Transocean Offshore International Ventures Ltd *v* Burgundy Global Exploration Corp [2010] SGHC 31

Case Number	: Suit No 87 of 2009 (Registrar's Appeal No 311 of 2009)
Decision Date	: 28 January 2010
Tribunal/Court	: High Court
Coram	: Andrew Ang J
Counsel Name(s)	: Toh Kian Sing, Ian Teo and Aston Lai (Rajah & Tann LLP)for the plaintiff; Rakesh Vasu and Winnifred Gomez (Gomez & Vasu)for the defendant.
Parties	: Transocean Offshore International Ventures Ltd — Burgundy Global Exploration Corp

Arbitration – Stay of Court Proceedings

28 January 2010

Andrew Ang J:

Introduction

1 This was an appeal against the decision of the assistant registrar ("the AR") in Summons No 3009 of 2009 who ordered that all further proceedings in the action brought by the plaintiff against the defendant be stayed in favour of arbitration in Singapore.

Background

The parties

2 The plaintiff, Transocean Offshore International Ventures Ltd, is a company incorporated in the Cayman Islands. Its business includes that of supplying mobile offshore drilling units and providing drilling services for the development of oil and natural gas reserves.

3 The defendant, Burgundy Global Exploration Corporation, is a company incorporated in the Republic of the Philippines. It was, at all material times, in the business of exploration and development of oil and gas resources in the Philippines.

The facts

4 The plaintiff and defendant were parties to a novated offshore drilling contract dated 29 September 2008 read with Amendment No 1 dated 30 October 2008 (collectively "the Drilling Contract"). As novated, the Drilling Contract provided for the plaintiff to supply a drilling unit or vessel "C KIRK RHEIN JR" ("the Vessel") and related drilling services to the defendant.

5 The Vessel was to be made ready and thereafter mobilised from Singapore to the drilling site off the Philippines some time in January 2009. The commencement of such mobilisation by the plaintiff was defined by Art I(b) of the Drilling Contract as the "Commencement Date". Article 11 of the Drilling Contract then expressly stipulated that prior to the Commencement Date, it was a condition precedent that the plaintiff and defendant entered into an escrow agreement ("the Escrow

Agreement") for the opening of an escrow account ("the Escrow Account"). The Escrow Agreement was backdated to 31 October 2008 to be consistent with the date of Amendment No 1.

6 The Escrow Agreement provided for the following:

(a) The establishment of the Escrow Account with the Singapore branch of Banco Bilbao in the joint names of the parties (cl 3.1(a)).

(b) The depositing by the defendant of the escrow amount ("the Escrow Amount") into the Escrow Account. The initial amount to be paid into this account was US$16.5m (cl 3.2(a)) payable on or before 15 December 2008 or 30 days prior to the Commencement Date, whichever was the earlier. Failure to deposit moneys into the Escrow Account in accordance with cl 3.2 entitled the plaintiff to terminate the Drilling Contract (cl 2).

(c) Further funding of the Escrow Account by the defendant on a monthly basis (cl 3.2(b)).

(d) Release of the funds in the Escrow Account to the plaintiff against joint instructions from the parties upon the defendant receiving an original invoice from the plaintiff (cll 4.1 and 4.2).

7 The defendant failed to deposit the Escrow Amount in accordance with cl 3.2(a). The plaintiff treated the defendant's failure to deposit as a repudiatory breach which it elected to accept. Accordingly, in accordance with the general law and cl 2 of the Escrow Agreement, which conferred on the plaintiff the right to terminate the Drilling Contract should the defendant fail to deposit the Escrow Amount into the Escrow Account in accordance with cl 3.2(a), the plaintiff issued a letter to the defendant on 22 December 2008 stating that it had:

(a) terminated the Drilling Contract pursuant to cl 2 of the Escrow Agreement; and

(b) accepted the defendant's repudiation of the Escrow Agreement due to its failure to deposit the Escrow Amount.

8 Thereafter, the parties entered into correspondence with the aim of finding a "suitably workable solution" but that did not bear fruit. The plaintiff then commenced the current action claiming, *inter alia*, damages for the defendant's breach and/or repudiation of the Escrow Agreement. A writ was filed on 29 January 2009 with an Amended Writ and Statement of Claim filed subsequently on 19 March 2009.

9 Subsequent to the commencement of the suit, the defendant appeared before the AR in Summons No 3009 of 2009 seeking a stay of the action brought by the plaintiff in favour of arbitration. The AR granted the application on the basis that the Escrow Agreement could not be seen as being separate and distinct from the Drilling Contract. Hence, the arbitration clause under the Drilling Contract could be extended to cover disputes arising out of the Escrow Agreement. Further, she also found that the true dispute between the parties lay under the Drilling Contract and, accordingly, that the matter ought to be stayed in favour of arbitration pursuant to Art 25.1 of the Drilling Contract.

The issues

10 What is significant for the purposes of this appeal is that the Drilling Contract and the Escrow Agreement have different dispute resolution clauses.

The dispute resolution clause under the Escrow Agreement

11 Clause 6.2(a) of the Escrow Agreement confers non-exclusive jurisdiction in favour of the Singapore Courts. It reads as follows:

> Each of the Parties *irrevocably submits to and accepts generally and unconditionally the non-exclusive jurisdiction of the courts and appellate courts of Singapore* with respect to *any legal action or proceedings* which may be brought at any time *relating in any way to this Agreement*. [emphasis added]

12 Clause 6.2(b) further provides:

> Each of the Parties *irrevocably waives any objection* it may now or in the future have to the venue of any action or proceedings, and any claim it may now or in the future have that the action or proceeding has been brought in an inconvenient forum. [emphasis added]

The dispute resolution clause under the Drilling Contract

13 The Drilling Contract provides for arbitration in the event of disputes between the parties. In so far as it is material to this appeal, Art 25 (as amended) reads:

> 25.1 **Arbitration**
>
> The following Dispute Resolution provision ***shall apply to this Contract*** .
>
> (a) Any dispute, controversy or claim arising out of or in relation to or in connection ***with this Contract*** , including without limitation any dispute as to the construction, validity, interpretation, enforceability, performance, expiry, termination or breach of ***this Contract*** whether based on contract, tort or equity, shall be exclusively and finally settled by arbitration in accordance with this Article XXV. Any Party may submit such a dispute, controversy or claim to arbitration by notice to the other Party.
>
> (b) The arbitration shall be heard and determined by three (3) arbitrators. Each side shall appoint an arbitrator of its choice within fifteen (15) days of the submission of a notice of arbitration. The Party-appointed arbitrators shall in turn appoint a presiding arbitrator of the tribunal within thirty (30) days following the appointment of both Party-appointed arbitrators. If the Party-appointed arbitrators cannot reach agreement on a presiding arbitrator of the tribunal and/or one Party refuses to appoint its Party-appointed arbitrator within said thirty (30) day period, the appointing authority for the implementation of such procedure shall be the London Court of International Arbitration ("*LCIA*"), who shall appoint an independent arbitrator who does not have any financial interest in the dispute, controversy or claim. All decisions and awards by the arbitration tribunal shall be made by majority vote.
>
> (c) Unless otherwise expressly agreed in writing by the Parties to the arbitration proceedings:
>
> (i) The arbitration proceedings shall be held in Singapore;
>
> (ii) The arbitration proceedings shall be conducted in the English language and the arbitrator(s) shall be fluent in the English language;

(iii) The arbitrator(s) shall be and remain at all times wholly independent and impartial;

(iv) The arbitration proceedings shall be conducted under the LCIA Rules, as amended from time to time ("*LCIA Rules*"), which Rules are deemed to be incorporated by reference into this Section 25.1;

(v) Any procedural issues not determined under the LCIA Rules shall be determined by the applicable laws of Singapore, other than those laws, which would refer the matter to another jurisdiction;

…

25.2 **Continuing Obligation**

The provisions of this Article XXV shall continue in force notwithstanding the expiration or prior termination of ***this Contract*** .

[emphasis added in bold italics]

The Court's decision

14 After hearing both parties, I allowed the plaintiff's appeal against the AR's decision. I set out the grounds of my decision below:

The defendant's breaches of the Escrow Agreement

15 The plaintiff's cause of action against the defendant was a straightforward claim arising from the defendant's failure to pay the Escrow Amount into the Escrow Account in accordance with the terms of the Escrow Agreement. Indeed, the defendant did not dispute that it failed to deposit the requisite sum pursuant to cl 3.2(a) of the Escrow Agreement. As such, the claim fell squarely within cl 3.2(a) of the Escrow Agreement. The defendant argued that the termination of the Drilling Contract was premised on a breach of the Drilling Contract. Since Art 25.1 of the Drilling Contract provided that any dispute to the termination or breach would be governed by arbitration, Art 25.1 would also apply to the plaintiff's claim in this action. I rejected this argument as the reason for the termination was the defendant's breach of the Escrow Agreement.

The inapplicability of Art 25 of the Drilling Contract

16 The burden then fell on the defendant to establish why the jurisdictional agreement in favour of the Singapore courts should not be honoured. Generally, a party wishing to depart from a non-exclusive jurisdiction clause must show exceptional circumstances amounting to strong cause before it may be allowed to do so: *S&W Berisford Plc and another v New Hampshire Insurance Co* [1990] 2 QB 631; *Bayerische Landesbank Girozentrale v Kong Kok Keong and another action* [2002] 1 SLR(R) 485; *Bambang Sutrisno v Bali International Finance Ltd and others* [1999] 2 SLR(R) 632 ("*Bambang Sutrisno*") and *The Hung Vuong-2* [2000] 2 SLR(R) 11. In the present matter, it was pertinent for the defendant to establish that such strong cause for departure existed, given that cl 6.2 of the Escrow Agreement conferred non-exclusive jurisdiction in favour of the Singapore courts and waived jurisdictional objection in the same clause; and the Court of Appeal had made it clear in *Bambang Sutrisno* that the situation involving a non-exclusive jurisdiction clause (cl 6.2(a)) coupled with a waiver of jurisdictional objection (cl 6.2(b)) was akin to that of an exclusive jurisdiction clause in a contract.

17 The plaintiff relied on *The Hung Vuong-2* as authority that the court may examine whether there were any real and genuine defences to the claim in determining whether there was any strong cause for the defendant not to be held to the jurisdictional agreement. In the present matter, the defendant raised two defences. The first defence related to terms allegedly implied into the Drilling Contract and the Escrow Agreement. The defendant alleged that it was not obliged to deposit the Escrow Amount unless and until the following implied obligations or conditions precedent in the Drilling Contract and the Escrow Agreement were satisfied:

(a) the plaintiff had provided various information and documents;

(b) the plaintiff had facilitated the defendant in the conduct of certain feasibility studies;

(c) the parties had reached an agreement on the Commencement Date or delivery date for the mobilisation of the Vessel; and

(d) the defendant had inspected and approved the Vessel.

The second defence was based on Art 19.1 of the Drilling Contract, a clause purporting to absolve the defendant from liability for the plaintiff's consequential loss:

> Notwithstanding any provisions to the contrary elsewhere in the Contract, [the defendant] shall save, indemnify, release, defend and hold harmless [the plaintiff] Group from [the defendant] Group's own Consequential Loss and *[the plaintiff] shall save, indemnify, release, defend and hold harmless [the defendant] Group from [the plaintiff] Group's own Consequential Loss*. [emphasis added]

18 The plaintiff dealt at length with the two defences. With regard to the implied conditions precedent, the plaintiff argued cogently that there was no room for implying the same. One of the reasons it put forth was that none of these implied conditions precedent were ever alleged prior to the stay application (despite parties having exchanged extensive correspondence prior to the deadline for payment of the Escrow Amount) and that:

> On a general level (which applies to both 'terms implied in fact' as well as 'terms implied in law'), an implied term, as R E Megarry so aptly put it, is 'so often the last desperate resort of counsel in distress' (see R E Megarry, *Miscellany-at-Law* (Stevens & Sons Limited, 1955) at p 210
>
> (*per* Andrew Phang Boon Leong JA in *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518 at [45])

Moreover, since, by the defendant's own argument, the conditions precedent were to be implied into both the Escrow Agreement and the Drilling Contract, there was no reason to stay the action as it would be open to the defendant to rely upon the defence (for what it was worth) in the court proceedings. With regard to Art 19.1 of the Drilling Contract, the plaintiff argued that it was a red-herring. I agreed, though not for all the reasons proffered by the plaintiff.

19 Mort importantly, the pre-occupation with the defences was, to my mind, based on an unwarranted extrapolation of the holding in *The Hung Vuong-2* ([16] *supra*). Upon a closer reading, I did not think that that case was entirely apropos. *The Hung Vuong-2* held that:

(a) a party had to show "strong cause" where it sought to bring an action in a different jurisdiction from that provided for in the jurisdiction clause;

(b) one of the factors which the court would take into account in determining "strong cause" was whether the party, which was seeking to take the action out of the contractual forum, genuinely desired trial in that foreign jurisdiction or was only seeking procedural advantages; and

(c) it would be difficult for that party to contend that he genuinely desired trial if he was unable to show that there was a real dispute, *ie*, that he had a real defence to the claim and, accordingly, the court was entitled to look into the alleged defence to determine if there was any real substance to it.

The Hung Vuong-2 involved a situation where parties could not agree on the jurisdiction under which the action ought to be brought. In other words, the tussle was between having the matter heard before the courts of one jurisdiction over the courts of *another jurisdiction*. The present matter, however, did not involve such a transnational element. Parties simply could not agree on whether the action ought to be brought before a court or an arbitration tribunal, *both of which are in Singapore*. The dispute was hence over the mode of dispute resolution, rather than jurisdiction.

20 In any event, I was firmly of the view that the defendant had not established a strong cause for departing from the agreement submitting to the jurisdiction of the Singapore courts. To my mind, Art 25 of the Drilling Contract did not apply for four reasons.

Carving out of the Escrow Agreement from the Drilling Contract

21 First, from a reading of the Escrow Agreement and the Drilling Contract, I was of the view that the parties had intentionally carved the former out from the latter and expressly subjected the former to a non-exclusive jurisdiction clause rather than an arbitration clause. Article 11 of the Drilling Contract demonstrated that the parties had agreed to carve out escrow matters from the Drilling Contract and to put them in a separate agreement. That evinced a clear intention by the parties to subject claims arising from the Escrow Agreement to the dispute resolution clause found within that particular agreement. Counsel for the plaintiff submitted that the motivation behind this move was to ensure quicker relief, in the event that the obligations contained in the Escrow Agreement were breached than if the matter were arbitrated, as there was no procedure under the London Court of International Arbitration Rules for a final interim award. I agreed with that submission as the obligations of the Escrow Agreement were relatively straightforward and non-technical in nature, as compared with those under the Drilling Contract. Counsel for the defendant, on the other hand, highlighted several references made in the Escrow Agreement to the Drilling Contract to support his position that the Escrow Agreement and the Drilling Contract were inextricably linked and that the former could not be seen on its own, separate and distinct from the Drilling Contract. He relied, *inter alia*, on cl 4.1(b) of the Escrow Agreement, which required the plaintiff's invoice to be in accordance with Art 13 of the Drilling Contract, and cl 3.2(b) of the Escrow Agreement which made repeated reference to the word "Term" (which definition under cl 1.1 of the Escrow Agreement included the phrase "unless terminated in accordance with terms of the Drilling Contract"). I was not convinced by that argument, as a contract may refer to a separate contract without necessitating the conclusion that both were inextricably linked with each other. Further, it could equally be said that the limited reference to the Drilling Contract supported the view that the Drilling Contract was not intended to apply as a whole. There was no specific provision incorporating Art 25 of the Drilling Contract into the Escrow Agreement. Neither was there any general incorporation clause in the latter. The law provides that distinct and specific words are required to incorporate an arbitration clause into a contract. In *L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd* [2000] 2 SLR(R) 852, Choo Han Teck JC stated at [18] that "arbitration clauses like exemption clauses, must be expressly brought to the attention of the other contracting party". In the present matter, not only was there no clause specifiying that the arbitration clause was to be incorporated into the Escrow Agreement,

there was an express clause conferring jurisdiction on the Singapore courts. Accordingly, incorporating an arbitration clause into the Escrow Agreement would be plainly inconsistent with the clear wording of cl 6.2 of the Escrow Agreement.

Proper construction of Art 25 of the Drilling Contract

22 Second, despite its apparent width, Art 25, as properly construed, did not extend to the claim in question. From the wording of the arbitration clause, it was clear that Art 25 was principally concerned with claims and disputes arising out of or in relation to the Drilling Contract, even though it also extended to those "in connection with" the Drilling Contract. After the general words "[a]ny dispute, controversy or claim arising out of or in relation to or in connection with this Contract", the examples of the types of dispute included were all those arising out of the Drilling Contract. Article 25.1 made repeated references to the phrase "this Contract". Further, Art 25.1(a) was preceded by an introductory sentence, which explicitly limited the parameters of the dispute resolution clause to cover claims arising out of the Drilling Contract only, as opposed to the Escrow Agreement: "The following Dispute Resolution provision shall apply to this Contract". This ought not to be dismissed as mere verbiage. Despite Art 25's apparent width, a dispute squarely under the Escrow Agreement and having at best a tenuous connection with the Drilling Contract ought not to be governed by Art 25 when cl 6.2 of the Escrow Agreement was clearly by far the more proximate dispute resolution clause.

23 I was reinforced in my view by *Coop International Pte Ltd v Ebel SA* [1998] 1 SLR(R) 615 ("*Coop International*"), a case concerning a subsequent agreement which did not contain an arbitration clause even though the original agreement that was subsequently terminated did. Parallels could be drawn between the arbitration clause in *Coop International* which covered "any dispute arising out of or in connection with the *present agreement* …" [emphasis added], and Art 25.1 of the Drilling Contract, in that both were drafted broadly. In construing the arbitration clause, Chan Seng Onn JC held that the arbitration clause in the original agreement did not extend to a dispute which arose out of the subsequent agreement. He rejected the respondents' argument which was based on the width of the arbitration clause and applied instead a test of "sufficient connection or relation" to the agreement containing the arbitration clause. The following remarks of Chan JC bear repetition:

> 24 Counsel for the respondents submitted that the dispute in question fell within the scope of the arbitration clause 12.2 as it was worded in very wide terms covering 'any disputes arising out of or in connection with' the distributorship agreement.
>
> 2 5 *Certainly the words of the clause are of wide import but its scope is not unlimited. The issues in dispute must still have arisen out of or be reasonably connected with the distributorship agreement*. If the dispute concerns a breach of the agreement itself or the proper interpretation of the terms of the distributorship agreement, then the arbitration clause would cover it.
>
> 26 However, if the parties subsequently enter a new agreement or a series of new agreements which do not have any arbitration clauses, and the dispute concerns these new agreements and not the original distributorship agreement, it becomes much less clear (a) whether the dispute in fact has any connection at all with the original agreement; and (b) whether the arbitration clause contained in the original agreement is applicable at all to the later agreements.
>
> 27 Hence, if a dispute concerns a transaction entirely unrelated to the distributorship agreement, I do not think that the arbitration clause 12.2 as drafted is capable of governing that dispute. Where the present dispute does not arise from the terms of the distributorship

agreement or from the execution of that agreement itself, I find it difficult to see how the arbitration clause 12.2 can be applicable.

[emphasis added]

24 Chan JC found support for his observations in *Kianta Osakeyhtio v Britain & Overseas Trading Co Ltd* [1954] 1 Lloyd's Rep 247 where Morris LJ at 252:

> The compensation agreement itself in one sense arose out of the 1937 contract, but the compensation agreement, as it seems to me, was *a new agreement and self-contained agreement*. It was an agreement which had an *independent existence. The dispute which arose out of that compensation agreement concerning its meaning was not in my view a dispute arising either out of the interpretation or the fulfilment of the contract of 1937*. [emphasis added]

Clause 6.2 of the Escrow Agreement prevailed over Art 25.1 of the Drilling Contract

25 Third, the defendant's approach to the Escrow Agreement and the Drilling Contract was to look upon the former as an extension of the latter and/or to construe the two together as though they were one document. The implicit assumption of the defendant's case was that Art 25 was of general application. Even if the Escrow Agreement was regarded as an extension of the Drilling Contract or as one with the latter, the defendant's position was still untenable. Clause 6.2 of the Escrow Agreement did not purport to deal with any disputes arising out of the Drilling Contract. Instead, it focussed only on claims arising out of the Escrow Agreement. This was clear from the wording of cl 6.2(a), which explicitly provided for the non-exclusive jurisdiction of the Singapore courts:

> … with respect to any legal action or proceedings which may be brought at any time relating in any way to this Agreement (ie, the Escrow Agreement). [emphasis added]

It is also a trite canon of construction that the general should give way to the specific. Given the specificity of cl 6.2 of the Escrow Agreement, it overrode Art 25 as the claim arose out of the Escrow Agreement.

26 In addition, I was of the view that where different but related agreements contained overlapping and inconsistent dispute resolution clauses, the nature of the claim and the particular agreement out of which the claim arose ought to be considered. Where a claim arose out of or was more closely connected with one agreement than the other, the claim ought to be subject to the dispute resolution regime contained in the former agreement, even if the latter was, on a literal reading, wide enough to cover the claim. I found judicial support for this view in the English decisions of *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 Lloyd's Rep 767 ("*Credit Suisse First Boston*") and *UBS AG v HSH Nordbank AG* [2009] 2 Lloyd's Rep 272 ("*UBS AG*"). Both cases concerned inconsistent jurisdiction clauses in separate agreements. In the former, a case involving the purchase of a series of bonds by a hedge fund from a bank, the purchase agreement contained an exclusive jurisdiction clause in favour of the English courts but the re-purchase agreement contained a non-exclusive jurisdiction clause in favour of the English courts and entitled either party to bring a claim in a court of competent jurisdiction. The bank made a margin call which the hedge fund was unable to pay, as a result of which the hedge fund became liable to re-purchase the bonds. It failed to pay the re-purchase price and that led the bank to commence proceedings in England. The hedge fund then commenced proceedings in New York against the bank for misrepresentation and fraud, which the bank sought to restrain by way of an anti-suit injunction against the New York proceedings in the English courts. To enable it to obtain the anti-suit injunction to restrain the New York

proceedings, the bank had to show that the governing jurisdiction clause was the exclusive English jurisdiction clause found in the purchase agreement. That contention was rejected by Rix J. At 777, the learned judge said:

> … where different agreements are entered into for different aspects of an overall relationship, and *those different agreements contain different terms as to jurisdiction*, it would seem to be applying *too broad and indiscriminate a brush simply to ignore the parties' careful selection of palette*. [emphasis added]

Rix J further considered whether the complaint in the New York action arose out of the purchase agreement or the re-purchase agreement and decided in favour of the latter. He concluded at 777 that the English jurisdiction clause in the purchase agreement was either inapplicable or, if applicable, overridden by the non-exclusive jurisdiction clause in the re-purchase agreement:

> I am nevertheless reluctant to hold that those of [the hedge fund's] claims in its New York complaint which refer to [the re-purchase agreement] are claims which arise out of or in connection with the [purchase agreements] and do not arise out of or in connection with the [re-purchase agreement]. If they arise out of or in connection with both the [purchase agreement] and the [re-purchase agreement], then, where the jurisdiction clauses are in conflict, I do not see why the [re-purchase agreement] clause should not prevail: either on the basis that, in a case of conflict on standard forms plainly drafted by [the bank], [the hedge fund] should be entitled to exercise the broader rights; or *on the basis that the clause in the contract which is closer to the claim and which is more specifically invoked in the claim should prevail over the clause which is only more distantly or collaterally involved*. [emphasis added]

27 Rix J's approach was reaffirmed very recently by the English Court of Appeal in the second case of *UBS AG* ([26] *supra*) which also involved two jurisdiction clauses, one in favour of England and the other, New York. Lord Collin was of the view at 286 that:

> 94. … [Rix J] must have meant as a matter of construction, … that the *parties must be taken to have intended that, where a dispute fell within both sets of agreements, it should be governed by jurisdiction clause in the contract which was closer to the claim*.
>
> 95. In this case it is not necessary to go so far. *Whether a jurisdiction clause applies to a dispute is a question of construction. Where there are numerous jurisdiction agreements which may overlap, the parties must be presumed to be acting commercially, and not to intend that similar claims should be the subject of inconsistent jurisdiction clauses*. The jurisdiction clause in the Dealer's Confirmation is a "boiler plate" bond issue jurisdiction clause, and is primarily intended to deal with technical banking disputes. *Where the parties have entered into a complex transaction it is the jurisdiction clauses in the agreements which are at the commercial centre of the transaction which the parties must have intended to apply to such claims as are made in the New York complaint and reflected in the draft particulars of claim in England*.
>
> [emphasis added]

Inapplicability of s 6 of the IAA

28 Fourth, the defendant sought to rely on s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") which provides:

> **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. [emphasis added]

However, I was of the view that this section was not applicable as s 6 could only be invoked if the claim from which the proceedings arose fell within the scope of an arbitration agreement; the Escrow Agreement did not contain an arbitration clause. In *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*"), the Court of Appeal made it clear at [22] that s 6 of the IAA could only be invoked if the party applying to stay the action could show that the instituted proceedings fell within the scope of an arbitration agreement:

> Section 6 of the IAA acknowledges the primacy of the specific arbitration agreement in question. In order to obtain a stay of proceedings in favour of arbitration under s 6, the party applying for a stay ("the applicant") must first show that that he is party to an arbitration agreement, and that the proceedings instituted involve a "matter which is the subject of the [arbitration] agreement". In other words, the applicant has to show that the *proceedings instituted fall within the terms of the arbitration agreement*. If the applicant can show that there is an applicable arbitration agreement, then the court *must* grant a stay of proceedings unless the party resisting the stay can show that one of the statutory grounds for refusing a stay exists, *ie*, that the arbitration agreement is "*null and void, inoperative or incapable of being performed*". [emphasis in original]

29 In any event, even if proceedings instituted under the Escrow Agreement did fall within the scope of Art 25.1, that provision had been rendered inoperative by the parties entering into the subsequent Escrow Agreement. By introducing a jurisdiction clause in the subsequent Escrow Agreement, the defendant waived the agreement to arbitrate and was, accordingly, estopped from asserting its rights to insist on arbitration. This was explained by the Court of Appeal in *Tjong Very Sumito* at [53]:

> To these illustrations we would add cases where *the party applying for a stay has waived or may be estopped from asserting his rights to insist on arbitration, such as where the parties have agreed subsequently that disputes may be resolved by litigation*. The facts of such a case would fall to be decided in accordance with the usual contractual analysis of estoppel and or waiver on the basis that *the arbitration agreement is "inoperative"*, see s 6(2) of the IAA. There are no impediments, under the IAA, preventing the parties to an arbitration agreement from agreeing to resolve the matter in any other manner that they may find more convenient. *In such a case, the agreement to arbitrate will be treated as having been waived as the parties are free to modify their agreement at any time*. [emphasis added]

Conclusion

30 All in all, the defendant's application for stay before the AR was really no more than a tactic to delay the progress of this suit. Allowing the stay to continue in operation would have meant allowing a defendant to subvert a plaintiff's contractual right to commence action in a particular venue by alleging defences that were purportedly based on another agreement. That could not be allowed, particularly when both parties clearly intended to subject any dispute arising out of a subsequent carved-out agreement to the Singapore courts. Accordingly, I allowed the plaintiff's appeal with costs fixed at $12,000 plus reasonable disbursements for the reasons above. I also set aside the costs

ordered below.