mediation.

123 I was referred by Plaintiff's counsel to case law from the United States of America in support of the proposition that a party which refuses to pay fees required for an arbitration to commence is in repudiatory breach of the agreement.

124 In *Tahisa Roach v BM Motoring LLC* 224 NJ 528 (2006) ("**Roach**"), one of two plaintiffs (who had purchased a used car from the defendant) tried to commence arbitration against the defendant under the rules of the American Arbitration Association (the "**AAA**") pursuant to an arbitration agreement between the parties. However, it appears that arbitration did not proceed as the defendant, over the course of two months, failed to advance the necessary filing and administrative fees necessary for the arbitration to proceed despite reminders by the AAA. Eventually, the AAA declined to administer the arbitration due to the non-payment of fees.

125 The Supreme Court of New Jersey, in a unanimous decision, held that the defendant in that case had committed a "material breach" of the parties' arbitration agreement which precluded the defendant from seeking to enforce the same. Solomon J, writing for the court in that decision, reasoned as follows:

> The benefit expected under an arbitration agreement is the ability to arbitrate claims. A failure to advance required fees that results in the dismissal of the arbitration claim deprives a party of the benefit of the agreement. Therefore, the failure to advance fees "goes to the essence" of the [Dispute Resolution Agreement] and amounts to a material breach.
>
> Additionally, *defendants owed plaintiff a duty of good faith and fair dealing… That is, by entering into the [Dispute Resolution Agreement], they implicitly covenanted to do nothing "which*

> *[would] have the effect of destroying or injuring the right of [plaintiffs] to receive the fruits of the [Dispute Resolution Agreement].* [Emphasis added]

126 I see no reason why the principles espoused in *Roach* should not apply equally to the instant case. I appreciate that here, what we have is a failure by the first Defendant to make payment of fees that would have enabled *mediation* to commence as opposed to arbitration. Nevertheless, by its failure to participate in mediation in good faith as evidenced by the conduct described at [122] above, the first Defendant has prevented the Plaintiff herein from being able to proceed at all in the manner contemplated for under the ADR Clauses.

127 Counsel for the first Defendant sought to persuade me that a failure to pay the fees necessary for the mediation to move forward may not have amounted to a repudiatory breach.

128 The first Defendant relied, in this regard, on the English decision of *BDMS Ltd v Rafael Advanced Defence Systems* [2014] All ER (D) 244 ("**BDMS**"). I am of the view that the facts of this decision can be distinguished from those in the case before me.

129 In *BDMS*, the plaintiff referred a dispute with the defendant to arbitration under the arbitration rules of the International Chamber of Commerce (the "**ICC**"). Article 30 of these rules provided, *inter alia*, for the payment of an advance on costs in the following terms:

> Article 30 – Advance to Cover the Costs of the Arbitration
>
> 1. After receipt of the Request, the Secretary General may request the Claimant to pay a provisional advance in an amount

> intended to cover the costs of arbitration until the Terms of Reference have been drawn up.
>
> 2. As soon as practicable, the court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative expenses for the claims which have been referred to it by the parties…
>
> 3. The advance on costs fixed by the court shall be payable in equal shares by the Claimant and the Respondent. Any provisional advance paid on the basis of Article 30(1) will be considered as a partial payment thereof. However, any party shall be free to pay the whole of the advance on costs in respect of the principal claim or the counterclaim should the other fail to pay its share.
>
> 4. When a request for an advance on costs has not been complied with, and after consultation with the Arbitral Tribunal, the Secretary General may direct the Arbitral Tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims, or counterclaims, shall be considered as withdrawn. Should the party in question wish to object to this measure, it must make a request within the aforementioned period for the matter to be decided by the court. Such party shall not be prevented, on the ground of such withdrawal, from reintroducing the same claims or counterclaims at a later date in another proceeding.

130 The defendant in *BDMS* refused to pay its share of the advance on costs fixed by the IC. It refused to do so because it had concerns about the plaintiff's ability to meet any adverse costs order and wished to make the payment only after an application it had made for the provision of security had been determined.

131 This plaintiff treated this failure as a repudiatory breach of the arbitration agreement between the parties and withdrew the arbitration proceedings. It then commenced proceedings in the English High Court, where the plaintiff's action was met with an application by the defendant for a stay of the court proceedings in favour of arbitration.

132 Hamblen J, who delivered the judgment of the High Court in *BDMS*, first recognised (*vide* [43] of the judgment) that most arbitral and court decisions do view a requirement to pay an advance on costs in arbitration proceedings *as a contractual obligation* which one party to the arbitration owes to its counterparty in those arbitral proceedings. He also recognised, at [43] of the judgment, that

> a failure to pay the advance…does involve a breach of the arbitration agreement.

133 Notwithstanding Hamblen J's finding as described in the preceding paragraph, however, the Judge did not accept that the breach of the arbitration was a *repudiatory* breach on the facts before him (*vide* [57] of the judgment).

134 First, Hamblen J opined that the breach was not repudiatory in nature because

> This is not a case in which the Defendant was refusing to participate in the arbitration. It was in fact actively participating in the arbitration, as illustrated by its involvement in the settling of the [terms of reference] and in exchanges as to the scope of the preliminary issue hearing. Its refusal to 'play by the rules' was limited to the issue of payment of its advance share on costs, *a matter which was due to be addressed at the forthcoming preliminary issue hearing.* Further, the refusal was not absolute, but was a refusal to pay unless security for costs was provided. [emphasis added]

135 Secondly, the breach

> did not deprive the Claimant of its right to arbitrate. It was at all times open to the Claimant to proceed with the arbitration by posting a bank guarantee for the Defendant's share and then seeking an interim award or interim measure order that the advance be paid by the Defendant.

136 Hamblen J then went on to express the view that in order for a breach to be repudiatory in nature (in his Honour's words, to "go to the root of the contract"),

> …it is generally necessary to show that the innocent party has been deprived of substantially the whole benefit of the contract. It is difficult to see how the Claimant is 'deprived' of that benefit when he has the means, *expressly afforded to him by the Rules*, to prevent that occurring and to see recourse. [emphasis added]

137 The Judge also went on to note that

> It has to be proved that the agreement was repudiated, not merely the arbitration reference. Even if a claim is deemed withdrawn as a result of default in payment of the advance on costs, there is no restriction on the same claim being brought to arbitration again at a future time (Article 30(4)). Future arbitration of the same claim is *expressly contemplated* so that irrevocable consequences as to arbitrability do not necessarily attach to the consequences of a failure to pay the advance on costs. [emphasis added]

138 On my reading of the *BDMS* judgment, Hamblen J's finding that the breach was not repudiatory in nature was decisively affected by two aspects of the case before him:

(a) the actions of the defendant in the case before him were actions which were not only *not precluded* by the arbitration rules to which parties had agreed, but had in fact been *expressly contemplated* and addressed in the rules (which expressly provided, for instance, for payment by the plaintiff of the defendant's share); and

(b) the defendant was not disputing its liability to pay the advance on costs *per se*, but merely refusing to do so until the question of security for costs had been disposed of. Equally importantly, it was seeking to have this question resolved within the framework of the arbitral rules

agreed to by the parties (by making an application for the provision of security for costs to the arbitral tribunal; see [16] of the judgment).

139 The aforementioned features are wholly absent on the facts before me.

140 Neither the ADR Clauses nor the SMC-SIAC Procedure adduced in evidence deal expressly with the issue of fees - in particular, neither provides that the Plaintiff is at liberty to pay fees which the first Defendant fails to pay or preserves the Plaintiff's rights in the event the Plaintiff chooses to do so.

141 To the contrary, the letters sent by the SMC to the Plaintiff and first Defendant were unequivocal in stating that each party should pay its share of the relevant fees. In this regard, I note that:

(a) The "Request for Mediation" form makes reference to a

> non-refundable filing fee of $267.50 (inclusive of GST) **per party**… [emphasis added]

(b) SMC's letter to the parties of 18 October 2014 made it clear that

> **Each party** is required to pay the filing fee of $267.50 (inclusive of GST) within three (3) working days after the receipt of this letter. Upon payment of the filing fee **from all parties**, SMC will proceed to make all relevant arrangements for the mediation. [emphasis added]

(c) SMC's letter of 19 January 2015 also makes reference to

> The fee payable **per law firm**… [emphasis added]

142 The differences in the dispute resolution procedures under consideration in *BDMS* and in the instant case lead me to conclude that the reasoning of Hamblen J in *BDMS* cannot be applied here. The ICC Rules under consideration in *BDMS* expressly contemplated for a situation where one party

might make payment on behalf of a non-paying party; equivalent provisions do not exist in either the ADR Clauses or the SMC-SIAC Procedure.

143 Accordingly, whilst the plaintiff in *BDMS* would have, in making payment on behalf of the defendant, been acting *consistently* with the agreed dispute resolution mechanism in availing itself of "means, expressly afforded to him by the [ICC Rules]" (*vide* [57] of the judgment in *BDMS*), of preventing the deemed withdrawal of its claim, in the instant case, the Plaintiff would instead, in choosing to make payment on behalf of the first Defendant, have been carrying out an act which would be *inconsistent* with requirements imposed by the SMC.

144 Further, in this instance, the first Defendant's failure to make payment of fees to the SMC was not predicated on a preliminary issue which it wished to have resolved *within the framework of the dispute resolution process agreed to by the parties* prior to making payment. This feature of the defendant's position in *BDMS*, considered alongside the defendant's continued participation in the arbitration process in *BDMS* meant that there was no possibility of construing its actions as falling within the first situation referred to in *RDC Concrete* (*vide* [114] above), that is, where by its actions or conduct it had conveyed an intention not to perform its contractual obligations. In contrast, the actions of the first Defendant here were at odds with the rules and procedure of the SMC, which the first Defendant had agreed would administer the mediation.

145 The suggestion by the first Defendant that it will participate in med-arb proceedings "fully and in good faith" if the same are commenced now by the Plaintiff is all too facile, given its conduct prior to the commencement of this Suit. This argument is also somewhat beside the point – if the first Defendant's

failure to pay the requisite fees to SMC and to otherwise participate in the Plaintiff's attempts to commence mediation amounted to a repudiatory breach of each of the arbitration agreements between the Plaintiff and the first Defendant and such breach was accepted by the Plaintiff, then the arbitration agreements have been discharged and it is now too late for the first Defendant to assert that the arbitration agreements should in effect be resuscitated for its benefit.

146 I appreciate that neither the ADR Clauses nor the SMC-SIAC Procedure contains express stipulations as to when med-arb under the ADR Clauses must be commenced. Nevertheless, it cannot be consistent with the parties' commercial intentions to construe the arbitration agreements between the parties here as effectively affording to the first Defendant a right to defer the commencement of the dispute resolution process to a time of its own choosing.

147 It is clear that so long as the ADR Clauses remain valid and enforceable, the Plaintiff is unable to enforce its legal rights by way of action in the courts due to s 6 of the IAA.

148 In light of this, to effectively read into the ADR Clauses a unilateral right for one party to defer indefinitely the commencement of the agreed dispute resolution process would result in a situation where the Plaintiff finds itself unable to enforce its substantive rights at all if the first Defendant simply refuses to engage in the dispute resolution process. That having been said, each case will turn on its own set of facts. Ultimately, the question is whether, as noted in *Toshin* (see [120] above), the parties in question have:

(a) acted honestly; and

(b) observed accepted commercial standards of fair dealing, having regard to the legitimate interests of the counterparty.

149 It bears highlighting that in the *Roach* decision, a failure to pay the necessary fees for a period of two months was regarded as a breach of the arbitration agreement such as to preclude the defaulting party from further seeking to enforce the same. In the instant case, the Plaintiff was stymied in its attempts to commence med-arb for a year before the Plaintiff accepted the first Defendant's breach. Bearing in mind that the lack of progress made in relation to the med-arb proceedings during this period was the result of the first Defendant's failure to take even the most basic steps necessary to commence med-arb (that is, to pay the necessary fees and agree on a date for mediation), I am satisfied that in this case the first Defendant cannot be said to have observed commercial standards of fair dealing.

150 I would add that the commercial intent of the parties as expressed in the ADR Clause is also inconsistent with an interpretation that would permit the Plaintiff to proceed directly to arbitration without first attempting mediation, which is an option the first Defendant suggests the Plaintiff could have adopted.

151 As mentioned above at [77] to [79], the parties expressly agreed to resolve disputes by med-arb. To this end, the parties agreed to adopt the SMC-SIAC Procedures which contain detailed provisions pertaining to the conduct of mediation against the backdrop of arbitration proceedings which are stayed pending the outcome of the mediation and as well as provisions (*vide* [77(b)] above) which allow for the mediation outcome to be recorded as an award. This is a materially different type of dispute resolution process from one in which the parties proceed directly to arbitration; the latter option would only be possible

if the Plaintiff and the first Defendant *mutually agree to vary* the original arbitration agreement as set out in the ADR Clauses.

152 Accordingly, by virtue of the foregoing, I find that the first Defendant's conduct throughout the period from June 2014 to July 2015 was in breach of its obligation to participate in mediation in good faith and had the ultimate effect of depriving the Plaintiff of substantially the whole benefit which it was intended to obtain, that is, recourse to the med-arb procedure encapsulated in the ADR Clauses. As mentioned at [114] above, conduct having such an effect would entitle an innocent party to terminate the contract in question.

Did the first Defendant renounce the arbitration agreements?

153 Alternatively, and with reference to the first situation mentioned at [114] above, I accept that the first Defendant had, through its conduct, clearly conveyed to the Plaintiff that it had no interest in performing its obligations under the ADR Clauses at all.

154 I reiterate that the first Defendant was obliged to participate in mediation in good faith. Whilst it is true that the first Defendant herein did not expressly state that it would not or did not wish to proceed to med-arb, its actions were inconsistent with its assertions and with the aforementioned obligation.

155 It will be recalled that over a sustained period of about one year, the first Defendant consistently refused to agree on a date for mediation to take place or make any payment of the requisite fees. Instead, it variously suggested methods of dispute resolution which had not been agreed upon (see [42] above), indicated that mediation could not take place until some later date (see [47], [52] and [61] above) and, eventually, stopped responding to the Plaintiff's solicitors' letters altogether (see [64] above).

156 It is especially telling that the first Defendant made no attempt to contact the Plaintiff following the latter's letter of 13 July 2015, wherein the Plaintiff had expressly stated that it saw the first Defendant's actions as being in repudiatory breach of the ADR Clauses but also offered to pursue med-arb if the first Defendant would respond positively to the Plaintiff's overtures. The first Defendant's failure to do so gives the lie to its earlier assertions that it remained keen to pursue dispute resolution by way of med-arb.

157 Against the backdrop of the first Defendant's conduct as outlined above, I accept that no weight should be placed on the first Defendant's insubstantial assertions of interest in pursuing med-arb. Instead, the first Defendant's actions demonstrate that it had no intention of mediating in good faith as required under the SMC-SIAC Procedure.

158 Before me, the first Defendant also highlighted that the Plaintiff did not itself fully comply with the requirements of the SMC-SIAC Procedure.

159 It is not disputed that when the Plaintiff first sought to initiate the med-arb procedure, it believed that med-arb proceedings were no longer being administered by the SMC or the SIAC. This was an erroneous belief which the first Defendant seems to have entertained as well until in or about April 2017.

160 Relying on this error, the first Defendant sought to argue that the process which the Plaintiff sought to initiate was not precisely that contemplated in the ADR Clauses and accordingly the Plaintiff itself had failed to comply with the requirements of the SMC-SIAC Procedure.

161 Under paragraph 3 of the SMC-SIAC Procedure, in order to initiate the med-arb proceedings, the Plaintiff was required to deliver

> to the SMC and the other party or parties a Request for Mediation (in accordance with the SMC Mediation Procedure) and a Notice of Arbitration (in accordance with the applicable SIAC Arbitration Rules).

162 It is not disputed that the Plaintiff did not deliver any Notice of Arbitration when it submitted its Request for Mediation to the SMC on 13 October 2014, as it should have done pursuant to paragraph 3 of the SIAC- SMC Procedure.

163 Notwithstanding this, I accept the Plaintiff's submission that this particular argument put forward by the first Defendant is wholly opportunistic and prizes form over substance. I accept, in this regard, that the Plaintiff at all material times tried to operationalise the ADR Clauses and the SMC-SIAC Procedure through its own efforts. For instance, I note that in their letter to the first Defendant's then solicitors of 22 September 2014, the Plaintiff's then solicitors stated that the Plaintiff was fully prepared to

> take the necessary steps to commence mediation with [the first Defendant] in the SMC with a view to commencing arbitration against [the first and second Defendants] thereafter if the mediation with [the first Defendant] is unsuccessful.

164 This point was reiterated in the Plaintiff's Request for Mediation dated 13 October 2014 sent to the SMC, wherein the Plaintiff stated as follows:

> The dispute herein is based on a License Agreement and a Distribution Agreement wherein the Applicant and the Respondent had agreed that to resolve disputes by med-arb in accordance with the SMC-SIAC Med-Arb procedure. Notwithstanding that the SMC-SIAC Med-Arb procedure is no longer available, the Applicant is requesting for mediation in the spirit of the said Agreements to resolve disputes by med-arb.

165 The foregoing paragraphs show that, in substance, the Plaintiff was prepared and did try to implement the med-arb procedures set out in the ADR Clauses and the SMC-SIAC Procedure.

166 In any event, the first Defendant did not once, following the despatch by the Plaintiff to the SMC of the Request for Mediation, state or otherwise intimate that the reason it was not participating in the dispute resolution process which the Plaintiff was attempting to initiate was because the suggestion by the Plaintiff was not compliant with the ADR Clauses. It either did not put forward a reason for its failure to pay the relevant fees or otherwise put its failure down to wholly unsubstantiated cash flow difficulties.

167 There is no evidence that the same, or similar, fees would not be payable had the requirements of the SMC-SIAC Procedure (*viz*. the issuance of both a Request for Mediation and a Notice of Arbitration) been completely satisfied by the Plaintiff. In the circumstances, given that the first Defendant would not even pay the requisite fees required to set in motion the agreed dispute mechanism, there is no reason to believe that if the Notice of Arbitration had been issued as well, the first Defendant's actions would have been any different from those it took in the period between June 2014 and July 2015.

The arbitration agreements are "inoperative"

168 By virtue of the foregoing, I find that the Plaintiff has discharged the burden of demonstrating that the first Defendant did commit a repudiatory breach of the arbitration agreement between the parties. In addition, I accept that the Plaintiff accepted this repudiatory breach by way of its letter of 13 July 2015 and its actions thereafter, thereby rendering the arbitration agreements inoperative within the meaning of s 6(2) of the IAA.

169 This would, on its own, justify dismissing the IAA Stay Application. Nevertheless, as parties also made substantial submissions on whether the

arbitration agreement should be regarded as having been rendered incapable of being performed, I will state my views on these submissions.

Are the arbitration agreements incapable of being performed?

170 The idea of an arbitration agreement that is "incapable of being performed" for the purpose of s 6(2) of the IAA was also fleshed out by Coomaraswamy J in the decision of *Dyna-Jet (HC)*.

171 At [152] of the judgment, His Honour opined that

> An arbitration agreement is incapable of being performed when there is an obstacle which cannot be overcome which prevents the arbitration from being set in motion.

172 Later on in the judgment in *Dyna-Jet (HC)* (at [157]), Coomaraswamy J went on to provide more clarity on the concept of an "obstacle" which could render an arbitration agreement incapable of being performed by stating that

> The core concept that this phrase seeks to capture is that, when a specific dispute arises between the parties, a **contingency prevents the arbitration from being set in motion**, whether that contingency is foreseen and bargained for on unforeseen and not bargained for. [Emphasis added]

173 It appears, from the foregoing, that where the phrase "incapable of being performed" is concerned, the focus is very much on the parties' *ability* to implement (or not, as case may be) the mechanism for dispute resolution contained in the relevant arbitration agreement, whereas the term "inoperative" focuses on the *willingness* of the parties to implement the same.

174 Plaintiff's counsel submitted that in the instant case, the arbitration agreement has been rendered incapable of being performed because the first Defendant has, on its own admission, ceased business operations and been dormant since 2015. Further, it was highlighted that the first Defendant's Mr

Arunachalam Nellian had deposed, in his affidavit affirmed on 1 May 2017, that the first Defendant had discharged one set of counsel in December 2014 because it had been unable to pay their fees.

175 This, the Plaintiff submits, amounts to a situation in which the first Defendant will now never be in a position to pay the fees necessary to initiate med-arb proceedings and constitutes a "contingency" which would prevent the arbitration from being "set in motion".

176 This part of the Plaintiff's submission was not fully addressed by the first Defendant. Instead, the first Defendant focussed, in its affidavits and submissions on this issue, on the fact that parties had been mistaken as to whether the SMC-SIAC Procedure could still be operationalised.

177 With respect, given that both parties now agree that the SMC and SIAC would still work together to operationalise any med-arb commenced by the parties, I think this submission somewhat misses the point. The real question in my view is whether the first Defendant's financial circumstances can be said to constitute a "contingency" which rendered the arbitration agreements between the parties incapable of being performed.

178 Taking the first Defendant's assertions at face value, it would appear that sometime in late 2014 and 2015, the first Defendant found itself in a position where it did not have the funds to pay the mediation fees and other ancillary amounts necessary to proceed with mediation before the SMC (*vide* the affidavit of Mr Arunachalam Nellian dated 1 May 2017 at [9]). However, no evidence of the first Defendant's present financial circumstances has been adduced and the first Defendant now claims it will fully participate in med-arb if the same is now commenced.

179 As I understand Coomaraswamy J's decision in *Dyna-Jet (HC)* and the authorities and literature therein referred to, an arbitration clause should only be deemed incapable of being performed, for the purposes of s 6(2) of the IAA, when the contingency in question renders it *permanently* impossible for the arbitration to be set in motion.

180 In this regard, the Learned Judge in *Dyna-Jet (HC)* cited (at [152]) the view of Lord Mustill and Stewart Boyd QC that "incapable of being performed"

> … connotes something more than mere difficulty or inconvenience or delay in performing the arbitration.

181 It will be noted that the words "mere difficulty", "inconvenience" and "delay", whilst each denoting some kind of contingency constituting an obstacle to the performance of arbitration, are clearly evocative of the transient nature of the obstacle in question. Such obstacles would not, in the view of the above-cited commentators, be sufficient to render an arbitration agreement "incapable of being performed".

182 In addition to the foregoing, Coomaraswamy J also cited with apparent approval (*vide* [154]) the following examples of circumstances which would fall within this proviso in s 6(2) of the IAA given by Margaret L Moses in *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2nd Ed, 2012) at p 34. These examples, reproduced below, are clearly suggestive of the quality of permanence that must be present before an arbitration agreement will be regarded as being "incapable of being performed":

> … An arbitration agreement could be incapable of being performed if, for example, there was contradictory language in the main contract indicating the parties intended to litigate. Moreover, if the parties had chosen a specific arbitrator in the agreement, who was, at the time of the dispute, deceased or unavailable, the arbitration agreement could not be effectuated unless, of course, the parties could agree on a new arbitrator.

> … In addition, if the place of arbitration was no longer available because of political upheaval, this could render that arbitration agreement incapable of being performed. If the arbitration agreement was itself too vague, confusing, or contradictory, it could prevent the arbitration from taking place.

The arbitration agreements are not "incapable of being performed"

183 Applying the principles I have set out above to the circumstances of this case, and bearing in mind that the burden of proving that the arbitration agreements are incapable of being performed lies on the Plaintiff, I am unable to conclude that the arbitration agreements are incapable of being performed. As mentioned above, there is insufficient evidence to show that the first Defendant would be *unable* to take such steps as may be necessary to set med-arb proceedings in motion.

The Case Management Stay Application

184 In conjunction with and subject to the success of the IAA Stay Application made by the first Defendant, the second, third and fourth Defendants also sought a stay of the Plaintiff's claims against each of them pending the outcome of any med-arb proceedings between the Plaintiff and the first Defendant (defined at [15] above as the Case Management Stay Application).

185 The basis of this Case Management Application would have been, if I had decided to grant the IAA Stay Application, the decision of the Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 ("***Tomolugen***").

186 The decision in *Tomolugen* was succinctly summarised by Steven Chong J (as His Honour then was) in His Honour's decision in *Maybank Kim*

Eng Securities Pte Ltd v Lim Keng Yong [2016] SGHC 68 at [20] and I respectfully adopt the same:

> *Tomolugen Holdings Ltd* concerned a claim for minority oppression brought against various defendants comprising the company of which the plaintiff was a minority shareholder, other shareholders and the directors of the company or its related companies. The Court of Appeal held that there were four separate categories of allegations made in support of the minority oppression claim. Of these allegations, only one fell within the scope of an arbitration agreement between the plaintiff and one of the defendants ("Lionsgate"), and was subject to a mandatory stay under s 6 of the IAA. The Court of Appeal exercised the court's inherent powers of case management, and ordered, *inter alia*, that if the plaintiff wished to pursue the allegation subject to arbitration, then the rest of the court proceedings, whether against Lionsgate or against the remaining defendants, would be stayed in the interests of case management, conditional upon the allegation being arbitrated expeditiously.

187 The decision of the Court of Appeal in *Tomolugen* was founded on the express recognition by the Court of Appeal of what it termed

> the statutory mandate [ie. under the IAA] and the strong legislative policy in favour of arbitration in circumstances where the dispute which is covered by the arbitration clause in question forms only part of a larger dispute with a broader horizon.

188 It is self-evident, therefore, that where there is no "statutory mandate" to be upheld because no part of the dispute needs to be referred to arbitration, there would be no basis for considering the grant of a stay of the remainder of the dispute on case management grounds.

189 This is the situation in which we find ourselves in the instant case as a consequence of my earlier finding that the arbitration agreement between the Plaintiff and the first Defendant has been discharged by reason of the latter's repudiatory breach and the former's acceptance of the same.

190 For this reason alone, the Case Management Stay Application cannot succeed.

191 For completeness, I will address the two main submissions made by the Plaintiff's counsel in the course of resisting the Case Management Stay Application.

The existence of common issues amongst the claims made by the Plaintiff

192 Before me, the Plaintiff's counsel submitted that one key feature present in the facts of *Tomolugen* was missing in the instant case, namely, the fact that there was a common issue to be tried in relation to each and every one of the defendants before the court in *Tomolugen*.

193 In contrast, the Plaintiff's counsel submitted that in the case before me, the *only* common issue which might arise in arbitration proceedings between the Plaintiff and the first Defendant as well as in court proceedings between the Plaintiff and the remaining Defendants would be

> …the averment that certain misrepresentations were made by [the second to fourth Defendants] on behalf of [the first Defendant].

194 With respect, a perusal of the Plaintiff's own Statement of Claim filed herein will reveal that this possible overlapping issue, which the Plaintiff accepts is common to all the Defendants herein, goes to the heart of the Plaintiff's claim against all the Defendants in this Suit.

195 Specifically, the third and fourth Defendants' alleged liability to the Plaintiff arises directly out of, *inter alia*, representations which they purportedly made to the Plaintiff and it was also the attribution of the third and fourth Defendants' acts in making these same representations to the first and second

Defendants which allegedly gives rise to the Plaintiff's claim against the first and second Defendants in the Suit herein.

196 Accordingly, the issue of whether misrepresentations were made by the Defendants to the Plaintiff, which are not admitted by the Defendants, will inevitably form the cornerstone of the Plaintiff's claim against each and every one of the Defendants. It follows, therefore, that had the IAA Stay Application been successful, one necessary (but not necessarily sufficient *per se*) element for the grant of a case management stay would be in place.

Is a case management stay precluded if the third and fourth Defendants have taken a step in the proceedings?

197 A separate argument raised before me by the Plaintiff's counsel in resisting the Case Management Stay Application was premised on the third and fourth Defendants' act of serving a Notice to Produce Documents Referred to in Pleadings, pursuant to O 24 r 10(1) of the Rules of Court ("**ROC**"), on 22 March 2017 (the "**NTP**").

198 By way of the NTP, the third and fourth Defendants sought the inspection of various documents referred to in the Statement of Claim filed in the Suit herein.

199 The Plaintiff responded to the NTP on 28 March 2017 by serving on the third and fourth Defendants a Notice Where Documents may be Inspected, pursuant to O 24 r 10(2) of the ROC (the "**Inspection Notice**").

200 On the same day, the solicitors acting for the third and fourth Defendants wrote to the Plaintiff's solicitors requesting soft copies of the documents set out

in the Inspection Notice. The soft copies in question were furnished by the Plaintiff's solicitors on 30 March 2017.

201 The Plaintiff's counsel submits that the foregoing acts by the third and fourth Defendants (through their solicitors) constitutes a "step" in the Suit.

202 Such a "step", the Plaintiff submits, should preclude the third and fourth Defendants from being granted a stay on case management grounds. The Plaintiff's reasoning, as set out in its counsel's written submissions, is as follows:

> 226. … If a party to an arbitration agreement has taken a step in the proceedings, it cannot apply to the Court under section 6 of the IAA to seek a stay of the proceedings.
>
> 227. It would be extremely incongruous if, notwithstanding that, that party could nonetheless obtain from the Court, on a case management basis, the very stay it could not obtain under section 6 of the IAA.
>
> 228. If so, it is difficult to see why the position should be any different vis-à-vis a party that is not privy to an arbitration agreement. If anything, the matter should be *a fortiori* as regards such a litigant: by taking a step in the proceedings, it has already unequivocally submitted to, invoked and signalled its acceptance of the Court's jurisdiction.

203 It is clear from the foregoing that the Plaintiff's counsel's submission on this issue is premised on an assumption that an unequivocal submission to the court's jurisdiction would be inconsistent with and preclude any stay on case management grounds.

204 With respect, there is nothing in the decision in *Tomolugen* which supports this proposition and the Plaintiff's submission in this regard is in my view misconceived.

205 The jurisprudential basis for the grant of a stay under s 6 of the IAA is fundamentally different from that of a case management stay granted pursuant to the principles elaborated upon in *Tomolugen*.

206 The requirement that a party seeking a stay pursuant to s 6 of the IAA should not have itself taken a step in the proceedings is expressly set out in s 6(1) of the IAA.

207 The principle that underpins this requirement was stated succinctly in the decision of the Court of Appeal in *Carona Holdings Pte Ltd and Ors v Go Delicacy Pte Ltd* [208] SGCA 34 ("***Carona***"). In *Carona*, the Court of Appeal noted (at [52]) that

> …a step which manifests a willingness to submit to the jurisdiction of the court instead of evincing an intention to rely on arbitration ought to be regarded as taking a step in the proceedings. As Prof M Sornarajah incisively points out in "Stay of Litigation Pending Arbitration" (1994) 6 SAcLJ 61 at 73, the single clear rule on this issue is that *if the defendant demonstrates a willingness to seek recourse via the gates of litigation, he cannot thereafter rely on the existence of the arbitration and request for a stay. Such an approach is based on a notion of estoppel…* [Emphasis added]

208 The requirement that a party which seeks a stay pursuant to s 6 of the IAA should not itself have taken a step is therefore predicated, *inter alia*, upon the recognition that a party should not be permitted to in effect ask a court to refrain from exercising its jurisdiction to adjudicate on a dispute if the party making such a request has itself already accepted the court's jurisdiction to do so.

209 This concern does not arise in relation to stays sought pursuant to the principles espoused by the Court of Appeal in *Tomolugen*.

210 In His Honour's decision in *BC Andaman Co Ltd & Ors v Xie Ning Yun & Anor* [2017] SGHC 64 at [102], Quentin Loh J described *Tomolugen*-type stays in the following manner:

> A case management stay only affects the plaintiff's choice of *the sequence in which he pursues proceedings against different defendants*, and involves no more on the part of the court in which the proceedings are brought than declining to hear the proceedings before it until some other time. [Emphasis added]

211 Adopting the above-cited characterisation of case management stays, it is clear that a party seeking a case management stay does not, in so doing, dispute in any manner the court's jurisdiction over the dispute in respect of which the case management stay is sought.

212 Accordingly, whether a party seeking a stay on case management grounds has taken a step in the proceedings, thereby expressly acknowledging the court's jurisdiction over the dispute in question, is surely not a relevant consideration on the issue of whether a case management may be granted.

213 The Plaintiff's submission that a party may only seek a case management stay if it has not taken any step in the proceedings is thus without merit.

Conclusion

214 In light of the foregoing, both the IAA Stay Application and the Case Management Stay Application are dismissed.

215 I will separately hear the parties the filing of further pleadings and on costs in light of the foregoing.

Teo Guan Kee
Assistant Registrar

Mr Colin Liew Wey-Ren (TSMP Law Corporation) for the plaintiff;
Mr Jimmy Yim, SC and Ms Dierdre Grace Morgan (instructed counsel) for the first and second Defendants;
Mr Jimmy Yim, SC and Ms Dierdre Grace Morgan (Drew and Napier LLC) for the third and fourth Defendants.