Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd [2008] SGHC 229

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Court:	High Court
Coram:	Nathaniel Khng AR
Counsel:	Mohan Reviendran Pillay and Toh Chen Han (MPillay) for the plaintiff, Lye Hoong Yip Raymond and Yeo Wen Si Cheryl-Ann (Pacific Law Corporation) for the defendant

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Introduction

1 This is an application by the plaintiff, Sembawang Engineers and Constructors Pte Ltd ("the Plaintiff"), for a stay of the counterclaim of the defendant, Covec (Singapore) Pte Ltd ("the Defendant"), pursuant to an arbitration agreement.

Background facts

2 The Plaintiff is a Singapore-registered limited exempt private company, which is in the business of, *inter alia*, mixed construction activities, including building construction and major upgrading works. The Plaintiff was at all material times the main contractor in a project awarded by the Land Transport Authority of Singapore (LTA) for the design, construction and completion of the works known as the "Kallang Paya Lebar Expressway C421–ECP to Nicoll Highway".

3 The Defendant is a Singapore-registered limited private company, which is in the business of, *inter alia*, building construction. By a contract referred to as "Sub-Contract for Reinforced Concrete Works – Package 1" awarded on 26 April 2002 ("Sub-Contract 1"), the Plaintiff engaged the Defendant as a subcontractor to carry out reinforced concrete works ("Sub-Contract Works 1"). During the progress of Sub-Contract Works 1, by a second contract referred to as "Sub-Contract for Reinforced Concrete Works – Package 2" awarded on 3 February 2005 ("Sub-Contract 2"), the Plaintiff engaged the Defendant to carry out further reinforced concrete works ("Sub-Contract Works 2").

4 Under Sub-Contract 1, the Defendant was obliged to complete Sub-Contract Works 1 within the period of 26 April 2002 to 1 November 2004. Pursuant to cl 27.4 of Sub-Contract 1, under certain circumstances, the Defendant was entitled to an extension of time upon application to the Plaintiff. Pursuant to cl 29 of the Sub-Contract 1, the Plaintiff was entitled to liquidated damages at the rate of S$41,000 for each day of delay by the Defendant in completing the whole of Sub-Contract Works 1. The Defendant was only able to complete Sub-Contract Works 1 on 20 September 2007. Prior to completion, no application had been made for an extension of time. On account of the 1,049 days of delay from 1 November 2004 to 20 September 2007, the Plaintiff commenced the present proceedings to recover liquidated damages of S$43,009,000 (*ie*, 1,049 days x S$41,000).

5 The gist of the Defendant's version of events is that the delay had been caused by the Plaintiff's own conduct. The Defendant was not able to commence work on Sub-Contract Works 1 immediately upon its appointment as a sub-contractor, as it was told by the Plaintiff's Project Director, Mr Lim Kok Hin, that work was only to be commenced upon the instruction of the Plaintiff. The Plaintiff subsequently declined many of the Defendant's requests to commence work and revised the schedule and sequence of the work to be done. The Plaintiff only gave the Defendant instructions to commence work in 2003 and work was commenced on or about 13 June 2003. Subsequent to the commencement of work, access to the site was given incrementally by the Plaintiff, and there were work stoppages caused by the Plaintiff and other restrictions on the work which could be done as imposed by the Plaintiff. These factors, and other delays, led to the progress of the work being impeded. In fact, the delay in completion had never been an issue between the parties. At no time was there any warning given that the work done was behind time. Indeed, there were representations made by representatives of the Plaintiff that Sub-Contract Works 1 had been completed on time and that the Defendant was not responsible for any delay in completion.

6 In the circumstances, the Defendant has contended that the Plaintiff's conduct throughout the project amounted to either a variation of the contract as to the commencement date of Sub-Contract Works 1, a collateral contract, a partly written and partly oral contract, a waiver, or an estoppel under which there was detrimental reliance. In addition, the Defendant has sought to set-off any liability to the Plaintiff with the money owed to it by the Plaintiff and the losses caused to it by the Plaintiff, which is alleged to be as follows:

(a) S$3,715,015.46 for the actual works which had been completed under Sub-Contract 1;

(b) S$1,692,248.15 for the actual works which had been completed under Sub-Contract 2;

(c) a retention sum under Sub-Contract 1 amounting to $1,141,155.31 which had been withheld by the Plaintiff;

(d) a retention sum under Sub-Contract 2 amounting to $752,322.85 which had been withheld by the Plaintiff;

(e) losses amounting to S$21,184,900 which was sustained as a result of the delays to the progress of its works; and

(f) the damages and costs it incurred by accelerating the work in order to mitigate the delay.

7 All of the moneys, losses, damages and costs which are claimed in the set-off are also the subject of a counterclaim ("the Counterclaim"). The Plaintiff subsequently took out the present application to stay the Counterclaim, pursuant to arbitration agreements found in cl 40.1 of Sub-Contract 1 and Sub-Contract 2. The said sub-clause, which is identical in both Sub-Contract 1 and Sub-Contract 2, provides for the following:

In the event of any dispute or difference between the [Plaintiff] and the [Defendant], whether arising during the execution or after the completion or abandonment of the Sub-Contract Works or after the termination of the employment of the [Defendant] under the Sub-Contract (whether by breach or in any other manner), with regards [*sic*] to any matter or thing of whatsoever nature arising out of the Sub-Contract or in connection therewith, then either Party shall give to the other notice in writing of such dispute or difference and such dispute or difference shall be finally resolved by arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this Clause. The tribunal shall consist of one (1) arbitrator whose appointment as arbitrator shall be agreed by the Parties in writing, or failing such agreement as may be appointed on the request of either Party by the Chairman of the Singapore International Arbitration Centre and in either case, the award of such arbitrator shall be final and binding on the Parties. The arbitration proceedings shall be in the English language. Provided Always [*sic*] that the [Plaintiff] shall have the sole discretion to commence proceedings in the courts of Singapore and/or any other jurisdiction if the [Plaintiff] deems fit.

Plaintiff's submissions

8 Counsel for the Plaintiff asserted that the Counterclaim would mostly be nothing more than bare assertions and should be regarded as frivolous and vexations. If they were genuine, the Defendant would have begun arbitration proceedings earlier, as Sub-Contract Works 1 was completed on 20 September 2007 and Sub-Contract Works 2 was completed on 7 July 2008. However, the Counterclaim was only brought after the Plaintiff commenced the present proceedings in court.

9 The *bona fides* of the Counterclaim aside, the language of cl 40.1 is such that the counterclaim would surely fall under the ambit of the arbitration agreement found therein. If the Counterclaim falls within the scope of the arbitration agreement, the Defendant would be in breach of the arbitration agreement, and it would follow that the proceedings should be mandatorily stayed. This would be because:

(a) the arbitration agreement in cl 40.1 states that the arbitration will be in accordance "with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force";

(b) r 32 of the applicable rules of the Singapore International Arbitration Centre, *viz*, the SIAC Rules, 3rd Edition, 1 July 2007 ("the SIAC Rules 2007"), states that the applicable law of the arbitration will be the International Arbitration Act (Cap 143A, 2002 Rev Ed);

(c) the domestic arbitration legal regime which is set out in the Arbitration Act (Cap 10, 2002 Rev Ed) will not be applicable as s 5(1) of the International Arbitration Act stipulates that a domestic arbitration will be treated as an international arbitration where parties agree in writing that Part II of the International Arbitration Act or the United Nations Commission on International Trade law (UNCITRAL) Model Law on International Commercial Arbitration ("the Model Law") is to apply to the arbitration;

(d) in the circumstances that a claim falls within the ambit of an arbitration agreement which contemplates an international arbitration, s 6 of the International Arbitration Act requires the court to mandatorily grant a stay where the application for a stay is made by the applicant "before delivering any pleading or taking any other step in the proceedings" and the arbitration agreement is not "null and void, inoperative or incapable of being performed"; and

(e) the application for a stay was made before the Plaintiff had delivered any pleading or taken any other step in the proceedings, and the arbitration agreement in cl 40.1 cannot be said to be null and void, inoperative or incapable of being performed.

Defendant's submissions

10 Counsel for the Defendant submitted that it would be inaccurate to state that the Counterclaim is baseless as a substantive Defence and Counterclaim had been filed. Indeed, if there were any tactical shenanigans, it would be on the part of the Plaintiff, as the very first time the delay in completion was broached was 4 September 2008, which would be many months after work had been completed, when the parties were in the midst of settling their accounts. Having suddenly brought up the issue of the delay, the Plaintiff then commenced court proceedings barely two weeks later.

11 Since the two parties are local entities, the relevant statute would be the Arbitration Act, which gives the court the discretion to stay or not to stay proceedings. But even if the International Arbitration Act is applicable, no stay should be granted. The construction of cl 40.1 would be at the crux of the present application. On the correct interpretation, once the Plaintiff had decided to commence court proceedings, it should follow that the Defendant should be entitled to raise all defences that it possesses, along with any counterclaims, in the court proceedings. This contention is supported by, *inter alia*, case law which indicates that the court should favour an interpretation which would aid the one-stop adjudication of disputes and avoid the possibility of a multiplicity of actions. Thus, the court should not exercise its discretion to stay the Counterclaim. Alternatively, no stay should be granted as the arbitration agreement in cl 40 is "null and void, inoperative or incapable of being performed".

The validity of the arbitration agreement

12 Counsel for both the Plaintiff and the Defendant were in agreement that a contractual provision similar to cl 40.1 has never come before the local courts. It would thus be apposite to begin with the observation that cl 40.1 contains a valid arbitration agreement for the purposes of both the Arbitration Act and the International Arbitration Act, which adopt the Model Law definition of an arbitration agreement. An arbitration agreement, according to art 7 of the Model Law, is "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". This would be an apt description of the agreement to arbitrate in cl 40.1. The fact that the latter part of cl 40.1 affords the Plaintiff with an option to choose court proceedings over arbitration will not detract from the characteristic of the arbitration agreement in cl 40.1 as being an arbitration agreement for the purposes of both the Arbitration Act and the International Arbitration Act (*cf*, *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603).

Legislative framework for stay applications

13 In the early 1990s, the Law Reform Sub-Committee on the Review of Arbitration Laws ("the Sub-Committee") was formed for the examination and reform of the existing laws relating to commercial arbitration in Singapore. In due course, the Sub-Committee recommended the enactment of legislation to, *inter alia*, give effect to the Model Law. The Model Law was adopted by the United Nations General Assembly on 11 December 1995 and it essentially sets out an efficient framework for the arbitration of disputes with a minimal amount of intervention from the courts (Leslie K H Chew, *Singapore Arbitration Handbook* (LexisNexis Butterworths, 2003) at p 87). It has been adopted in many jurisdictions, including Australia and Hong Kong. The work of the Sub-Committee culminated in the enactment of the International Arbitration Act (Act 23 of 1994) on 31 October 1994.

14 In 1997, a second committee, *viz*, the Review of Arbitration Act Committee ("the Committee"), was appointed by the Attorney-General Mr Chan Sek Keong (as he then was) to re-examine arbitration legislation in light of the enactment of the International Arbitration Act in 1994. The Committee recommended that the regimes governing domestic arbitration and international arbitration be kept separate but largely consistent with each other. The main reason given for separate regimes was that this would facilitate a greater degree of supervision by the courts over the development of domestic arbitration laws (Law Reform and Revision Division, Attorney-General's Chambers, *Review of Arbitration Laws* (LRRD No 3/2001) at p vii). The Committee also produced a draft Arbitration Bill 2001, which provided for domestic arbitration laws to have greater consistency with the Model Law. In drafting the Bill, the Committee also drew significantly from the Arbitration Act 1996 (c 26) (UK) ("the English Arbitration Act"), which had been enacted with close regard to the Model Law.

15 The Arbitration Bill 2001 was enacted as the Arbitration Act (No 37 of 2001). At the same time, the International Arbitration Act was amended to remove any inconsistencies with the Arbitration Act which might have been in attendance. Thus, in Singapore, two separate but somewhat similar legal regimes govern the conduct of commercial arbitration. At present, the conduct of international arbitration is governed by the International Arbitration Act (Cap 143A, 2002 Rev Ed) while the conduct of domestic arbitration is governed by the Arbitration Act (Cap 10, 2002 Rev Ed).

16 One of the more palpable differences in the two legal regimes can be found in the provisions relating to the court's discretion to grant a stay of court proceedings where there is an arbitration agreement. Section 6 of the International Arbitration Act states:

Enforcement of international 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.

[emphasis added]

In contrast, the corresponding provision in the Arbitration Act, *viz*, s 6, states:

Stay of legal proceedings

6.—(1) Where any party to an arbitration agreement 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) *may*, if the court is satisfied that —

(*a*) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and

(*b*) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration,

make an order, upon such terms as the court thinks fit, staying the proceedings so far as the proceedings relate to that matter.

[emphasis added]

17 Thus, under the International Arbitration Act, where a party to an arbitration agreement institutes court proceedings against another party to the same agreement for a matter that falls within the scope of the agreement, and the agreement is not null and void, inoperative or incapable of being performed, any of the parties to the agreement may, after entering appearance but before delivering any pleading or taking any other step in the proceedings, apply to the court for a stay of the court proceedings and the stay will mandatorily be given insofar as the matter in question is concerned (*Coop International Pte Ltd v Ebel SA* [1998] 3 SLR 670 at [99] and *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR 646 at [75]). In contrast, under the Arbitration Act, a stay will be given at the discretion of the court.

18 Having set out the legislative framework for a stay of court proceedings where there is an arbitration agreement, I will now consider the Plaintiff's arguments that the arbitration contemplated by the arbitration agreement found in cl 40.1 is to be treated as an international arbitration.

Election to be treated as an international arbitration

19 Section 3 of the Arbitration Act states that the legal regime for domestic arbitration will apply to any arbitration where the place of the arbitration is Singapore *and* Part II of the International Arbitration Act does not apply to that arbitration. In other words, any arbitration which is conducted in Singapore and to which Part II of the International Arbitration Act does not apply would be considered to be a domestic arbitration. Any other arbitration would be considered to be an international arbitration. That having been said, the applicability of Part II of the International Arbitration Act is governed by s 5 of the International Arbitration Act, which states:

Application of Part II

5.—(1) This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration.

(2) Notwithstanding Article 1 (3) of the Model Law, an arbitration is international if —

(a) at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(3) For the purposes of subsection (2) —

(a) if a party has more than one place of business, the place of business shall be that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, a reference to his place of business shall be construed as a reference to his habitual residence.

(4) Notwithstanding any provision to the contrary in the Arbitration Act (Cap. 10), that Act shall not apply to any arbitration to which this Part applies.

20 The key provision for present purposes would be s 5(1), which states that Part II and the Model Law will not apply to a domestic arbitration "unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration". In essence, this provision provides that a domestic arbitration will be treated as an international arbitration if parties to the domestic arbitration agree in writing that Part II of the International Arbitration Act or the Model Law applies to that domestic arbitration. Similar provisions can be found in other jurisdictions. Examples would include s 66(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c 40) (UK) and s 2L of the Arbitration Ordinance (Cap 341) (Hong Kong). The Plaintiff contends that s 5(1) is operative, as r 32 of the SIAC Rules 2007, which is applicable through cl 40.1, states:

Where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the International Arbitration Act (Chapter 143A, 2002 Ed, Statutes of the Republic of Singapore) or its modification or re-enactment thereof.

21 The argument by the Plaintiff is that the parties, by adopting the SIAC Rules 2007, including r 32, have agreed in writing that Part II of the International Arbitration Act applies to the arbitration, and therefore, under s 5(1) of the International Arbitration Act, the arbitration contemplated should be treated as an international arbitration. Section 5(1) of the International Arbitration Act would, in simple terms, convert a domestic arbitration into an international arbitration where parties agree in writing that Part II of the International Arbitration Act or the Model Law applies to that arbitration. Rule 32 of the SIAC Rules 2007 states that the whole of International Arbitration Act, which necessarily includes Part II, will be the law of the arbitration. *Ex hypothesi*, the arbitration contemplated by the arbitration agreement in cl 40.1 should be treated as an international arbitration.

22 Parenthetically, it should be pointed out that r 32 of the SIAC Rules 2007 only makes the International Arbitration Act the law of the arbitration where the seat of the arbitration is Singapore. In this respect, there has not been any denial that Singapore is the seat of the arbitration. In fact, the Defendant, by arguing that the Arbitration Act governs the arbitration contemplated by the arbitration agreement in cl 40.1, is acknowledging that Singapore is the seat of the arbitration, as the arbitration would have to be conducted in Singapore in order for the Arbitration Act to apply (see [19] above). In any event, r 18 of the SIAC Rules 2007 indicates that where the SIAC Rules 2007 applies, the seat of the arbitration will be Singapore unless otherwise agreed.

23 The question then is whether an agreement for the application of the International Arbitration Act as the law of the arbitration through the adoption of the SIAC Rules 2007 is sufficient to make s 5(1) of the International Arbitration Act operative. Put in another way, would an agreement for the application of the International Arbitration Act as the law of the arbitration through the adoption of the SIAC Rules 2007 be considered to be an agreement that Part II of the International Arbitration Act or the Model Law applies to the arbitration? On a plain reading of s 5(1), it would appear that an affirmative answer to this question is very plausible. Counsel for the Plaintiff and the Defendant were both in agreement that there has, as yet, been no case that has expressly dealt with this point. Some support for the proposition that the adoption of the SIAC Rules 2007 suffices to make s 5(1) operable may, however, be forthcoming from the recent decision of the Court of Appeal in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 ("*NCC International AB*").

24 In *NCC International AB*, V K Rajah JA, who delivered the decision of the Court of Appeal, discussed the different levels of curial intervention in international and domestic arbitration. He opined that the drafters of the International Arbitration Act intended that the court would have a narrow role for intervention in international arbitration (at [34]). The Arbitration Act, in contrast, was drafted with the intention that there should be some supervision by the court in domestic arbitration. As was explained at the second reading of the Arbitration Bill 2001, "the Bill adopts the position that some supervision by the Courts over the conduct of arbitration in domestic arbitration is desirable" (*Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2215 (Assoc Prof Ho Peng Kee, Minister of State for Law)). Accordingly, Rajah JA observed that the court would "play a relatively more interventionist role in domestic arbitration as compared to international arbitration" (*NCC International AB* at [51]). He emphasised, however, that the greater scope for intervention would still be premised on the same principle that the court must intervene only in the limited circumstances where curial intervention will support arbitration (*ibid*). He then concluded (*id* at [53]):

[R]egardless of whether the court's jurisdiction is exercised under the [Arbitration Act] or the [International Arbitration Act], the same general principle of limited and cautious curial assistance applies. The court will intervene only sparingly and in very narrow circumstances, such as where the arbitral tribunal cannot be constituted expediently enough, where the court's coercive enforcement powers are required or where the arbitral tribunal has no jurisdiction to grant the relief sought in the matter at hand.

25 *NCC International AB* ([23] *supra*) was a case where the appellant had applied to the High Court for an interim mandatory injunction to compel the respondent to continue supplying it concrete according to the terms of a contract between the parties, which contained an agreement to arbitrate disputes. The High Court judge refused to grant the injunction. In coming to his decision, the judge made no finding, despite a request by counsel, as to whether he was exercising his jurisdiction under the International Arbitration Act or the Arbitration Act. The appellant subsequently appealed against the judge's decision. In his grounds of decision, Rajah JA stated that the decision of the Court of Appeal would be unaffected by whether the court's jurisdiction was founded on the International Arbitration Act or the Arbitration Act, and accordingly, no finding would be made as to which of these statutes was applicable on the facts (at [18]). Be that as it may, some guidance is forthcoming for present purposes, as Rajah JA later made the following comments (at [52]):

[N]otwithstanding that domestic arbitration does not fall within the ambit of "international" arbitration as defined under the [International Arbitration Act], the parties can expressly opt to have the [International Arbitration Act] apply by either agreeing in writing to this effect or adopting institutional rules which expressly stipulate that the [International Arbitration Act] shall apply .... One instance of such an institutional rule is r 32 of the [SIAC Rules 2007], which provides that where the seat of arbitration is Singapore, the law of arbitration conducted under the auspices of the Singapore International Arbitration Centre shall be the [International Arbitration Act].

26 The remarks made by Rajah JA, although *obiter dicta*, are compelling support for the proposition that where the SIAC Rules 2007 is adopted, the domestic arbitration in question will be treated as an international arbitration for the purposes of the International Arbitration Act. Nevertheless, it might, perhaps, be prudent to be circumspect. In my view, two concerns, in particular, can be identified.

27 The first concern revolves around the fact that where the SIAC Rules 2007 is adopted, the application of the International Arbitration Act is being agreed upon through the adoption of rules of arbitration rather than an express agreement. In this respect, the question might be raised as to whether it would be sufficient to adopt rules of arbitration which stipulate that the International Arbitration Act is applicable, as opposed to an express agreement on the applicability of the International Arbitration Act in the arbitration agreement in question.

28 In my view, however, if Parliament had intended that the adoption of rules of arbitration to be not sufficient to cause s 5(1) of the International Arbitration Act to be operative, the provision would have included a caveat that would be similar but opposite to s 15(2) of the International Arbitration Act, which states:

For the avoidance of doubt, a provision in an arbitration agreement referring to or adopting any rules of arbitration shall not of itself be sufficient to exclude the application of the Model Law or this Part to the arbitration concerned.

By stating that the caveat that would have been included would be similar but opposite to s 15(2), I am suggesting that it would have read:

For the avoidance of doubt, a provision in an arbitration agreement referring to or adopting any rules of arbitration shall not of itself be sufficient to include the application of the Model Law or this Part to the arbitration concerned.

29 The second concern is that s 5(1) of the International Arbitration Act states expressly that the parties must agree that Part II of the International Arbitration Act or the Model Law applies to the arbitration. On the strictest reading of s 5(1), a domestic arbitration will only be treated as an international arbitration where parties agree that Part II of the International Arbitration Act or the Model Law applies to the arbitration in a *general* sense. This might raise the query as to whether such a general averment to the applicability of the International Arbitration Act must be given or whether an agreement that the law of the arbitration is the International Arbitration Act *à la* r 32 of the SIAC Rules 2007 suffices.

30 In *substance*, however, the choice of the International Arbitration Act as the law of the arbitration may be construed as amounting to an agreement that the International Arbitration Act generally applies to the arbitration. As Jean François Poudret & Sébestien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd Ed, 2007) states (at p 83):

The arbitration law (*lex arbitrii*) *encompasses all provisions governing the arbitration in a given country*, particularly the formal validity of the arbitration agreement, the arbitrability of the dispute, the composition of the arbitral tribunal, fundamental procedural guarantees, assistance from the courts and judicial review of the award. [emphasis added]

31 The concept of the law of the arbitration aside, one would observe that there is nothing in the records of Parliamentary debates to oppose the proposition that an agreement that the International Arbitration Act is the law of the arbitration suffices for the operation of s 5(1) of the International Arbitration Act. Neither is there anything to oppose this proposition in the drafting history of the said provision. In fact, the opportunity for parties to elect between the two legal regimes for arbitration appears to have been included to allow parties to have greater freedom in tailoring the applicable law of the arbitration to their needs and/or desires. In this respect, the comments of the Sub-Committee would be enlightening. The Sub-Committee stated in its 1993 report (at paras 15–16):

Election to treat "domestic" arbitration as "international"

15 The Committee specifically considered whether, as a matter of policy, it would be desirable to permit two Singapore parties to a dispute which concerned a purely Singapore subject matter to elect to have the dispute dealt with under the "international" arbitration regime. As a practical matter, this would allow the parties to agree upon a lesser degree of curial intervention than would be permitted under the existing domestic arbitration regime. Under the existing law in Singapore, the parties are already permitted (with limited exceptions) to restrict the degree of curial intervention by way of an exclusion agreement. However the degree of curial intervention would be even further reduced in the case of the proposed regime for international arbitrations.

16 Although the Committee noted the view that the courts should be more closely involved in arbitration disputes which are domestic in character (both in order to protect weaker parties and for the purposes of being involved in the evolution of decisions that concern domestic law and practice), **the preference of the Committee is to permit commercial parties the freedom to agree to have disputes dealt with according to the international arbitration regime (albeit with a lesser degree of curial intervention).** The Committee did not consider whether there should be any specific exceptions to this liberty of the parties to agree upon the nature of the regime to be adopted.

[bold in original]

32 Having dealt with the two concerns, I should also add that any fears that the acceptance of the proposition that the adoption of the SIAC Rules 2007 causes an arbitration to be treated as an international arbitration would result in all parties who decide to choose the SIAC Rules 2007 being forced to have their arbitration treated as an international arbitration is unfounded. This would be because art 2(1) of Schedule 1 of the SIAC Rules 2007 states:

Where parties have by agreement expressly referred to arbitration under the SIAC Domestic Arbitration Rules, the agreement shall be deemed to be a reference to arbitration under these Rules and to this Schedule.

Article 2(2) then states:

Notwithstanding Rule 32, the law of the arbitration to which this Schedule applies shall be the Arbitration Act (Chapter 10, 2002 Ed, Statutes of the Republic of Singapore) or its modification or re-enactment thereof.

33 Thus, parties who wish to utilise the SIAC Rules 2007 but still retain their arbitration's status as a domestic arbitration may do so by making express reference to the SIAC Domestic Arbitration Rules – the latest version being the SIAC Domestic Arbitration Rules, 2nd Edition, 1 September 2002. Having mentioned this, I will state, at this juncture, that I am not cognisant of any such reference to the SIAC Domestic Arbitration Rules in cl 40.1. There was only an express reference to arbitration in accordance with the "Arbitration Rules of the Singapore International Arbitration Centre". This clearly cannot be construed as a reference to the SIAC Domestic Arbitration Rules. I would further observe that there is no room for arguing that the parties had intended the expression "Arbitration Rules of the Singapore International Arbitration Centre" to be a reference to the SIAC

Domestic Arbitration Rules. This would be because the use of this expression would be exactly what the predecessor set of international arbitration rules to the SIAC Rules 2007, *viz*, the SIAC Rules, 2nd Edition, 22 October 1997, which was in force at the time both Sub-Contract 1 and Sub-Contract 2 were entered into, would, according to its preamble, have required for it to be applicable. Thus, the parties had clearly intended, from the outset, that the rules pertaining to international arbitration, rather than domestic arbitration, should be applicable.

34 For these reasons, it is my view that the arbitration contemplated in the arbitration agreement in cl 40.1 should be treated as an international arbitration and, accordingly, should be subject to the international arbitration legal regime found in Part II of the International Arbitration Act and the Model Law. As such, a stay of the Counterclaim will be mandatorily granted unless the Counterclaim does not fall within the scope of the arbitration agreement in cl 40.1, or the Plaintiff had applied for the stay after delivering any pleading or taking any other step in the proceedings, or the arbitration agreement in cl 40.1 is null and void, inoperative or incapable of being performed (see [17] above).

Scope of the arbitration agreement

35 It was not denied that the Counterclaim falls within the ambit of the arbitration agreement in cl 40.1. In any event, there is no basis for doing so. The fact that the Counterclaim is within the scope of the arbitration agreement in cl 40.1 is irrefutable, as the subject matter of the Counterclaim can easily be construed to be a disputes or differences relating to Sub-Contract 1 and Sub-Contract 2 that has arisen during the execution or after the completion of Sub-Contract Works 1 and Sub-Contract Works 2.

Delivery of pleading or taking any other step

36 There is also no reason to believe that the Plaintiff had applied for the stay of the Counterclaim prior to the delivery of any pleading or taking any other step in the proceedings. The Plaintiff had filed a reply to the Defendant's Defence and Counterclaim in which it stated expressly that it did not "purport to plead to or otherwise deal with" the Counterclaim. The reply was filed after this application for a stay of the Counterclaim was taken out. In the circumstances, the Plaintiff certainly cannot, in my view, be construed as falling afoul of the requirement of applying for a stay prior to the delivery of any pleading or taking any other step in the proceedings in s 6(1) of the International Arbitration Act, having regard to the principles espoused in *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR 168, *WestLB AG v Philippine National Bank* [2007] 1 SLR 967, and *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR 460.

37 As such, the only basis for which the Counterclaim would not be stayed would be if the arbitration agreement in cl 40.1 is null and void, inoperative or incapable of being performed.

Null and void, inoperative or incapable of being performed

38 It has been observed that the courts in Singapore have, thus far, not made any direct pronouncements on the meaning and scope of the phrase "null and void, inoperative or incapable of being performed" (*Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at para 20.041). However, there are English cases on s 9(4) of the English Arbitration Act (the equivalent of s 6(2) of the International Arbitration Act) and writings of legal scholars which may be of some assistance.

39 Turning, firstly, to the expression "null and void", it can be safely concluded from the outset that it is unlikely that the arbitration agreement in cl 40.1 can be construed in such a manner, as its *existence* cannot be impugned. This expression would have applicability where, for example, the arbitration agreement was never entered or is subsequently found to be void *ab initio* (David St John Sutton *et al*, *Russell on Arbitration* (Sweet & Maxwell, 23rd Ed, 2007) at para 7-046). One example of the first situation would be *Sun Life Assurance Co of Canada v CX Reinsurance Co Ltd* [2003] EWCA Civ 283. In that case, the English Court of Appeal upheld the decision of the trial judge, who was of the opinion that there was no arbitration agreement concluded between the parties and that the agreement relied on by the applicant was thus null and void.

40 Turning to the next term, *viz*, "inoperative", in Sutton *et al*, *Russell on Arbitration*, it is said that an arbitration agreement will be considered to be inoperative where it has been repudiated, abandoned, or contains an inherent contradiction such that it cannot be given effect (at para 7-046). One example of a case where the arbitration agreement has been repudiated would be *Downing v Al Tameer Establishment* [2002] EWCA Civ 721. In that case, the defendant denied the existence of any contractual relationship between the parties. Subsequently, the plaintiff, on the basis that he had accepted the defendant's repudiation of the

agreement including the arbitration agreement, commenced court proceedings. The English Court of Appeal, having considered the repudiation of the arbitration agreement, refused the defendant's application for a stay of court proceedings.

41 The learned authors of Sir Michael J Mustill & Steward C Boyd, *Commercial Arbitration* (Butterworths, 2nd Ed, 1989) provide a more comprehensive insight into what the term "inoperative" would constitute. It is stated that the term "inoperative" would appropriately describe an arbitration agreement which "has for some reason ceased to have effect for the future" (at p 464). Three general situations in which an arbitration agreement may be said to be inoperative are subsequently provided (*ibid*). The first would be where the court has ordered the arbitration agreement to cease to have effect (*ibid*). The second would be where legal doctrines, such as frustration and discharge by breach, have rendered the arbitration agreement inoperative (*ibid*). The third would be where the agreement has "ceased to operate by reason of some further agreement between the parties" (*ibid*).

42 Turning to the last term, *viz*, "incapable of being performed", this term would relate to the capability or incapability of parties to perform an arbitration agreement. In Mustill & Boyd, *Commercial Arbitration*, it is stated the expression would suggest "something more than mere difficulty or inconvenience or delay in performing arbitration" (at p 465). There has to be "some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the agreement" (*id* at p 465). In Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008), some examples of situations where an arbitration agreement has become incapable of being performed are given. It is stated (*id* at pp 32–33):

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. In addition, if the place of arbitration was no longer available because of political upheaval, this could render the 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.

43 In my opinion, if the Defendant's case was taken at its highest, the arbitration agreement in cl 40.1 would either be *inoperative* or *incapable of being performed* (see [40]–[42] above). Before proceeding further, it would be convenient to set out cl 40.1 in full again. The sub-clause states:

In the event of any dispute or difference between the [Plaintiff] and the [Defendant], whether arising during the execution or after the completion or abandonment of the Sub-Contract Works or after the termination of the employment of the [Defendant] under the Sub-Contract (whether by breach or in any other manner), with regards [*sic*] to any matter or thing of whatsoever nature arising out of the Sub-Contract or in connection therewith, then either Party shall give to the other notice in writing of such dispute or difference and such dispute or difference shall be finally resolved by arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this Clause. The tribunal shall consist of one (1) arbitrator whose appointment as arbitrator shall be agreed by the Parties in writing, or failing such agreement as may be appointed on the request of either Party by the Chairman of the Singapore International Arbitration Centre and in either case, the award of such arbitrator shall be final and binding on the Parties. The arbitration proceedings shall be in the English language. Provided Always [*sic*] that the [Plaintiff] shall have the sole discretion to commence proceedings in the courts of Singapore and/or any other jurisdiction if the [Plaintiff] deems fit.

44 The same rules and principles of interpretation for a normal commercial document would apply in a consideration of the true construction and effect of cl 40.1 (Julian D M Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 7-60); a restatement of the rules and principles has recently been given by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029). It can be added that, as far as possible, a commercially logical construction is to be preferred over another that is commercially illogical. As stated in *Law Debenture Trust Corporation Plc v Elektrim Finance BV* [2005] 2 Lloyd's Rep 755 ("*Law Debenture Trust*") by Mann J (at 766):

In essence, I should construe this document as a commercial document in the light of its factual circumstances, and *I accept that a construction which gives a sensible commercial effect to the document is to be preferred to one which gives an illogical and/or uncommercial effect*. [emphasis added]

45 The defendants in *Law Debenture Trust* initiated arbitration proceedings over certain disputes with the plaintiff. The plaintiff, however, proceeded to commence court proceedings against the defendants for the same disputes. The defendants subsequently applied for, *inter alia*, a stay of the court proceedings pursuant to an arbitration agreement, which, interestingly, was found in a clause that is similar to cl 40.1. The pertinent parts of the clause read (*id* at 757–758):

29.2 Any dispute arising out of or in connection with these presents … may be submitted by any party to arbitration for final settlement under … (the UNCITRAL Arbitration Rules), which rules are deemed to be incorporated by reference into this clause 29.2

…

29.6 The agreement by all the parties to refer all disputes arising out of or in connection with these presents … to arbitration in accordance with clause 29.2 above is exclusive such that neither [the first defendant] nor [the second defendant] shall be permitted to bring proceedings in any other court or tribunal other than by way of counterclaim in respect of proceedings brought by the [plaintiff] and/or each of the Bondholders in respect of any of the above documents in such other court or tribunal in accordance with this clause.

29.7 Notwithstanding clause 29.2, for the exclusive benefit of the [plaintiff] and each of the Bondholders, [the first defendant] and [the second defendant] hereby agree that the [plaintiff] and each of the Bondholders shall have the exclusive right, at their option, to apply to the courts of England, who shall have non-exclusive jurisdiction to settle any disputes which may arise out of or in connection with these presents … and that accordingly any suit, action or proceedings (together referred to as "Proceedings") arising out of or in connection with any of the above may be brought in such courts.

…

46 Mann J was of the opinion that the correct construction of cl 29 would be that the clause set out a dual dispute resolution regime. In this respect, he stated (*id* at 766–767):

The logical starting point in analysing the clause is sub-clause 29.2. That, on its face, contains a blanket arbitration provision which, without more, could be enforced by each party against the other. Sub-clauses 29.3 and 29.4 do not help one way or the other. The same is true of sub-clause 29.5. Sub-clause 29.6 does not make any real sense without sub-clause 29.7, and it is over this latter sub-clause that the real point arises. Leaving aside the first three words for the moment, on its face it gives a right to [the plaintiff] and the bondholders to apply to the courts to determine disputes arising under the various documents. They have "the exclusive right … to apply to the courts of England"; that right is "at their option". The effect of that is "that accordingly any suit, action or proceedings … arising out of or in connection with any of the above may be brought in any such courts." That wording seems to be clear and unequivocal. The [plaintiff] and the Bondholders have an "exclusive" right - they have it and the [defendants] do not. That right, of course, detracts from the otherwise clear terms of clause 29.2, but one can still make sense of those two provisions together, and if there was any doubt as to the purpose clause 29.7 being to detract from clause 29.2, that is completely dispelled by the opening words of the later sub-clause, "notwithstanding clause 29.2 …". Those words can be paraphrased by the words "despite what is said in clause 29.2". When that is done, the two clauses running together make perfect sense. There is a dual dispute resolution regime. Arbitration is available under clause 29.2; litigation is available to [the plaintiff] and the bondholders, if they wish, as an alternative under clause 29.7.

47 Mann J emphasised that the plaintiff should not be allowed to "blow hot and cold" between modes of dispute resolution. If arbitration proceedings were to be commenced, the right to litigation would be waived, and vice versa. In this respect, he stated (*id* at 767):

Thus clause 29.7 has the effect of giving [the plaintiff] an option which the [defendants] do not have. They may litigate, but the [defendants] can be forced to arbitrate (unless litigation is started, in which case they can counterclaim). [The plaintiff] cannot be forced to arbitrate if it wishes to commence its own proceedings covering the same subject matter. I have difficulty in seeing any arguable limits, let alone any substantive limits, on the rights of [the plaintiff] in that respect. The one limit that probably exists is that [the plaintiff] cannot blow hot and cold, as [counsel for the defendants] accepted. If [the plaintiff] starts an arbitration it would have waived its right (or option) to go by way of litigation. By the same token, if it participates sufficiently in an arbitration, it may well be held to have waived its rights to exercise its option. Subject to that, it has its clear rights.

48 In my view, *Law Debenture Trust* ([44] *supra*) is instructive. Similar to cl 29 in that case, it would appear that cl 40.1 can be constructed as setting out a dual dispute resolution regime. It is clear from cl 40.1 that both parties are obligated to have their disputes arbitrated – "either Party shall give to the other notice in writing of such dispute or difference and such dispute or difference shall be finally resolved by arbitration". However, the Plaintiff has an option to commence court proceedings – "Provided Always [*sic*] that the [Plaintiff] shall have the sole discretion to commence proceedings in the courts of Singapore and/or any other jurisdiction if the [Plaintiff] deems fit". It is pertinent that the word "provided" is accepted as having the same meaning as the phrase "on the condition that" or "on the understanding" (see *The Oxford English Dictionary* (J A Simpson & E S C Weiner eds) (Clarendon Press, 2nd Ed, 1989) vol XII at p 984). Thus, cl 40.1 can be read as there being an agreement by both parties to arbitrate their disputes on the understanding that the Plaintiff has the choice to commence proceedings in the courts. This gives the impression that for the Plaintiff, arbitration and court proceedings are in the alternate to each other – a dual dispute resolution regime – where the choice of one mode of dispute resolution will waive the right to the other.

49 But it does not follow that the choice of court proceedings would, as a matter of course, result in a complete waiver by the Plaintiff of its right to hold the Defendant to its obligation to have disputes arbitrated. Obviously, if the Plaintiff chooses to commence court proceedings for certain matters, the Plaintiff cannot subsequently do a *volte-face* and have the same matters arbitrated. This, in my opinion, would be the correct interpretation of the restriction on blowing hot and cold that was espoused in *Law Debenture Trust* (see [47] above).

50 It would also be logical that if dispute resolution by way of court proceedings were to be chosen, the Defendant should be entitled to defend itself in whichever way it chooses. It would follow that the Plaintiff cannot argue that claims that have been raised as set-offs should be arbitrated, as such claims would be considered to be raised as a defence, *viz*, the defence of set-off, to the original claim (see *Singapore Civil Procedure 2007* (G P Selvam chief ed) (Sweet & Maxwell Asia, 2007) at para 18/17/2). In this respect, the following statement made in *VV v VW* [2008] 2 SLR 929 by Judith Prakash J is germane (at [45]):

> Once the plaintiffs had submitted their claim to arbitration the defendant was entitled to raise all defences that it possessed to the same including any claims that could be set off against any award made in the plaintiffs' favour. The arbitrator's jurisdiction to determine the plaintiffs' claim obviously included a jurisdiction to hear and determine the defendants' defence and that would mean he also had jurisdiction to hear the set-off claims. It was incorrect for the plaintiffs to argue that the arbitrator did not take jurisdiction over the counterclaims simply because he did not make any finding on their merits. The merit or lack of merit of the counterclaims in so far as they constituted set-offs and the issue whether it was reasonable for the defendant to raise all of them could only go towards influencing the nature and quantum of the costs order.

51 In essence, Prakash J was of the view that once a claim had been sent for arbitration, the defendant would be entitled to raise all defences that it possessed, including the defence of set-off. Similarly, it should be the case that once a claim is submitted for litigation, a defendant is entitled to raise all defences, including the defence of set-off. Parenthetically, I should add that the right to raise the defence of set-off may be eliminated by the presence of clear and unequivocal words to the contrary in the contract (see *Hiap Tian Soon Construction Pte Ltd v Hola Development Pte Ltd* [2003] 1 SLR 667 at [32]). In this regard, I make no comment on the Defendant's defence of set-off as the present application is for a stay of the Counterclaim and no more.

52 That having been said, I would point out that a counterclaim is *not* a set-off. In some American jurisdictions, a counterclaim is construed as a set-off against the original claim (Bryan A Garner, *A Dictionary of Modern Legal Usage* (Oxford University Press, 2nd Ed, 1995) at p 238). However, in England, a counterclaim is treated as an independent cause of action and not a defence to the original claim (*ibid*). The English position has been adopted in Singapore (see *Liu Wing Ngai t/a Kam Wah Ultrasonic Engineering Co v Lui Kok Wai t/a Almac Machinery* [1997] 1 SLR 559 at [121]).

53 If a counterclaim is not a set-off, and hence, not a defence, it does not follow that the Plaintiff, by choosing to commence court proceedings, has waived its right to have a claim raised as a counterclaim arbitrated. Support for this proposition can be inferred from the *dicta* of Prakash J in *VV v VW* (see [50] above), which carefully distinguishes between claims raised in a set-off and claims raised in a counterclaim. Of course, if a contractual provision contains a stipulation that a party is allowed to institute counterclaims upon the commencement of court proceedings, it should be the case that the choice of court proceedings waives the right to have a counterclaim arbitrated. In this regard, cl 40.1 can, crucially, be distinguished from cl 29 in *Law Debenture Trust* ([44] *supra*), as cl 29.6 explicitly gave the defendants in that case the right to institute counterclaims in the event that litigation was commenced. Moreover, no extrinsic evidence exists to suggest that the Defendant was intended to have such a

right. For these reasons, I am of the opinion that the Plaintiff's choice to commence court proceedings does not result in a waiver of its right to have the Counterclaim arbitrated.

54 To reiterate, having regard to cl 40.1 as a whole, it is my view that the choice to commence court proceedings cannot act as a general waiver of the right to have disputes falling under the ambit of the arbitration agreement arbitrated. It will only act as a waiver *vis-à-vis* the disputes that the Plaintiff chooses to proceed with in court and any defences raised in response (subject to terms in the contract to the contrary (see [51] above)). The waiver will not extend to claims that are not instituted as part of the defence, *ie*, counterclaims.

55 There is no commercial illogicality in such a construction. The seemingly absurd scenario of the Defendant having the same claim adjudicated twice, *ie*, as a set-off in the court and as a claim in arbitration, is, to borrow the words of Mann J in *Law Debenture Trust* ([44] *supra*), "in the nature of an accident arising out of the particular facts" and "is not an inherent commercial absurdity underlying the whole operation of [cl 40.1]" (at 768). I might add that while there is a chance that contradictory findings may arise, any inconsistency is unlikely to be of significance, as the doctrine of *res judicata* and issue estoppel will apply to prevent conflicting material findings by the court and the arbitral tribunal (see *Tan Poh Leng Stanley v Tang Boon Jek Jeffrey* [2001] 1 SLR 624 at [17]).

56 For the sake of completeness, I will consider the contentions of the Defendant regarding the court's preference of an interpretation which would aid the one-stop adjudication of disputes and avoid the possibility of a multiplicity of actions. In this regard, the main case cited by the Defendant was the decision of the House of Lords in *Fili Shipping Co Ltd v Premium Nafta Products Ltd* [2008] 1 Lloyd's Rep 254 ("*Fili Shipping*"), where Lord Hoffmann asserted (at 257):

[T]he construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

57 Similar judicial pronouncements have been made by the English Court of Appeal in *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488 and *Fiona Trust & Holding Corporation v Privalov* [2007] 2 Lloyd's Rep 267. I do acknowledge that some *general guidance* may be drawn from these cases. Logically, unless clearly indicated otherwise by the language of the contract, the court should be slow to agree that parties had accepted the possibility of separate sets of proceedings for disputes arising out of the same legal relationship. In my opinion, however, the language of cl 40.1 clearly indicates that the possibility of separate proceedings for the Plaintiff's claims and the Defendant's claims had been envisaged.

58 Drawing all the threads of the analysis together, it is clear that the arbitration agreement in cl 40.1 cannot be said to be null and void, inoperative or incapable of being performed.

Decision of the court

59 Under s 5(1) of the International Arbitration Act, the arbitration contemplated in the arbitration agreement found in cl 40.1 is to be treated as an international arbitration. As such, a stay of the Counterclaim will be mandatorily granted unless the Counterclaim does not fall within the scope of the arbitration agreement in cl 40.1, or the Plaintiff had applied for the stay of the Counterclaim after delivering any pleading or taking any other step in the proceedings, or the arbitration agreement in cl 40.1 is null and void, inoperative or incapable of being performed. However, the Counterclaim clearly falls within the ambit of the arbitration agreement, the stay application was made prior to the delivering of any pleading or the taking of some other step in the proceedings, and the arbitration agreement cannot be said to be null and void, inoperative or incapable of being performed.

60 In the circumstances, I am left with no choice but to order a stay of the Counterclaim.

Conclusion

61 For the foregoing reasons, the Plaintiff's application is allowed. I will hear the parties on costs.