DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

DI WILAYAH PERSEKUTUAN KUALA LUMPUR

(BAHAGIAN DAGANG)

GUAMAN SIVIL NO: WA-22NCC-109-03/2021

ANTARA

1. LYSAGHT CORRUGATED PIPE SDN BHD
(No. Syarikat: 197201001314 (12941-P))

2. LYSAGHT GALVANIZED STEEL BERHAD
(No. Syarikat: 197901002195 (46426-P)) **… PLAINTIF-PLAINTIF**

DAN

1. POPEYE RESOURCES SDN BHD
(No. Syarikat: 1274750-T)

2. MACSTEEL INTERNATIONAL FAR EAST LIMITED
(No. Pendaftaran Syarikat Asing: F02727) **… DEFENDAN-DEFENDAN**

JUDGMENT

(Enclosures 15, 28 and 44)

[1] This Judgment is in respect of three applications, two of which were by the Plaintiffs for an injunction to restrain arbitration proceedings in Hong Kong at the Hong Kong International Arbitration Centre ("**HKIAC**") bearing case number HKIAC/A20292 between the 2nd Defendant and the Plaintiffs ("**Hong Kong Arbitration**") (**Enclosures 15 and 28**) and one application was by the 2nd Defendant to stay all proceedings in this action pending the disposal of the Hong Kong Arbitration pursuant to Section 10 of the Arbitration Act 2005 (**Enclosure 44**).

[2] The reliefs sought in Enclosures 15 and 28 are identical and the only difference is that Enclosure 15 is the 1st Plaintiff's application whereas Enclosure 28 is the 2nd Plaintiff's. The Plaintiffs reason for filing Enclosures 15 and 28 separately and at different times was because the Plaintiffs were waiting for the issuance of the reports of the Singapore Forensic Document Examiner, LGK Consultants, dated 9.3.2021 and 22.3.2021 respectively ("**Plaintiffs' Expert Reports**"). It was only after the Plaintiffs' Expert Reports were issued and the results of which were made known to the Plaintiffs did the 1st Plaintiff then file Enclosure 15 on 10.3.2021 followed by the filing of Enclosure 28 on 23.3.2021 by the 2nd Plaintiff.

[3] The injunctions sought by the Plaintiffs in Enclosures 15 and 28 can be termed "anti-arbitration injunctions".

[4] Enclosures 15 and 28 were originally *ex parte* applications made on Certificates of Urgencies but I had converted them to *inter partes* applications and directed the Plaintiffs to serve Enclosures 15 and 28 on the 2nd Defendant to enable me to make a more informed decision.

[5] At the first hearing date of Enclosures 15 and 28, learned counsel for the 2nd Defendant, Mr TS Oon, attended and requested for time for the 2nd Defendant to file its Affidavit In Reply, which I granted. Whilst learned counsel for the Plaintiffs, Ms Cindy Goh, did not object to the postponement of Enclosures 15 and 28, she, however, orally applied for an *ad interim* injunction which was objected to by learned counsel for the 2nd Defendant. In order to preserve the status quo of the matter I granted the Plaintiffs' *ad interim* injunction to restrain the 2nd Defendant from continuing with the Hong Kong Arbitration until the disposal of Enclosures 15 and 28.

[6] On 30.4.2021, the 2nd Defendant filed Enclosure 44 and requested that Enclosure 44 be heard first.

[7] As Enclosures 15 and 28 and Enclosure 44 (collectively "**the Applications**") are interlinked, I directed for all the Applications to be heard together but the sequence of the hearing is for Enclosure 44 to be heard first followed by Enclosures 15 and 28.

[8] After 2 days of hearing lengthy oral arguments I reserved my decision and subsequently dismissed Enclosure 44 and allowed Enclosures 15 and 28. I set out below the reasons for my decision.

A] BACKGROUND

[9] The Plaintiffs' and 2nd Defendant's respective positions in this case are summarised below.

i) <u>The Plaintiffs' Claim</u>

[10] Interestingly, the Plaintiffs' claim in this action is not for any specific sum of money or liquidated damages other than general and exemplary damages.

[11] In order to immediately put context to the Plaintiff's claim, the reliefs sought by the Plaintiffs in their Re-Amended Statement of Claim dated 25.3.2021 ("**Statement of Claim**") are substantially reproduced below:

"57.2 A declaration that the Contracts No. 168758, 168298 and 168803 are null and void and/or cancelled;

57.3 A declaration that two (2) letters one (1) letter dated 17.03.2020 and one (1) letter dated 29.04.2020 were forged and/or are fraudulent in nature and are null and void;

57.4 A declaration that the purported authorisation letter dated 10.6.2020 were forged and/or are fraudulent in nature and are null and void;

57.5 A permanent injunction prohibiting, preventing and/or restraining the Second Defendant whether acting by itself, its directors, officers, employees, servants or agents or any of them howsoever from taking any action against the Second Plaintiff in relation to the Contracts No. 168758, 168298 and 168803 including proceeding with the arbitration proceedings commenced by the Second Defendant against the Second Plaintiff on 15.12.2020;

57.6 Further and/or in the alternative, a permanent injunction prohibiting, preventing and/or restraining the Second Defendant whether acting by itself, its directors, officers, employees, servants or agents or any of them howsoever from taking any action against the Second Plaintiff for the registration and/or enforcement of any arbitral award;

57.7 General damages to be assessed;

57.8 Exemplary damages and/or aggravated damages to be assessed;"

[12] Therefore, the Plaintiffs' main contention is that they do not have a contract or agreement with the 2nd Defendant for the sale and purchase of steel products and more specifically what is called "hot rolled coils" ("**HRC**").

[13] The 1st Plaintiff is a company incorporated on 9.10.1972 under the Companies Act 1965 and is in the business of, inter alia, manufacturing

and sale of galvanized corrugated steel pipes, drainage structures, highway guardrails and trading of galvanized steel products.

[14] The 2nd Plaintiff is a public listed company incorporated on 4.4.1979 under the Companies Act 1965 and is in the business of manufacturing galvanized steel product.

[15] One of the main raw materials required by both the Plaintiffs in manufacturing their products is HRC.

Between the 1st Plaintiff and the 1st Defendant

[16] The 1st Defendant is a company incorporated under the Companies Act 1965 with its registered address in Kuala Lumpur and business address in Klang, Selangor. The 1st Defendant was involved in the business of wholesale of construction materials.

[17] Sometime in **March 2019**, the 1st Plaintiff began purchasing HRC from the **1st Defendant**.

[18] At all material times, the 1st Plaintiff and the 1st Defendant were in a buyer-seller relationship. The 1st Plaintiff would purchase raw materials in the form of HRC from the 1st Defendant for purpose of manufacturing its products.

[19] For every purchase, the 1st Plaintiff and the 1st Defendant would enter into a contract that contains the standard terms and conditions as follows:

i) The seller is the 1st Defendant and the buyer is the 1st Plaintiff.
ii) The contract is signed on Ringgit Malaysia basis.

iii) The purchase price agreed upon are stated in the contracts.

iv) The payment terms shall be 14 days after receiving the goods.

v) The agreed purchase price would include all ocean freight, insurance, port charges, port handling, loading discharge at port, free time provided at loading port and final delivery to the 1st Plaintiff's factory in Ipoh.

[20] Between **March 2019 and February 2020**, the 1st Plaintiff purchased and the 1st Defendant supplied HRC to the 1st Plaintiff and a total of **11 contracts** were entered into between the 1st Plaintiff and the 1st Defendant ("**the LCP-Popeye Contracts**").

[21] As of July 2020, the 1st Plaintiff had duly fully paid all sums due and owing to the 1st Defendant under the LCP-Popeye Contracts. There is no outstanding amount between the 1st Plaintiff and the 1st Defendant. The total sum paid by the 1st Plaintiff to the **1st Defendant** is **RM14,718,510**.

[22] The 1st Plaintiff had only dealt with the 1st Defendant in respect of the transactions under the LCP-Popeye Contracts.

Between the 2nd Plaintiff and the 1st Defendant

[23] The nature of relationship between the 2nd Plaintiff and the 1st Defendant is substantially the same as the relationship between the 1st Plaintiff and the 1st Defendant above.

[24] The 2nd Plaintiff began purchasing HRC from the 1st Defendant from sometime in **January 2019**.

[25] At all material times, the 2nd Plaintiff and the 1st Defendant were in a buyer-seller relationship. The 2nd Plaintiff would purchase raw materials in the form of HRC from the 1st Defendant for purpose of manufacturing its products.

[26] For every purchase, the 2nd Plaintiff and the 1st Defendant would enter into a contract that contains the standard terms and conditions as follows:

i) The seller is the 1st Defendant and the buyer is the 2nd Defendant.
ii) The contract is signed on Ringgit Malaysia basis.
iii) The purchase price agreed upon are stated in the contracts.
iv) The payment terms were 30% cash deposit upon confirmation of the 2nd Plaintiff and 1st Defendant and 70% upon actual packing list and vessel booking note.
v) The agreed purchase price would include all ocean freight, insurance, port charges, port handling, loading discharge at port, free time provided at loading port and final delivery to the 2nd Plaintiff's factory in Ipoh.

[27] Between **January 2019 and February 2020**, the 2nd Plaintiff purchased and the 2nd Defendant supplied HRC to the 2nd Plaintiff and a total of **9 contracts** were entered into between the 2nd Plaintiff and the 1st Defendant ("**the LGS-Popeye Contracts**").

[28] As of **June 2020**, the 2nd Plaintiff had duly fully paid all sums due and owing to the 1st Defendant under the LCP-Popeye Contracts. There is no outstanding amount between the 2nd Plaintiff and the 1st Defendant. The total sum paid by the 2nd Plaintiff to the **1st Defendant** is **RM10,522,675**.

[29] The 2nd Plaintiff had only dealt with the 1st Defendant in respect of the transactions under the LCP-Popeye Contracts.

Discovery of Alleged Forgery by the 1st Plaintiff

[30] On **2.9.2020**, the 1st Plaintiffs received an email from the 2nd Defendant claiming for overdue payment of **USD1,151,630.84** for **five contracts** allegedly entered into between the 1st Plaintiff and the 2nd Defendant. The 2nd Defendant claimed that there were five contracts allegedly entered into between the 1st Plaintiff and the 2nd Defendant from October 2019 to February 2020 ("**the said 5 Contracts**") but one of the said 5 Contracts which is Contract No. 168804 had been cancelled.

[31] On **3.9.2020**, the 2nd Defendant forwarded photocopies of the said 5 Contracts to the 1st Plaintiff. Out of the 5 Contracts, the 2nd Defendant claimed that **four** of which are still outstanding (being the subject matter of the 2nd Defendant's claim in the Hong Kong Arbitration) ("**the 4 Impugned LCP Contracts**").

[32] The 2nd Defendant also attached certain related documents with the 4 Impugned LCP Contracts including, inter alia, the following documents:

i) Two letters dated 17.3.2020 purportedly under the letterhead of the Plaintiff requesting for extension of time to delay shipment of goods and payment; and

ii) One letter dated 29.4.2020 purportedly under the letterhead of the Plaintiff requesting for extension of time to delay shipment of goods and payment;

iii) Two authorisation letters dated 26.11.2019 and 10.6.2020 purportedly issued by the 1st Plaintiff to the 2nd Defendant to forward shipping documents to the 1st Defendant which are without letterhead but signed on behalf of the 1st Plaintiff;

(collectively referred to as "**Impugned LCP Letters**")

[33] Upon discovering that the Impugned LCP Letters were forged 1st Plaintiff lodged 2 police reports on 4.9.2020 and 10.9.2020 in respect of the matter.

[34] The 2nd Defendant on 18.11.2020, through its solicitors sent an additional eight contracts that were allegedly entered into between the 1st Plaintiff and the 2nd Defendant and enquired whether they are also forgeries.

[35] Upon checking, the 1st Plaintiff, in response, communicated to the 2nd Defendant that the said additional eight 8 contracts are also forgeries and stressed that the 1st Plaintiff had **never** entered into any contract with the 2nd Defendant. The 1st Plaintiff also stressed that they had **never** dealt with the 2nd Defendant in respect of any goods and that they had fully paid the **1st Defendant** for all the goods that had been delivered to them by the 1st Defendant under the LCP-Popeye Contracts.

[36] The 1st Plaintiff lodged another police report in respect of the said additional alleged eight 8 contracts on 26.11.2020.

Discovery of Alleged Forgery by the 2nd Plaintiff

[37] On 8.9.2020, the 2nd Plaintiff received an email from the 2nd Defendant claiming for overdue payment of USD1,555,656.12 over **three**

contracts allegedly entered into between the 2nd Plaintiff and the 2nd Defendant from January 2020 to February 2020. The 2nd Plaintiff only discovered later that the 2nd Defendant had sent an earlier email dated 3.9.2020 but it was not received ("**the 3 Impugned LGS Contracts**").

[38] By way of the aforesaid emails dated 8.9.2020 and 28.9.2020, the 2nd Defendant forwarded photocopies of the 3 Impugned LGS Contracts and certain documents to the 2nd Plaintiff including, inter alia:

i) Two letters dated 17.3.2020 purportedly under the letterhead of the 2nd Plaintiff requesting for extension of time to delay shipment of goods and payment; and

ii) One letter dated 29.4.2020 purportedly under the letterhead of the 2nd Plaintiff requesting for extension of time to delay shipment of goods and payment;

iii) An authorisation letter dated 10.6.2020 purportedly issued by the 2nd Plaintiff to the 2nd Defendant to forward shipping documents to the 1st Defendant which are without letterhead but signed on behalf of the 2nd Plaintiff.

(collectively referred to as "**Impugned LGS Letters**")

[39] Upon discovering that the LGS Contracts were forged the 2nd Plaintiff then lodged two 2 police reports on 5.9.2020 and 9.9.2020.

[40] The 2nd Defendant on 3.11.2020, through its solicitors sent an additional six contracts that were allegedly entered into between the 2nd Plaintiff and the 2nd Defendant and enquired whether they are also forgeries.

[41] Upon checking, the 2nd Plaintiff, in response, communicated to the 2nd Defendant that the said additional six contracts are also forgeries.

[42] The 2nd Plaintiff then lodged another police report on 26.11.2020 in respect of the said additional alleged six contracts.

The Hong Kong Arbitration

[43] Despite the allegation of forgery by the Plaintiffs in respect of, inter alia, the Impugned LCP Contracts and Impugned LGS Contracts (collectively "**the Impugned Contracts**"), the 2nd Defendant proceeded to initiate the Hong Kong Arbitration against the Plaintiffs through a Notice of Arbitration dated 15.12.2020 ("**Notice of Arbitration**").

[44] After the Notice of Arbitration were served on the Plaintiffs, the Plaintiffs informed the 2nd Defendant of their intention to appoint a forensic handwriting expert to examine the authenticity of the signatures on the Impugned Contracts and requested for the original copies of the documents from the 2nd Defendant. The 1st Plaintiff had also suggested for a joint handwriting expert to be appointed with the 2nd Defendant for the inspection of the documents. However, **no response** was forthcoming from the 2nd Defendant.

[45] The Plaintiffs had put on record to the 2nd Defendant and the HKIAC that the Impugned Contracts are forgeries and they have never agreed to any arbitration agreement and that they should not be compelled to participate in the arbitration proceedings.

ii) The 1st Defendant

[46] The 1st Defendant did not enter appearance in this action.

iii) The 2nd Defendant's Position

[47] The 2nd Defendant's position is simply that the Impugned Contracts as well as the Impugned LCP Letters and the Impugned LGS Letters (collectively **"the Impugned Letters**") are not forged and are valid and enforceable.

[48] The 2nd Defendant further contends, inter alia, that:

i) the 1st Defendant is an agent of the Plaintiffs;

ii) there were dealings between the Plaintiffs and the 2nd Defendant, inter alia, as follows:

a) Meeting in **April 2017** that took place at the 2nd Plaintiff's office in Ipoh;

b) Communications between **10 to 22 July 2017** via email and Whatsapp in order to arrange a joint visit by the 2nd Defendant and the Plaintiffs to the Benxi Iron and Steel (Group) International Economic and Trading Co Ltd (China) ("**Benxi Steel**") in China to discuss the purchase of HRC;

c) Meetings/trips by the 2nd Defendant to the Plaintiffs factories in Ipoh in **April and July 2017**;

d) A joint trip to Benxi Steel in China on **20.7.2017**;

e) Meetings between the 2nd Defendant and the Plaintiffs in Malaysia in **November 2017** at the 1st Plaintiff's factory in Ipoh.

f) The furnishing of the 1st Plaintiff's corporate and financial documents to the 2nd Defendant via email on **4.8.2018**;

g) Letter from the 1st Plaintiff to Formosa Ha Tin Steel Corp (Vietnam) ("**Formosa**") dated **25.2.2019** outlining specifications and monthly requirements for the purchase of steel products.

h) Meeting between the 2nd Defendant, the Plaintiffs and Formosa on **13.6.2019** in Kuala Lumpur.

i) Letter from the 1st Plaintiff/2nd Plaintiff to Formosa dated 17.6.2019 outlining specifications and monthly requirements for the purchase of steel products.

iii) There were previously completed contracts between the 2nd Defendant and the Plaintiffs. Throughout 2019, the 2nd Defendant entered into **14 separate contracts** with the Plaintiffs for the sale and purchase of HRC on CIF (cost, insurance, and freight) Port Klang terms ("**14 Completed Contracts**"). All 14 Completed Contracts were all **paid** on a timely manner. Each of the Completed Contracts contained an arbitration clause.

iv) The 14 Completed Contracts were each performed without incident: the HRC was shipped and delivered to the Plaintiffs and paid for in full. The 1st Defendant acted as an **intermediary agent** for the Plaintiffs, **arranging for** the 14 Completed Contracts to be signed by the Plaintiffs, **receiving payments** in **Malaysian Ringgit** from the Plaintiffs and then **remitting payments** in **USD** to the 2nd Defendant.

v) In **May 2019** the 2nd Defendant couriered to the 1st Plaintiff a full set of documents for Contract No. 164152 (which is not part of the 4 Impugned LCP Contracts).

B] ENCLOSURE 44

[49] Learned counsel for the 2nd Defendant contends that the stay applied for under Section 10 of the Arbitration Act 2005 ("**AA 2005**") must be read with Sections 8 and 18 AA 2005. Sections 8, 10 and 18 AA 2005 provide as follows:

Section 8 AA 2005

*"No court shall intervene in matters governed by this Act, **except** where so provided in this Act."*

Section 10 AA 2005

*(1) A court before which proceedings are brought in respect of a matter which **is the subject of an arbitration agreement** shall, where a party makes an application before taking any other steps in the proceedings, **stay those proceedings and refer the parties to arbitration unless** it finds that the **agreement is null and void, inoperative or incapable of being performed**.*

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.

……

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

(4) This section ***shall also apply*** *in respect of an* ***international arbitration, where the seat of arbitration is not in Malaysia***

Section 18 AA 2005

(1) The ***arbitral tribunal may rule on its own jurisdiction****,* ***including*** *any objections with respect to the* ***existence or validity*** *of the* ***arbitration agreement****.*

(2) For the purposes of subsection (1)-

(a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and

(b) a decision by the arbitral tribunal that the agreement is null and void shall not ipso jure entail the invalidity of the arbitration clause.

(3) ***A plea that the arbitral tribunal does not have jurisdiction*** *shall be raised not later than the submission of the statement of defence.*

(4) A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator.

(5) ***A plea that the arbitral tribunal is exceeding the scope*** *of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.*

(6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.

(7) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits.

(8) Where the arbitral tribunal ***rules on such a plea as a preliminary question that it has jurisdiction****, any party may, within thirty days after having received notice of that ruling* ***appeal to the High Court*** *to decide the matter.*

(9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

(10) No appeal shall lie against the decision of the High Court under subsection (8).

(own emphasis added)

[50] It was submitted on behalf of the 2nd Defendant that the first principle is that an arbitral tribunal is competent to rule in the first instance on a dispute as to its own jurisdiction, including a dispute as to the very existence of an arbitration agreement, otherwise known as the *kompetenz-kompetenz* principle. It is reflected in Section 18 of the Arbitration Act 2005. The Plaintiffs' assumption that this Court has the power to determine a dispute about the existence of the Impugned Contracts is at odds with the *kompetenz-kompetenz* principle. The Court of Appeal in **Capping Corp Ltd v. Aquawalk Sdn Bhd [2013] 1 LNS 574** was cited by learned counsel for the 2nd Defendant and in particular the following passages:

"[28] Learned authors in the book - The Arbitration Act 2005 - Uncitral Model Law as applied in Malaysia - at page 87 in respect of sec 18(1) states as follows:

> *18.6 Section 18(1) provides for the doctrine of 'Kompetenz-Kompetenz' which is taken from German terminology. The doctrine has two aspects.* ***Firstly, it confirms to the arbitrators that they may decide on their jurisdiction without need for support from the***

Court. Secondly, it <u>discourages</u> the Court from determining the issue before the arbitral tribunal has decided it*. The Court itself when seized prematurely with the issue of the arbitrator's jurisdiction would confine itself to find that an arbitration agreement exists and to refer the parties to arbitration. In effect, the doctrine reduces the ability of one party to delay the proceedings by taking the matter to Court and claiming want of jurisdiction.*

[29] Applying that spirit of ***minimal interference*** *by the Courts on matters relating* ***disputes agreed to be resolved by arbitration****, we make no further rulings on any of the other issues raised by the respective counsel in this appeal or the High Court.* ***Those issues ought to be adjudicated by an arbitrator or arbitrators****.*

(own emphasis added)

[51] In further support of his submissions above learned counsel for the 2nd Defendant also cited the case of **Renault SA v. Inokom Corporation Sdn Bhd [2010] 5 MLJ 394** where the Court of Appeal held:

"[24] We have taken note that under the 2005 Act there is no equivalent provision to s 25(2) of the 1952 Act which provides that in a dispute which involves the question of whether a party has been guilty of fraud, the High Court shall have power to order that the arbitration agreement shall cease to have effect so far as may be necessary to enable that question to be determined by the High Court. It is indisputable, that ***under the 2005 Act matters of fraud are no longer to be treated in a special category, and is deemed to be within the competence of arbitrators****. Widening the scope of the jurisdiction of arbitrators is certainly* ***consistent with current judicial policy to promote and encourage alternative dispute resolutions*** *in lieu of court litigation."*

(own emphasis added)

[52] Essentially learned counsel for the 2nd Defendant point is that this Court must not or should be slow to interfere with matters which parties have

agreed to resolve by way of arbitration and that the arbitrator is competent to decide disputes including matters which involve fraud as in the present case.

[53] Both learned counsel for the 2nd Defendant and Plaintiffs have each submitted a rather huge number of authorities on this issue but I do not find it necessary to go through each and every one of them and shall concentrate on the more pertinent ones only.

[54] I am in complete agreement with the principles enunciated in the above cases that learned counsel for the 2nd Defendant had cited and agree that where the dispute or matter is within the arbitral tribunal's purview, generally, the Court should not interfere with the tribunal's jurisdiction (**Capping Corp** (supra)). However, for a stay to be granted under Section 10 AA 2005 there **must** first be an agreement between parties to refer their dispute to arbitration and this is made clear from the words, "*unless it finds that the agreement is null and void, inoperative or incapable of being performed*" in Section 10 AA 2005. This is further reinforced by the above quoted passage by the Court of Appeal in **Capping Corp** (supra), "*on matters relating disputes* ***agreed*** *to be resolved by arbitration*".

[55] Therefore, the main and crucial issue to be determined by this Court in so far as Enclosure 44 is concerned is whether there is in existence a **valid and enforceable** agreement between the Plaintiffs and the 2nd Defendant to arbitrate their dispute. Only then can a stay be granted under Enclosure 44.

[56] The issue in the instant case is the very ***existence*** of an agreement to arbitrate and not so much the terms of such an agreement.

[57] The 2nd Defendant alleged that the agreement to arbitrate is contained in the Impugned Contracts which states as follows:

*"**Governing Law and Arbitration:***

Any unresolved dispute, controversy or claim arising out of or relating to this contract, including any question regarding its existence, validity or termination, shall be settled by arbitration in accordance with the Hong Kong International Arbitration Centre (HKIAC) arbitration rules as at present in force, subject to the following:

(a) The place of arbitration shall be Hong Kong, unless otherwise agreed by the parties; the language of the arbitration shall be English;

(b) The number of arbitrators shall be three, one to be nominated by each party and the third (chairman), to be nominated by the two appointed arbitrators or, failing agreement on such nomination to be of a nationality independent of the parties and to be nominated by the HKIAC, provided that if the respondent party fails to nominate their arbitrator within 14 days of receipt of the nomination by the claimant, the arbitrator nominated by the claimant shall be the sole arbitrator.

The award of the arbitral tribunal shall be final. This agreement shall be governed by the laws of Hong Kong."

2nd Defendant's Position

[58] The arguments advanced on behalf of the 2nd Defendant is essentially that the Hong Kong Arbitration has jurisdiction to determine on a preliminary point under Section 18(3) AA 2005, a plea that the arbitral tribunal does not have jurisdiction and that the Plaintiffs are entitled to submit such a plea. However, the contrast argument by the Plaintiffs is if there is no arbitration agreement to begin with then there would really be no need for the Hong Kong Arbitration in the first place.

[59] This is “chicken and egg” argument, a phrase I had used at the hearing of Enclosure 44, which was coincidentally also used in a Singapore High Court case cited by learned counsel for the 2nd Defendant, **Malini Ventura v. Knight Capital [2015] SGHC 225**, **[2015] 5 SLR 707**.

[60] **Malini Ventura** (supra) was heavily relied on by learned counsel for the 2nd Defendant, which case also dealt with a similar stay application under **Section 6 of the Singapore International Arbitration Act 2002** which provides as follows:

“Enforcement of intentional arbitration agreement

6.—(1) Notwithstanding Article 8 of the Model Law, 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****.”*

(own emphasis added)

[61] In **Malini Ventura** (supra), the plaintiff there sought for a declaration that she had not entered into any arbitration agreement with the defendants and a further declaration that all arbitration proceedings commenced by the defendants against the plaintiff were a nullity and of no effect. She also applied for an injunction to restrain the defendants from continuing

with the arbitration proceedings against the plaintiff pending the full and final disposal of the action. The plaintiff alleged that her signature in a contract of guarantee was forged. The Guarantee contained an arbitration clause. Meanwhile the defendants applied for a stay of the court proceedings pending the full and final determination of the arbitration proceedings.

[62] Faced with a similar question as in the instant case, Judice Prakash J in **Malini Ventura** (supra) held as follows:

"How should section 6 of the IAA be applied?

19 ***This is where the chicken and the egg question arises****. Mr Nakul Dewan, counsel for the defendants, says that the international arbitration regime in place in Singapore gives primacy to the Tribunal and it is the Tribunal that has the first bite at deciding whether or not there is an arbitration agreement which confers jurisdiction on it. The defendants further say that under s 6 of the IAA I have no choice but to refer the question of the existence, validity or termination of an arbitration agreement to the Tribunal. The plaintiff's riposte is that s6 would only apply to an "arbitration agreement" and that since she did not sign the Guarantee, neither she nor the defendants are parties to an "arbitration agreement" within s 6(1) and therefore the defendants are not allowed to apply to court for a stay of this action. It is for the court to decide whether there is an arbitration agreement or not."*

……..

21 The ***plaintiff*** *relies on s 6(1) to argue that where the* ***existence*** *of an arbitration agreement is* ***challenged****, until that challenge is resolved by the court, there can be* ***no "arbitration agreement" which permits the opposing party to apply for a stay of the court action****. The* ***defendants****, on the other hand, refer to Art 16 of the Model Law, which is part of Singapore law, and emphasise that under Art 16(1)* ***the Tribunal may rule on its own jurisdiction including any objections with respect to the "existence or validity of the arbitration agreement"****. Accordingly, s 6(2) makes it plain that*

a stay must be issued unless the court is satisfied that the arbitration agreement is null and void or inoperative or incapable of being performed.

22 ***There is no doubt that as a matter of general law, the courts have jurisdiction to decide on the existence or otherwise of a putative contract and this would include an arbitration agreement****. It is the defendants who have invoked s 6 of the IAA to persuade me that in the present case the court's general jurisdiction must give way to the Tribunal's jurisdiction which is founded not only on Art 16 of the Model Law but also on r 25.2 of the SIAC Rules which specifically empowers the Tribunal to decide on the existence of the arbitration agreement.* ***This section can only be invoked if there is an "arbitration agreement"*** *and therefore the question is* ***what burden of proof the defendants have to satisfy*** *in order to persuade me of this.*

(own emphasis added)

[63] The Singapore High Court in **Malini Ventura** (supra) finally decided that the test to be applied under the circumstances is the ***prima facie*** **test** and held as follows:

"36 Bearing in mind the differences in the regimes governing international arbitration in Singapore and in England, ***I do not think it will be correct for me to fully take on board the approach of the English courts as set out in*** **Albon** ***([30] supra) and*** **Al-Naimi***. The regime in force here gives primacy to the tribunal although, of course, the court still has an important role to play. If I were to hold that, in a situation where the conclusion of the arbitration agreement is in issue, the jurisdiction in s 6(2) to stay the court proceedings would not bite unless I could conclude, on the basis of the usual civil standard, that the arbitration agreement had been entered into, I would be imposing too high a burden on the party seeking the implementation of the arbitration agreement.* ***I consider that it would satisfy the rights of both parties if the party applying for the stay was able to show on a*** **prima facie** ***basis that the arbitration agreement existed****. The matter would then go to* ***the tribunal to decide whether such existence could be established on the usual civil standard*** *and then, if any party was dissatisfied with the tribunal's decision, such party could come back to the court for the last say on the issue.*

In another case regarding a tribunal's jurisdiction, albeit a different aspect not involving the formation of the arbitration agreement, the Court of Appeal observed that it was only in the clearest case that the court should decide that there was no jurisdiction instead of remitting the matter to the tribunal for an initial decision (see Tjong Very Sumito v Antig Investments Pte Ltd *[2009] 4 SLR(R) 732 at [22]—[24]).*

(own emphasis added)

[64] **Malini Ventura** (supra) also referred to the English cases of **Nigel Peter Albon v. Naza Motor Trading Sdn Bhd [2007] 2 All ER 1075** and **Ahmad Al-Naimi v. Islamic Press Agency Inc [2000] 1 Lloyd's Rep 522** which dealt with a similar stay application where the existence of the arbitration agreement was being challenged However, the High Court in **Malini Ventura** (supra) did not follow the approaches taken in **Albon** (supra) and **Al-Naimi** (supra) by reason of the differences in the regimes governing international arbitration in Singapore and in England.

[65] The approach taken in the case of **Malini Ventura** (supra) was endorsed by the Singapore Court of Appeal in **Tomolugen Holdings Ltd v Silica Investors Ltd [2015] SGCA 57, [2016] 1 SLR 373** where it was held as follows:

"63 The prima facie approach was also the view urged upon us by the amicus curiae, Prof Boo. We agree that a Singapore court should adopt a prima facie standard of review when hearing a stay application under s 6 of the IAA. In our judgment, ***a court hearing such a stay application should grant a stay in favour of arbitration if the applicant is able to establish a prima facie 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**."*

(own emphasis added)

[66] It was further submitted on behalf of the 2nd Defendant that the **Malini Ventura** (supra) and **Tomolugen** (supra) apply in Malaysia as Malaysia's AA 2005 and Singapore's International Arbitration Act are both based on the same UNCITRAL Model Law.

Plaintiffs' Position

[67] In contrast, learned counsel for the Plaintiffs relied heavily on the English case of **Albon** (supra) (**Albon (trading as NA Carriage Co) v. Naza Motor Trading Sdn Bhd and another (no 3) [2007] All ER 1075** as cited by learned counsel for the Plaintiffs) and submitted that **Albon** (supra) relied on **Order 62.8(3)** of the **English Civil Procedure Rules** ("**English Rules**") which is similar to our **Order 69 Rule 10(3) of the Rules of Court 2012** ("**ROC**"). A comparison between Order 69 Rule 10(3) ROC and Order 62.8(3) of the English Rules can be seen below:

Order 69 Rule 10(3) ROC

*"(1) An application seeking a **stay of legal proceedings** under section 10 of the 2005 Act shall be served on all parties to those proceedings who have given an address for service.*

(2) A copy of an application under paragraph (1) shall be served on any other party to the legal proceedings (whether or not he is within the jurisdiction) who has not given an address for service, at-

(a) his last known address; or
(b) a place where it is likely to come to his attention.

(3) ***Where a question arises as to whether****-*

(a) ***an arbitration agreement has been concluded****; or*
(b) the dispute which is the subject matter of the proceeding falls within the terms of such agreement,

the Court may decide that question or give directions *to enable it to be decided* ***and may order the proceeding to be stayed pending its decision****."*

Order 62.8(3) of the English Rules

*"****Where a question arises as to whether****—(a)* ***an arbitration agreement has been concluded****; or (b) the dispute which is the subject-matter of the proceedings falls within the terms of such an agreement* ***the court may decide that question or give directions*** *to enable it to be decided* ***and may order the proceedings to be stayed pending its decision****."*

(own emphasis added)

[68] Learned counsel for the Plaintiffs argued that the English position on this matter is in line with the wordings of Order 69 Rule 10(3) ROC and that the drafters of the ROC must have intended for the High Court to have ruled on the ***existence*** of an arbitration agreement **first** before it may order a stay of proceedings under Section 10 AA 2005. Thus, the "*full merits*" approach fits better in accordance with Malaysian law.

[69] In dealing with the different approaches taken in **Malini Ventura** (supra) and **Albon** (supra), it is important to highlight that **Albon** (supra) also involved an allegation of forgery of an agreement which contained an arbitration clause.

[70] The application for stay in **Albon** (supra) was based on **Section 9** of the **English Arbitration Act 1996** which application also involved **Section 30** and Order 62.8(3) of the English Rules. Sections 9 and 30 of the English Arbitration Act 1996 state as follows:

*"**9.** Stay of legal proceedings—(1) **A party to an arbitration agreement** against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which **under the agreement is to be referred to arbitration** may (upon notice to the other parties to the proceedings) **apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter** . . .*

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

*(4) On an application under this section **the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed** . . ."*

*"**30.** Competence of tribunal to rule on its own jurisdiction—(1) Unless otherwise agreed by the parties, **the arbitral tribunal may rule on its own substantive jurisdiction**, that is, as to—(a) **whether there is a valid arbitration agreement**, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.*

Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part."

(own emphasis added)

[71] Lightman J in **Albon** (supra) held that there are two requirements that need to be established as **conditions precedent** before the jurisdiction

of the Court to stay proceedings under Section 9 of the English Arbitration Act 1996 can be invoked, as follows:

"[14] I turn now to the first issue. The first question raised is what (if anything) Naza Motors needs to establish as ***conditions precedent to invoking the jurisdiction conferred by s 9(1) to grant a stay of court proceedings****. In my judgment the language of s 9(1) plainly establishes* ***two threshold requirements****. The first is that* ***there has been concluded an arbitration agreement*** *and the second is that* ***the issue in the proceedings is a matter which under the arbitration agreement is to be referred to arbitration****.* ***The first condition is as to the conclusion*** *and the second is as to the scope of the arbitration agreement. Accordingly unless and until the court is satisfied that both these conditions are satisfied the court cannot grant a stay under s 9.*

(own emphasis added)

[72] Further, **Albon** (supra) relied on the English Court of Appeal case of **Al-Naimi** (supra) in setting out the guidelines for a stay application where the **conclusion** of the arbitration agreement is in issue, as follows:

[16] *Guidelines were laid down by Judge Humphrey Lloyd QC in* Birse Construction Ltd v St David Ltd *[1999] BLR 194 at first instance and (though the decision of the judge was reversed) his statement of the guidelines was approved on appeal by the Court of Appeal ((1999) 70 ConLR 10) and again by the Court of Appeal in the later case of* **Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Services Inc** ***(2000) 70 ConLR 21****. These* ***guidelines*** *are to the effect that on an application for a stay such as the present* ***where the conclusion of the arbitration agreement is in issue,*** *there are* ***four options open to the court: (1) (where it is possible to do so) to decide the issue on the available evidence presently before the court that the arbitration agreement was made and grant the stay; (2) to give directions for the trial by the court of the issue; (3) to stay the proceedings on the basis that the arbitrator will decide the issue; and (4) (where it is possible to do so) to decide the issue on the available evidence that the arbitration agreement was not made and dismiss the application***

for the stay. *The Court of Appeal adopted the second of these options. The guidelines and the decision of the Court of Appeal establish that on an application under s 9(1) of the 1996 Act the court can try and (subject to one qualification) should decide the issue whether the arbitration agreement was concluded. The minor qualification in respect of which the guidelines are not in accord with the construction which I have adopted is in respect of the third of the guidelines.* ***Where there is an issue which the court cannot resolve on the available evidence on the application as to whether the arbitration agreement was concluded, the court indeed can stay the proceedings so that the arbitrators can decide the issue, but only by exercising its inherent jurisdiction and not by exercising any jurisdiction under s 9****. Support for this view may be found in a passage in the* Al Naimi *case ((2000) 70 ConLR 21 at 30).*

(own emphasis added)

[73] In examining Sections 9(1) and 9(4) of the English Arbitration Act 1996, Lightman J in **Albon** (supra) held that Section 9(4), which is in *pari materia* with our **Section 10(1) AA 2005**, assumes that there is a concluded arbitration agreement. This is in line with the two threshold requirements which Lightman J held to be "*conditions precedent to invoking the jurisdiction conferred by s 9(1) to grant a stay of court proceedings*".

[74] Confronted with the question on whether there were any local cases with similar fact that dealt with the same issue as in the present case learned counsel for the 2nd Defendant cited the Court of Appeal case of **TNB Fuel Services Sdn Bhd v. China National Coal Group Corp [2013] 4 MLJ 857** where the existence of the arbitration agreement in that case was challenged. However, the issue of the correct or proper test to be applied in a situation where the existence of an arbitration agreement is in issue in a stay application under Section 10 AA 2005 was not raised nor decided in **TNB** (supra). Further, the facts of **TNB** (supra) were quite

different and also involved different issues that were not in consideration in the instant case.

[75] Therefore, whilst **TNB** (supra) involved a similar stay application under Section 10 AA 2005, however, it is not directly applicable to the present case for the following reasons:

i) In **TNB** (supra) the challenge to the "existence" of the arbitration agreement was **not** based on the fact that the agreement did not exist per se but because it was contained in a separate document which was not in the main or primary agreement between parties, which the High Court did not agree to refer or use.

ii) The High Court considered the merits of the respondent's application for the injunction on the basis of the Arbitration Act 1952 and not AA 2005 Act, which ought to have been the case. In other words, the High Court in **TNB** (supra) did not decide the case based on the correct prevailing applicable law.

iii) The Court of Appeal held that the trial judge erred in not considering the application for the injunction on the basis of **Section 9(5) AA 2005** and the fact that the exchange of documents between the parties (bid form and supporting bid bond from the respondent, the letter of award by the appellant and the letter from the respondent confirming acceptance of the terms in the letter of award) constituted the requisite offer and acceptance thereby creating a binding contract. This contract, in turn, incorporated the terms of an unsigned contract (the coal purchase contract) thereby incorporating by reference the arbitration agreement in this document.

iv) The Court of Appeal further held that if the trial judge had applied Section 9(5) AA 2005 to these facts, she would have come to the conclusion that the arbitration agreement was binding on the parties.

v) Conversely in the instant case, the application of Section 9(5) AA 2005 is not in issue. It is not in dispute that the Impugned Contracts contained an arbitration agreement. This arbitration agreement is **not** contained in any other document that could be argued to form a contract between parties. It is the very existence of the Impugned Contracts containing the arbitration Agreement that is in issue here based on the allegation that they are forged.

vi) In **TNB** (supra), the arbitral tribunal had been fully-constituted and the appellant and the respondent had attended the preliminary meeting fixed by the arbitral tribunal ("**Tribunal**"). The **respondent** informed the Tribunal that it was challenging the jurisdiction of the Tribunal to hear the dispute that was brought to arbitration by the appellant. The Tribunal agreed to hear the respondent's **jurisdictional challenge** as a preliminary issue. Directions were given by the Tribunal for parties to exchange pleadings and witness statements on the preliminary issue. Having agreed to raise the issue of the "existence" of the arbitration agreement before the Tribunal as a jurisdictional challenge, it was **not** right or proper for the **respondent** in **TNB** (supra) to then apply to the High Court to restrain the arbitral proceedings based on the same issue. In the present case, the Plaintiffs have been consistent in reserving their rights to not participate in the Hong Kong Arbitration. In this regard the Plaintiffs had acted expeditiously in initiating this action as well as Enclosures 15 and 28 to restrain the Hong Kong Arbitration from proceeding.

vii) Further, **TNB** (supra) did not involve the issue of **fraud** or **forgery**. Thus, as the outcome of the case (on appeal) showed, it was possible for the High Court to arrive at a decision that an arbitration agreement existed based on available evidence (**Albon** (supra)).

[76] The following excerpts from **TNB** (supra) makes the above distinctions between the present case and **TNB** (supra) clear:

> *"[21] With respect, in our judgment,* ***the learned trial judge erred in not considering the application for the injunction on the basis of sub-s 9(5) of the Arbitration Act 2005****. The fact of the matter is that the exchange of documents between the parties which included: the bid form and supporting bid bond from the respondent, the letter of award by the appellant and the letter from the respondent confirming acceptance of the terms in the letter of award constitutes the requisite offer and acceptance thereby creating a binding contract. This contract, in turn, incorporated the terms of the unsigned coal purchase contract thereby incorporating by reference the arbitration agreement' in this document. Against these background facts, in our judgment,* ***if the learned trial judge had applied s 9(5) of the Act to these facts, we are of the considered opinion that Her Ladyship would have come to the conclusion that the 'arbitration agreement' was binding on the parties****. In any event, in our opinion, even if Her Ladyship entertained any doubts concerning the existence of the 'arbitration agreement', Her Ladyship ought to have leaned in favour of refusing the injunction so as to enable this jurisdictional issue to be determined by the arbitral tribunal following the pronouncements of the court in the authorities of* Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhdand CMS Energy Sdn Bhd v Poscon Corp *and the passage in the book of* Malaysian Arbitration Act 2005 *by Sundra Rajoo and* WSW Davidson *recited in paras 11, 14 and 13 respectively in this judgment.*
>
> (own emphasis added)

[77] As stated earlier in this Judgment, I accept and do not discount the general rule of the law that the Court is slow to interfere with arbitration

proceedings where there is an agreed arbitration agreement and the application of the doctrine of *kompetenz-kompetenz.* A doctrine which is in line with Section 18 AA 2005 in that an arbitral tribunal may rule as to its own jurisdiction including the issue of the existence of the arbitration agreement. This position is trite and the rule is contained in several high authorities which have been referred to earlier including **TNB** (supra) as well as another case heavily relied on by learned counsel for the 2nd Defendant, **Dell Computer Corp v. Union des consommateurs [2007] SCJ No 34** (Canadian Supreme Court).

[78] However, that does *not* mean that the Court should automatically grant a stay under Section 10 AA 2005 when an applicant under that provision claims there is a binding arbitration agreement. Neither is the Court precluded from critically considering the facts of such an application when the arbitration agreement itself is disputed. To do so would ultimately result in removing the jurisdiction of the Court under Section 10 AA 2005.

[79] It cannot be denied that the arbitration agreement is the cornerstone of a stay application under Section 10 AA 2005. It is fundamental.

[80] In fact, further to paragraph 73 of this Judgment, in the context of a Section 10(1) AA 2005 stay application, I find the following passages from the decision of Lightman J in **Albon** (supra) regarding his interpretation of Sections 9(1) and 9(4) of the English Arbitration Act 1996 to be very elucidating:

"[18] My construction of s 9(1) is entirely in accord with s 9(4) and (again subject only to minor qualifications) with the authorities on that section. ***Section 9(4) assumes that an arbitration agreement has been concluded and it provides for the situation where issues arise whether that concluded agreement is or may be in law 'null and void, inoperative, or***

incapable of being performed'. In this context 'null and void' means 'devoid of legal effect'*. This is made clear by the decision in 1983 of the United States Court of Appeals for the Third Circuit in* Rhone Mediterranee Compagnia v Achille Lauro *(1983) 712 F 2d 50. The court in that case had to determine the construction of identical wording in section 3 of Article II of the 1959 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. On this issue the court said (at 53):*

> *'...we conclude that the meaning of Article II section 3 which is most consistent with the overall purposes of the Convention is that an agreement to arbitrate* ***is "null and void" only (1)*** *when it is subject to an internationally recognized defense such as duress, mistake,* ***fraud*** *or waiver... or (2) when it contravenes fundamental policies of the forum state. The "null and void" language must be read narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate.'*

Likewise in this context ***for an arbitration agreement to be 'inoperative' it must have been concluded but for some legal reason have ceased to have legal effect****; eg by reason of acceptance of a repudiation as in Downing v Al Tameer Establishment [2002] EWCA Civ 721 at [26]-[35], [2002] 2 All ER (Comm) 545 at [26]-[35]."*

…….

"[21] As regards the third submission, I have already given my reasons for holding that ***an arbitration agreement must have been 'concluded' before it can be held to be 'null and void'****. It is true that in the second sentence of his judgment in the* Sun Life Assurance *case Potter LJ did indeed say (at [2]):*

> *'The judge [below] dismissed the application, holding that* ***no arbitration agreement had been concluded*** *between the parties and that the agreement relied on by CNA was thus "****null and void" within the meaning, and for the purposes, of s 9(4) of the 1996 Act****.'*

The judgment of the first instance judge is not available. But it is clear that there was no issue and no argument in the Sun Life Assurance *case whether,* ***in a case where no arbitration had been concluded, the situation was***

outside s 9(1) or 'null and void' within s 9(4). *The dictum can carry no weight and certainly no sufficient weight to undermine the conclusion which I have reached."*

(own emphasis added)

[81] Section 9(1) read together with Section 9(4) of the English Arbitration Act 1996 is *pari materia* with Section 10(1) AA 2005 and the similarities can be seen from the following comparison of the relevant material parts of Section 10(1) AA 2005 and the English Arbitration Act 1996 (to which I have put emphasis):

i) The opening words of Section 10(1) AA 2005:

"A court before which proceedings are brought in respect of a matter which is the ***subject of an arbitration agreement*** *shall"*

ii) The relevant parts of Section 9(1) of the English Arbitration Act 1996:

"A party ***to an arbitration agreement*** *against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which* ***under the agreement is to be referred to arbitration*** *may (upon notice to the other parties to the proceedings) apply ….."*

iii) The ending words of Section 10(1) AA 2005:

"…. stay those proceedings and refer the parties to arbitration ***unless it finds that the agreement is null and void, inoperative or incapable of being performed****."*

iv) Section 9(1) of the English Arbitration Act 1996:

"(4) On an application under this section the court shall grant a stay ***unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed****."*

[82] Therefore, I am inclined to accept the interpretation given by Justice Lightman in **Albon** (supra) that there must first be a **concluded** arbitration agreement (in that it must exist) before the Court can hold it to be "inoperative", but for some legal reason have ceased to have legal effect.

[83] Justice Lightman in **Albon** (supra) relied on the English Court of Appeal case of **Sun Life Assurance Co of Canada v. CX Reinsurance Co Ltd [2003] EWCA Civ 283, [2004] Lloyd's Rep IR 58** which held that if there was no concluded arbitration agreement the situation was outside Section 9(1) of the English Arbitration Act 1996 or "null and void" within Section 9(4).

[84] Therefore, applying the interpretation given by the above English Courts in **Albon** (supra) and **Sun Life Assurance** (supra) to Section 10(1) AA 2005, I would summarise the position as follows:

i) There must be a "concluded" arbitration agreement (that it must exist and is valid) before Section 10(1) AA 2005 can operate if not the application for stay would be outside scope of Section 10(1) AA 2005 and cannot apply **or** if there is no "concluded" arbitration agreement (or that it does not exist or is invalid) the application for stay may *still* fall within Section 10(1) AA 2005 but the arbitration agreement is "null and void". In either case, if the Court finds there is no "concluded" arbitration agreement, the stay application under Section 10(1) AA 2005 would not succeed.

ii) There are 2 threshold requirements for an application for stay under Section 10 AA 2005 ("**Threshold Requirements**") as follows:

a) That there is a concluded arbitration agreement (the existence of an arbitration agreement). This also goes to the validity of the arbitration agreement; and

b) That the issue in the proceedings is a matter which under the arbitration agreement is to be referred to arbitration or otherwise the **scope** of the arbitration agreement.

Test To Be Applied – *Prima Facie* or "Full Merits"

[85] I now return to the arguments of learned counsel for the 2nd Defendant and the Plaintiffs on the issue of the correct test to be applied in a Section 10 AA 2005 stay application where the existence of the arbitration agreement itself is being challenged.

[86] I begin with the fact that Sections 10 and 18 AA 2005 must be interpreted in harmony and this includes the doctrine of *kompetenz-kompetenz.* This is also the earlier-mentioned "chicken and egg" argument.

[87] The facts of this case are rather unique and I would opine that they do not fall within the usual Section 10 AA 2005 stay applications which deal with the "scope" (or terms) of the arbitration agreement rather than its existence.

[88] The unique salient features of the present case are as follows:

i) There is a main action and its subject matter is for the Court to determine the *existence* of the arbitration agreement itself. The Plaintiffs' cause of action is based on forgery and fraud.

ii) The scope or terms of the arbitration agreement is not in issue here.

iii) The Plaintiffs had applied for an interlocutory injunction to restrain arbitral proceedings from proceeding pending the disposal of the main action.

iv) The 2nd Defendant applied for a stay under Section 10 AA 2005 based on their allegation that there is a valid and binding arbitration agreement.

[89] Out of the many authorities cited by both learned counsel for the 2nd Defendant and the Plaintiffs, only two cases have similar factual background and issues as in the instant case and they are the Singapore case of **Malini Ventura** (supra) and the English case of **Albon** (supra).

[90] There are two separate positions taken in **Malini Ventura** (supra) and **Albon** (supra) regarding the test to be applied where the existence of the arbitration agreement is in question and they are as follows:

i) **Malini Ventura** (supra) applied a *prima facie* test ("**Prima Facie Test**");

ii) **Albon** (supra) did not specify a particular test but the words used were, "*on the **available evidence on the application** as to whether the arbitration agreement was concluded*" which learned counsel for the Plaintiffs' referred to as the "full merits" test where

the civil standard of balance of probability applies ("**Full Merits Test**").

[91] Based on the authorities cited by parties, there were only two other cases which referred to the Prima Facie Test and that is the Singapore Court of Appeal case of **Tomolugen** (supra) and Canadian Supreme Court case of **Dell Computer** (supra) but the facts of these cases are different than the present case.

[92] There was no Malaysian case cited that makes reference to or applied the Prima Facie Test in respect of an application for stay under Section 10 AA 2005.

[93] Nevertheless, I note that the Federal Court in **Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd [2016] 5 MLJ 417, [2016] 9 CLJ 1** did refer to **Dell Computers** (supra), however, it did not specifically refer or apply the Prima Facie Test. In fact, the Federal Court in **Press Metal Sarawak** (supra) only referred to **Dell Computer** (supra) in respect of **Section 18(5) AA 2005** which provides, "a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings".

[94] On the specific issue of the existence of a valid and binding arbitration agreement, the Federal Court in **Press Metal Sarawak** (supra) held as follows:

*"[43] The **first issue** which **must be determined under s 10(1) of the 2005 Act** is whether there is in **existence** **a valid and binding arbitration agreement or clause** between the parties relating to the subject matter of the claim in question."*

.....

*[48] The learned judge **made a finding** that 'even though the placement slip do not expressly contain an arbitration clause, it is not a disputed fact that the placement slip makes reference to the following: renewal of policy No HW-E0023997-EMB-R002'. The learned judge **concluded that the evidence adduced by the defendant** clearly showed that the above reference related to the policy number of the previous Jerneh Policy and there was an understanding between the parties that the new policy would be based upon the terms of the expired Jerneh Policy.*

*[49] **Together with other supporting documentary evidence** in the form of an email from the defendant dated 24 October 2012 which also made reference to the placement slip and the renewal of the Jerneh Policy, and a series of emails between the plaintiff and its authorised broker, BIB Insurance, particularly an email dated 2 October 2012 from BIB Insurance, sent to the defendant, which clearly made reference to the renewal of the previous Jerneh Policy, the learned judge concluded that the expired Jerneh Policy contained an arbitration clause in relation to both the machinery breakdown and the loss of profits sections of the cover, and the said arbitration clause was effectively incorporated in the latter policies by the reference made in the placement slip.*

*[50] **In light of all those findings**, the learned judge held that 'in my view the intention of the parties was that any disputes would be referred to arbitration as per terms and conditions of the expiring Jerneh Policies and agreement extends to the matters claim in this suit'.*

*[51] **We agree with the findings of the learned judge on this issue**. **These are findings of fact based on the evidence adduced before the court**. We find that these findings are consistent with the provisions of s 9 of the 2005 Act, particularly sub-s (5) thereof which clearly provides that a reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement; and the agreement is in writing and the reference is such as to make that clause part of the agreement. We find no reason to disturb them.*

(own emphasis added)

[95] It is clear from the above quoted passages from **Press Metal Sarawak** (supra) which emphasis I added, that the Federal Court approved the learned High Court's **evaluation** and **findings of fact** based on **evidence** adduced before the Court. It is therefore safe to say that such evaluation of evidence is **not** consistent with the Prima Facie Test.

[96] To further emphasise this point, the Federal Court in **Press Metal Sarawak** (supra) did not speak of a superficial or cursory method of evaluation evidence or otherwise a non-detailed method of examination the evidence in an application under Section 10(1) AA 2005 where the existence of an arbitration agreement is in issue. On the contrary, it seems to supports a more thorough approach in assessing the evidence.

[97] I am therefore of the considered view that the Prima Facie Test is not applicable to the present case.

[98] In the recent case of **Master Mulia Sdn Bhd v. Sigur Ros Sdn Bhd [2020] 9 CLJ 213; [2020] 6 MLRA 51** the Federal Court held as follows:

> *"[56] ..... Whilst we appreciate the appellant's arguments that s. 37 should be interpreted in a manner consistent with the underlying policies and objectives of the New York Convention and the Model Law,* ***the courts must be mindful against importing principles advocated by foreign jurisdictions without careful consideration of the foreign law in question and our AA 2005****. In this respect, we are bound to agree with the submission of the respondent that* ***the Singapore position is not applicable in Malaysia****. We say this because sub-ss. 37(1)(b)(ii) and 37(2)(b)(ii) do not require prejudice to be established; unlike s. 48(1)(a)(vii) of the Singapore Act which requires the applicant to show that the rights of any party have been prejudiced."*
>
> (own emphasis added)

[99] While **Master Mulia** (supra) was not dealing with Section 6 of the Singapore International Arbitration Act, however, as the Federal Court had pointed out, caution must be applied in importing the Singapore position when dealing with AA 2005.

[100] Having considered and compared the Singapore position and the English position in relation to a stay of arbitral proceedings with Section 10(1) AA 2005, I am of the considered view that the English position is to be preferred.

[101] Not only is Sections 9(1) read with Section 9(4) of the English Arbitration Act 1996 in *pari materia* with Section 10(1) AA 2005 but Order 62.8(3) of the English Rules is also similar to Order 69 Rule 10(3) ROC.

[102] Thus, I find that the principles enunciated in **Albon** (supra), to which I have dealt with in extenso, are applicable to the instant case. This would include the **Full Merits Test** which I find to be consistent and in line with the method of evaluating evidence in **Press Metal Sarawak** (supra) for determining the existence of an arbitration agreement in an application for stay under Section 10 AA 2005.

[103] This would also include the Threshold Requirements for an application for stay under Section 10 AA 2005 on the issue of whether there is a concluded arbitration agreement (existence and validity) and the scope or the terms of the arbitration agreement. For the purpose of completeness, no arguments were advanced on the second part of the Threshold Requirements and hence is not an issue as far as the stay application in Enclosure 44 is concerned.

[104] Further, as stated earlier in paragraph [72], **Albon** (supra) had clearly set out the guidelines in the form of the four options open to the Court where the conclusion of the arbitration agreement is in issue which are:

i) "*(where it is possible to do so) to decide the issue on the available evidence presently before the court that the arbitration agreement was made and grant the stay*";

ii) "*to give directions for the trial by the court of the issue;*

iii) *"to stay the proceedings on the basis that the arbitrator will decide the issue*"; and

iv) "*(where it is possible to do so) to decide the issue on the available evidence that the arbitration agreement was not made and dismiss the application for the stay*".

[105] I find these guidelines to be not only instructive but it also allows the Court to navigate between several option depending on its findings on the question of the existence of the arbitration agreement.

[106] On the earlier issue of reconciling the jurisdictional issue of an arbitral tribunal and the Court and the doctrine of *kompetenz-konpetenz*, Justice Lightman in **Albon** (supra) had this to say:

"[20] I would answer the first and second submissions as follows. Whilst the ***doctrine of 'Kompetenz-Kompetenz'*** *(which is given effect in a domestic d arbitration by s 30 of the 1996 Act) provides that the arbitral tribunal shall have jurisdiction to determine whether the arbitration agreement was ever concluded,* ***it does <u>not</u> preclude the court itself from determining that question****. There are* ***two reasons*** *why the court must have jurisdiction to rule on whether the arbitration agreement was concluded. The first is that the rule of law in general and subject only to limited exceptions requires that* ***a party***

should not be barred from access to the court for the resolution of disputes *unless the grounds for such bar are established. A bar on the ground of* ***the alleged conclusion of an arbitration agreement*** *(in general and subject only to limited exceptions)* ***is not established unless and until the court has ruled on the issue whether it has been concluded****. The second is that, unless and until it is held that the arbitration f agreement has been concluded, the compelling factors requiring respect for the terms agreed regarding arbitration do not come into play or at any rate do not come into play with their full force and effect."*

(own emphasis added)

[107] Therefore, whilst it is trite that the Court should be slow to interfere with the jurisdiction of an arbitral tribunal, this does not mean that the Court should readily grant a Section 10(1) AA 2005 stay application when the existence of the arbitration agreement itself is question without evaluating the facts and evidence for itself based on the Full Merits Test. By doing so would tantamount to removing the Court's own jurisdiction to determine this issue.

[108] I cannot stress enough that if there is no arbitration agreement in existence then there can be no reason for the arbitration proceedings.

The "Available Evidence"

[109] Having determined that the Full Merits Test is to be applied in determining whether there is a valid binding arbitration agreement in existence, I will now apply the said Test to the "available evidence" for Enclosure 44 (**Albon** (supra); **Press Metal Sarawak** (supra)).

[110] The following is not in dispute based on the affidavits evidence of both parties:

i) The Impugned Contracts were not electronically signed and the signatures were physically made.

ii) The 2nd Defendant does not have the original signed Impugned Contracts.

iii) The Impugned Contracts were given to the 2nd Defendant by the 1st Defendant.

iv) Basic visual comparison shows that there is a difference between the signatures in the Impugned Contracts with the Plaintiffs' representatives' specimen signatures.

v) There were no invoices or claims made directly by the 2nd Defendant to the Plaintiffs regarding the Impugned Contracts until recently when the dispute arose in this case.

vi) There are no correspondences directly between the 2nd Defendant regarding the Impugned Contracts or payment of the 14 Complete Contract prior to the dispute in this case arose.

vii) There were no correspondences containing direct orders or instructions given by the Plaintiffs to the 2nd Defendant.

viii) The 2nd Defendant dealt with the 1st Defendant and not the Plaintiff in respect of the Impugned Contracts.

ix) The 2nd Defendant only received payments from the 1st Defendant in respect of the Impugned Contracts and 14 Completed Contracts.

x) The Plaintiffs never made any payment to the 2nd Defendant.

xi) The payments terms in the Impugned Contracts were in US Dollars whereas the payment terms in the LCP-Popeye Contracts and LGS-Popeye Contracts were in Ringgit Malaysia.

xii) There were no documents which conclusively or clearly show that the 1st Defendant was an agent of the Plaintiffs.

[111] Based on the above, it would appear at this stage, that the 2nd Defendant only has circumstantial evidence that the Impugned Contracts were not forged and not direct evidence, bearing in mind that this case concerns forgery and fraud.

[112] When dealing with the allegation of forgery or fraud, unless it is absolutely without substance, the matter would usually proceed to be determined through trial and not via affidavit evidence alone (**Order 14 Rule 1(2)(b) ROC**, **Marina Sports Ltd v. Alliance Richfield Pte. Ltd. [1990] 1 LNS 40; [1990] 3 MLJ 5**)

[113] Therefore, based on the available evidence I find that, in so far as the stay application in Enclosure 44 is concerned, there is insufficient evidence to conclude that there is a valid arbitration agreement in existence.

[114] In this regard, even applying the Prima Facie Test, I would still conclude that there is no *prima facie* arbitration agreement based on the available evidence. I would add that in **Malini Ventura** (supra) it was not difficult to determine *prima facie* that the Guarantee was signed by the plaintiff there as, inter alia:

i) The Guarantee was provided by a firm of solicitors that was acting for parties involved in the transaction.

ii) The plaintiff never disputed she signed the Guarantee even after the letter of demand was issued to the plaintiff and her solicitors were discussing possible mediation with the defendants' solicitors. It was only much later did the plaintiff assert that she had not signed the Guarantee.

iii) There was no independent evidence that the signature on the Guarantee was not hers and on the other hand there was some independent evidence that the signature on the Guarantee could be the plaintiff's.

iv) It was only the plaintiff's word that she did not sign the Guarantee and she had shown she was capable of misrepresenting the true position.

[115] This is a marked difference from the present case. The Plaintiffs had, inter alia, been consistent in their assertion that their representatives' signatures in the Impugned Contracts were forged, lodged several police reports and further engaged the Singapore Forensic Document Examiner, LGK Consultants, to examine the Impugned Contracts. The Plaintiffs had also informed the 2nd Defendant and maintained that the Impugned Contracts were forged.

[116] In the circumstances, I dismissed Enclosure 44 with costs in the cause and applying the four options available to the Court as held in **Albon** (supra), I directed for this matter to be set down for trial.

[117] In this regard, the 2nd Defendant ought to have waited until this matter is decided at trial as I had informed parties as early as at the point when Enclosures 15 and 28 were initially fixed for hearing that the Court is prepared to have this matter heard expeditiously and for an early trial to be fixed. Nevertheless, the 2nd Defendant proceeded to file Enclosure 44.

C] ENCLOSURES 15 AND 28

[118] Given that a substantial part of the arguments of parties in Enclosure 44 covered Enclosures 15 and 28, the hearing of Enclosures 15 and 28 proceeded faster than Enclosure 44. Similarly, I do not find it necessary to regurgitate the facts or go through every minute detail of Enclosures 15 and 28 save to show how the requirements of the interim injunction sought were fulfilled.

Jurisdiction of the Court to Grant the Anti-Arbitration Injunction

[119] It was not disputed at the Hearing of Enclosures 15 and 28 that the Court has the jurisdiction to grant the anti-arbitration injunction (**Weissfisch v. Julius [2006] EWCA Civ 218** (United Kingdom), **Kraft Foods Group Brands LLC v. Bega Cheese Ltd (2018) 358 ALR 1** (Australia), **Lin Ming & Anor v. Chen Shu Quan [2012] HKCU 557** (Hong Kong), **Pilecon Industrial Engineering Sdn Bhd v. Maxson Resources Ltd [2002] 1 MLJ 217**, **Innotec Asia Pacific Sdn Bhd v. Innotec GmbH [2007] MLJU 891**, **Jaya Sudhir a/l Jayaram v. Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1** (FC)).

Requirements of an Interim Anti-Arbitration Injunction

[120] I am in agreement with learned counsel for the Plaintiffs that there are two sets of tests for an anti-arbitration injunction and they are as follows:

i) The interlocutory injunction requirements as laid down in **American Cyanamid Co. v. Ethicon Ltd [1975] 1 All ER 504** ("**the American Cyanamid Requirements**") and applied in **Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193**; and

ii) Additionally, the conditions set out in **J Jarvis & Sons Ltd v. Blue Circle Dartford Estates Ltd [2007] EWHC 1262** for an anti-arbitration injunction, which was recognised in **Jaya Sudhir** (supra). Though **J Jarvis** (supra) was ultimately distinguished in **Jaya Sudhir** (supra) but the principles of **J Jarvis** (supra) is still applicable. This is because **J Jarvis** (supra) was distinguished in **Jaya Sudhir** (supra) as the latter case involved an anti-arbitration injunction by a non-party to the arbitration proceedings while the former case, **J Jarvis** (supra), concerned an anti-arbitration injunction which involved parties to an arbitration agreement.

[121] Therefore, I opine that both the above tests apply in respect of Enclosures 15 and 28.

i) The American Cyanamid Requirements

[122] The four requirements of an interlocutory injunction in **American Cyanamid** (supra) are as follows:

i) There is a serious question to be tried;
ii) The balance of convenience lies in favour of the applicant;
iii) Damages are not an adequate remedy; and
iv) An undertaking as to damages by the applicant.

Serious Question to be Tried

[123] The requirement that there is a serious question to be tried can be ascertained from the part of this Judgment pertaining to Enclosure 44. The issue of forgery and fraud are serious questions to be tried given, inter alia, that the authenticity and validity of the arbitration agreement (the Impugned Contracts) cannot be determined by way of affidavit evidence.

[124] In addition, the following, inter alia, issues also constitute serious questions to be tried:

i) Whether the Impugned Contracts and Impugned Letters are null and void as they are forged.

ii) The involvement of the 1st Defendant in the dispute between the 2nd Defendant and the Plaintiff.

iii) Whether it is custom in the trade for parties to not have original copies of contracts.
iv) Whether the alleged background facts set out by the 2nd Defendant can prove the authenticity of the Impugned Contracts and Impugned Letters.

v) Whether the 1st Defendant is an agent of the Plaintiffs.

vi) Whether the shipping documents exhibited by the 2nd Defendant conclusively shows that all the goods were delivered to the Plaintiffs as part of the Impugned Contracts.

Balance of Convenience

[125] In **Alor Janggus Soon Seng Trading Sdn Bhd & ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241** the Supreme Court held as follows:

"Be that as it may, the grant or refusal of an interlocutory injunction must be decided on the fundamental principle that ***the court should take whichever course that appears to carry the lower risk of injustice****. We are engaged in weighing the respective risks that injustice may result from deciding one way rather than the other at the stage when the evidence is incomplete. On the one hand, there is the risk that if the interlocutory injunction is refused but the plaintiffs succeed in establishing at the trial their legal rights to the protection for which the injunction has been sought they may in the meantime have* ***suffered harm and inconvenience or monetary loss for which an award of money can provide no adequate recompense****. On the other hand, there is the risk that if the interlocutory injunction is granted but the plaintiffs fail at the trial, the defendants may in the meantime have suffered harm and inconvenience which is similarly irrecompensable."*

(own emphasis added)

[126] I agree with learned counsel for the Plaintiffs that the balance of convenience lies in favour of granting the injunction sought for the following reasons:

i) If the interlocutory injunction is not granted, the 2nd Defendant will proceed to try and obtain an arbitration award against the Plaintiffs in the Hong Kong Arbitration based on the Impugned Contracts

which is to be determined by this Court following the Court's dismissal of Enclosure 44. The 2nd Defendant's solicitors in Hong Kong have been pushing for the Hong Kong Arbitration to proceed.

ii) If the Hong Kong Arbitration proceeds parallel with this action it may lead to conflicting decisions not to mention duplicity of actions. Both the arbitral tribunal and this Court would be determining the same issue regarding the authenticity of the Impugned Contracts.

iii) Further, Malaysian Courts is the proper forum to hear the jurisdictional issue at substantially less inconvenience and expense. The arbitral and legal fees in Hong Kong is much more expensive in comparison to the costs in Malaysia. The advance arbitral tribunal fee and administrative fees alone add up to HKD509,586 and that does not include arbitrator fees, solicitors' fees, expert fees or even fees for renting the venue in HKIAC.

iv) There is a high possibility that the Plaintiffs will suffer irreparable harm to its goodwill and reputation which cannot be quantified. In this regard the 2nd Plaintiff is a public listed company with a long-standing reputation in Malaysia. The damage to the Plaintiffs' goodwill and reputation of close to 50 years may not be quantifiable and cannot be compensated in monetary terms (**SAP(M) Sdn Bhd & Anor v. I World HRM Net Sdn Bhd & Anor [2006] 2 MLJ 678**).

v) The harm is greater on the Plaintiffs than the 2nd Defendant. If the 2nd Defendant succeeds in this action then it can proceed with the Hong Kong Arbitration where there will no longer be a jurisdictional issue in so far as it relates to the existence or authenticity of the Impugned Contracts and arbitration agreement contained therein.

In addition, the 2nd Defendant can also be compensated by an award of costs for this proceeding.

vi) However, if the injunction is refused and the Plaintiffs succeed in this action, they would have incurred significant costs and expenses, suffered losses, both monetarily as well as reputation. This is because the Plaintiffs would have to participate in the Hong Kong Arbitration which includes, inter alia, engaging foreign legal counsel as well as expending time and effort to travel there.

Damages Are Not An Adequate Remedy

[127] In **American Cynamid** (supra) it was held as follows.

"As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

[128] As stated earlier, the harm or loss to the Plaintiffs would not reasonably be adequately compensated by an award of damages.

Undertaking as to Damages

[129] There was no substantial challenge by the 2nd Defendant on this issue and further the Plaintiffs' financial background as evidenced from the Plaintiffs' financial position for the Financial Year ended 31.12.2019

shows that they are in good financial standing to honour the undertaking given by the Plaintiffs.

[130] As such, I do not find the Plaintiffs' undertaking to be an issue here.

ii) The Additional Conditions for an Anti-Arbitration Injunction

[131] The case of **J Jarvis** (supra) set out 2 conditions for an anti-arbitration injunction as follows:

i) The injunction does not cause injustice to the claimant in the arbitration; and

ii) The continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process.

[132] Further, it was held in **Claxton Engineering Services Ltd v TXM Olaj-es Gazkutato Kft (No 2) [2011] EWHC 345 (Comm)** as follows:

"In order to establish exceptional circumstances, it will usually be necessary as a minimum, to establish that ***the applicant's legal or equitable rights have been infringed or threatened by a continuation of the arbitration, or that its continuation will be vexatious, oppressive or unconscionable****"*

(own emphasis added)

[133] Therefore, based on the above cases of **J Jarvis** (supra) and **Claxton** (supra), the additional conditions for an anti-arbitration injunction are:

i) The injunction does not cause injustice to the claimant in the arbitration;

ii) The applicant's legal or equitable rights have been infringed or threatened by the continuation of the arbitration; or

iii) The continuation of the arbitration proceeding will be vexatious, oppressive or unconscionable.

[134] Whilst these conditions are in addition to the **American Cyanamid** (supra) requirements for an interlocutory injunction, however, there is some overlap. Some of the earlier stated reasons for the granting of the interlocutory injunction would also apply here and are summarised as follows:

i) The injunction does not cause injustice to the 2nd Defendant as Claimant in the Hong Kong Arbitration - The 2nd Defendant can still proceed with the Hong Kong Arbitration if the Court determines that the Impugned Contracts are valid and enforceable. The arbitral tribunal in Hong Kong's jurisdiction would no longer be an issue. The 2nd Defendant can be compensated by costs.

ii) Plaintiffs' (Applicants) legal or equitable rights have been infringed or threatened by the continuation of the arbitration - If the Impugned Contracts are found to be forged the Plaintiffs rights would certainly be infringed by the continuation of the Hong Kong Arbitration. Following from my decision in respect of Enclosure 44, this Court has the jurisdiction to determine the existence and validity of the arbitration agreement.

iii) The continuation of the arbitration proceeding will be vexatious, oppressive or unconscionable - This position is the same as in paragraph (ii) above. Further, if the Hong Kong Arbitration was to proceed together with the present case, it will result in duplicity in

terms of the work, costs and effort as well as the issues being determined by the arbitral tribunal and this Court that may result in conflicting decisions. This has to be avoided.

[135] Hence, I find that the additional conditions as laid down in **J Jarvis** (supra) and **Claxton** (supra) have also been satisfied.

D] CONCLUSION

[136] Based on the aforementioned reasons, I dismissed Enclosure 44 with cause in the cause and allowed Enclosures 15 and 28 with costs in the cause.

Dated this 10th day of February, 2022

-SGD-

(**WAN MUHAMMAD AMIN BIN WAN YAHYA**)
Judicial Commissioner
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