Dalian Hualiang Enterprise Group Co Ltd and Another v Louis Dreyfus Asia Pte Ltd [2005] SGHC 161

Case Number : Suit 1002/2004, RA 129/2005

Decision Date : 07 September 2005

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Michael Lai and Wendy Tan (Haq and Selvam) for the first and second plaintiffs; P Jeya Putra (AsiaLegal LLC) for the defendant

Parties : Dalian Hualiang Enterprise Group Co Ltd; Dalian Jinshi Oil-Making Co Ltd — Louis Dreyfus Asia Pte Ltd

Arbitration – Stay of court proceedings – Whether court having jurisdiction to order stay of proceedings under s 6(1) International Arbitration Act on ground that dispute existing between parties that should be referred to arbitration in another jurisdiction – Section 6(1) International Arbitration Act (Cap 143A, 2002 Rev Ed)

Arbitration – Stay of court proceedings – Whether court having to consider if dispute between parties in fact existing before deciding to order stay or obliged to order stay whenever any dispute between parties arising – Section 6(2) Arbitration Act (Cap 10, 2002 Rev Ed), s 6(2) International Arbitration Act (Cap 143A, 2002 Rev Ed)

7 September 2005

Woo Bih Li J:

1 Dalian Hualiang Enterprise Group Co Ltd ("DHE") and Dalian Jinshi Oil-Making Co Ltd ("DJOM") are the first and second plaintiffs respectively. Louis Dreyfus Asia Pte Ltd ("Louis Dreyfus") is the defendant.

2 Under Sales Contract No SBS 031103 ("SBS 031103") dated 1 November 2003, DHE agreed to buy from Louis Dreyfus 55,000mt of soya beans, with ten per cent more or less at Louis Dreyfus' option and at a premium. The shipment was to be ex-US Gulf, Brazil or Argentina. The vessel *Armonikos* was eventually designated to carry the cargo. Hence SBS 031103 was referred to as "the Armonikos contract". I will adopt that description as well for convenience.

3 By agreement dated 8 March 2004, the Armonikos contract was assigned by DHE to DJOM. Louis Dreyfus was also a party to this assignment.

4 Subsequently, DJOM claimed for payment of despatch money and overage premium under the Armonikos contract. By email dated 6 September 2004, one Sally Yang of Louis Dreyfus Beijing confirmed the amount payable as

> DES – US$122,269.51
>
> OAP [meaning the overage premium] – US$66,547.46

This email was sent to Christina Wang Xiuling a staff of Beijing Canma Grain Corporation, the agent for DHE and then for DJOM.

5 The present action was filed by both DHE and DJOM to claim the despatch money and overage premium. However Louis Dreyfuss applied for a stay of the action on the ground that

pursuant to an arbitration agreement in the Armonikos contract, the dispute between the parties should be referred to arbitration in London under the auspices of FOSFA, *ie* the Federation of Oils, Seeds and Fats Association Limited.

6 The assistant registrar who heard the stay application said that Mr Michael Lai, who represented both DHE and DJOM, had conceded in the course of submission that there was a subsisting arbitration agreement between DHE and Louis Dreyfus (but not between DJOM and Louis Dreyfus). The assistant registrar then referred to the issues before him as threefold:

(a) whether the arbitration agreement had been incorporated into the contract between DJOM and Louis Dreyfus; and

(b) whether there was a dispute between the parties which was capable of arbitration under s 6(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") which could in turn be split into two issues:

(i) whether there was an admission by Louis Dreyfus of the debt, and

(ii) assuming there was such an admission, whether Louis Dreyfus could claim a set-off from a running account.

I should add that the set-off issue was raised by Louis Dreyfus because it had a claim not against DHE or DJOM but a different company by the name of Guangdong Fuhong Edible Oil Co Ltd ("Fuhong") and under a different contract SBS 040412B. It was alleged by Louis Dreyfus that the vessel of carriage for that contract was *Hanjin Tacoma* and that contract was referred to as "the Hanjin Tacoma contract". I will also adopt that description for convenience.

7 Louis Dreyfus alleged that DHE and DJOM were part of a group of companies known as the "JINSHI GROUP". It was also alleged that Fuhong was a close trading partner of the JINSHI GROUP and was treated at all material times as part of the JINSHI GROUP in so far as the alleged running account was concerned.

8 The assistant registrar concluded that the arbitration agreement had been incorporated into the contract between DJOM and Louis Dreyfus as well.

9 On the issue as to whether there was an admission by Louis Dreyfus, he split this into two sub-issues, *ie* firstly, was there an admission and, secondly, did the admission come from Louis Dreyfus? There seemed to be an admission by Sally Yang but Louis Dreyfus was taking the position that Ms Yang was employed by Louis Dreyfus, China, and was not an employee of Louis Dreyfus itself. Therefore, it was alleged that Ms Yang had no authority to bind Louis Dreyfus on liability or quantum.

10 The assistant registrar concluded that there was clearly a dispute on the second sub-issue involving the authority of Sally Yang. On the authority of *Coop International v Ebel SA* [1998] 3 SLR 670 ("*Coop International*"), he found that that was not a dispute capable of resolution by the courts.

11 The assistant registrar went on to say that if he had to decide on the issue of set-off, he would have ruled against Louis Dreyfus because Fuhong was a different company. Furthermore, the Hanjin Tacoma contract was entered into after the Armonikos contract had been assigned by DHE to DJOM.

12 DHE and DJOM were dissatisfied and appealed against the stay order of the assistant registrar. Their appeal was heard by me. At the first hearing of the appeal on 27 June 2005, Mr Lai informed me that he was not taking the issue whether the arbitration agreement was incorporated into the Armonikos contract. The arguments therefore centred on whether there was an admission binding on Louis Dreyfus. This involved a consideration of the court's role under s 6(2) of the IAA. This consideration was also relevant for the set-off issue. On the court's role under s 6(2) IAA, the question was whether the court had jurisdiction to consider if there was in fact a dispute, sometimes referred to as a genuine dispute, between the parties or whether the court was obliged to refer any dispute to arbitration so long as there was a dispute.

1 3 As the question about the court's jurisdiction under s 6(2) IAA would be of importance to other litigants as well, I asked the parties to present further arguments on it. As it turned out, the further arguments for DHE and DJOM canvassed a new point as well, *ie* that the set-off issue was not even within the scope of the arbitration agreement. In the meantime, the further arguments for Louis Dreyfus did not raise any new point. Accordingly, in the light of the new point raised for DHE and DJOM, I allowed Louis Dreyfus to present arguments solely in response to the new point. After such arguments in response were received, I gave my decision. I allowed the appeal with costs. Louis Dreyfus has filed an appeal to the Court of Appeal. I set out below my reasons.

The admission issue

14 The question of the authority of Sally Yang turned out to be a red herring. I say this because she was not the only one who had admitted the claims for despatch money and overage premium under the Armonikos contract. The sums payable on these claims were disclosed in a statement of account issued by Louis Dreyfus itself. True, that statement of account had a self-serving reference to the JINSHI GROUP but that was relevant only to the set-off issue. In my view, the statement of account demonstrated that Louis Dreyfus was accepting that the sums claimed under the Armonikos contract would be due and payable but for its claim under the Hanjin Tacoma contract.

Whether the set-off issue was within the scope of the arbitration agreement

15 As regards the question whether the set-off issue was within the scope of the arbitration agreement, both sides had assumed that I had the jurisdiction to rule on the question.

16 Sections 6(1) and 6(2) IAA state:

> **6.**—(1) Notwithstanding Article 8 of the Model Law, where any party to any 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 the court to stay the proceedings so far as the proceedings relate to that matter.
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> (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.

17 As s 6(1) IAA refers to Art 8 of the Model Law, which is the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, I set out Art 8(1) of the Model Law which is the material provision for present

purposes. It states:

> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

18 Accordingly, the reference in s 6(1) IAA to "Notwithstanding Article 8 of the Model Law" applies primarily to the second part of Art 8(1) regarding the stage when an application for a stay may be made. The substance of the first part of Art 8(1) stating that the matter has to be the subject of an arbitration agreement is also found in s 6(1) IAA. The third part of Art 8(1) stating that the court "shall … refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed" is, for present purposes, substantially the same as s 6(2) IAA, although s 6(2) IAA does permit the court to make a stay order on such terms and conditions as the court may think fit. I will refer to this third part as "the third part of Art 8(1)" for convenience.

19 I mention that the third part of Art 8(1) is substantially the same as s 6(2) IAA because there is case law in other jurisdictions on Art 8(1) or on provisions whose substance is, for present purposes, the same as the third part of Art 8(1).

20 Before elaborating on s 6(2) IAA, I should first deal with s 6(1) as s 6(2) IAA only applies if the stay application is made in accordance with s 6(1). In turn s 6(1) applies where the proceedings in court are "in respect of any matter which is the subject of the [arbitration] agreement". This means that if the court proceedings are not in respect of a matter which is the subject of the arbitration agreement, then the court has no jurisdiction under s 6(2) to order a stay. A possible question was whether it should be the court or the arbitral tribunal to determine whether the court proceedings were in respect of a matter which was the subject of an arbitration agreement.

21 In *Gulf Canada Resources Ltd v Avochem International Ltd* 66 BCLR (2d) 114 ("*Gulf*"), the Court of Appeal of British Columbia was dealing with s 8(2) of the International Commercial Arbitration Act, 5 BC 1986 c 14 (Can) ("the ICA Act 1986") which is in substance the same as the third part of Art 8(1) of the Model Law. The main judgment was that of Hinkson JA. Before dealing with s 8(2) of the ICA Act 1986, he referred to s 6 of the Arbitration Act RSBC 1979 c 18 (Can) ("the 1979 Act"). The substance of the material part of s 6 of the 1979 Act was the same as s 6 of Singapore's Arbitration Act (Cap 10, 2002 Rev Ed) which applies to domestic arbitrations. I will refer to that legislation as "the Singapore domestic Arbitration Act". Hinkson JA said that it was the exercise of discretion by the court to refuse a stay of proceedings pursuant to s 6 of the 1979 Act that led the legislature to regard such a refusal as judicial intervention in commercial arbitrations. To accomplish its purpose, the legislature enacted a number of new provisions in the ICA Act 1986 with a view to limiting such judicial intervention. One of the new provisions was s 8(2). He said at 120 to 121:

> 35 The court continues to have some residual jurisdiction to exercise on an application for a stay of legal proceedings pursuant to s 8 of the Act.
>
> 36 Thus, if the court concludes that one of the parties named in the legal proceedings is not a party to the arbitration agreement or if the alleged dispute does not come within the terms of the arbitration agreement or if the application is out of time, the court should not grant the application.
>
> …

39 Considering s.8(1) in relation to the provisions of s.16 and the jurisdiction conferred on the arbitral tribunal, in my opinion, it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.

40 Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

22 The material part of s 16 of the ICA Act 1986 which Hinkson JA had referred to was s 16(1) which states:

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

Section 16(1) of the ICA Act 1986 is substantially the same as Art 16(1) of the Model Law.

23 Subsequently in *Prince George (City) v McElhanney Engineering Services Ltd* [1995] 9 WWR 503 ("*McElhanney*"), the Court of Appeal of British Columbia cited the judgment of Hinkson JA in *Gulf* quite extensively with apparent approval although the issues in the two cases were not the same. Cummings JA who delivered the judgment of the court then said at 521:

53 Thus if a party is alleged to be a party to an arbitration agreement, but that party clearly establishes that it is not a party to such an agreement, the court has a residual jurisdiction to refuse a stay. This is no more than a jurisdiction to satisfy itself that the prerequisites of s. 8 of the Act have, in fact, been met. If those prerequisites clearly have not been met, then the court should refuse a stay. If it is arguable whether the prerequisites have been met, then the stay should be granted and the issue can be resolved in the arbitration. …

24 However, Cummings JA rejected the kind of residual discretion which Parret J in the court below alluded to. Parret J had been of the view that the court could refuse to order a stay if there were multiple parties and multiple issues which were interrelated and some, but not all, the parties were bound by an arbitration agreement.

25 I was of the view that I had jurisdiction to determine if the matter before the court was the subject of the arbitration agreement between the parties. However, if that issue was arguable in that the outcome was not clear to me, then I should stay the court proceedings.

26 At this juncture, it is appropriate to set out the terms of the arbitration agreement under the Armonikos contract. It states:

ARBITRATION : Should any dispute arise between the contracting parties to which no agreement can be reached, these disputes shall be settled by arbitration, which shall take place in London as per FOSFA.

27 I did not think that the adjective "contracting" assisted in the interpretation of the scope of

the arbitration agreement. Even without that adjective, the reference to the parties would be to the parties of the Armonikos contract. The adjective simply reinforced this interpretation.

28 As for the reference to "any dispute", Lord Esher MR considered the phrase "all disputes" in *Re An Arbitration between Hohenzollern Actien Gesellschaft fur Locomotivban and The City of London Contract Corporation* (1886) 54 LT 596. Lord Esher MR said at 597:

> That is the 10th clause of the contract, and it is in the widest possible terms: "All disputes are to be settled by the engineer to the purchasers and the engineer to be appointed by the vendors, or their umpire in case of difference, such arbitration to be conducted in conformity with the C.L.P. Act, or any existing statutory modification of the same." Now, of course, "all disputes" cannot mean disputes as to matters that have no relation at all to the contract. But I think that those words are to be read as if they were "all disputes that may arise between the parties in consequence of this contract having been entered into."

29 I was of the view that the phrase "any dispute" should also be given a wide interpretation. Nevertheless, it would not cover a dispute unrelated to the transaction covered by the Armonikos contract. For example, if there was a dispute between DHE or DJOM on the one hand and Louis Dreyfus on the other hand under a separate contract which did not have an arbitration agreement, would that dispute be caught by the arbitration agreement in the Armonikos contract? Surely not. Likewise, even if that separate contract had its own arbitration agreement, the dispute thereunder would be referred to arbitration under that arbitration agreement and not under the arbitration agreement in the Armonikos contract.

30 On the facts before me, I had found that there was an admission that the sums claimed under the Armonikos contract would be due and payable but for the claim under the Hanjin Tacoma contract. The disputes under the Hanjin Tacoma contract were separate and distinct from the Armonikos contract. Furthermore, neither DHE or DJOM was a party to the Hanjin Tacoma contract. While it was true that the sums claimed by the plaintiffs were payable under the Armonikos contract, the allegation about the running account arose only because of Louis Dreyfus' claim under the Hanjin Tacoma contract. Furthermore, the issue as to whether there was a running account or not was, in my view, unrelated to the very transaction under the Armonikos contract. Indeed, the submission for Louis Dreyfus was simply that the "defence of a running account undoubtedly falls within the scope of the arbitration agreement". This was a bald argument. In my view, it was clear that the set-off issue was not the subject of the arbitration agreement. In the circumstances, I allowed the appeal.

The court's jurisdiction under s 6(2) IAA

3 1 Accordingly, the jurisdiction of the court under s 6(2) IAA became academic. However, as submissions were made on this issue and in view of the importance of the issue, I will venture my view on it.

32 It is important to bear in mind that there are two legislative regimes in Singapore in respect of arbitration.

33 The IAA applies to international arbitrations. Section 5(2) IAA states when an arbitration is international. If the arbitration is international, ss 6(1) and 6(2) IAA become relevant. I have set out ss 6(1) and 6(2) above.

34 The other legislative regime is the Singapore domestic Arbitration Act which I have already mentioned above. Section 3 thereof states that the Act shall apply to any arbitration where the place

of arbitration is Singapore and where Pt II of the IAA does not apply to that arbitration.

35 Section 6(1) of the Singapore domestic Arbitration Act is similar to s 6(1) IAA. However, s 6(2) of the former is not similar to s 6(2) of the latter. Section 6(2) of the Singapore domestic Arbitration Act states:

> (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 application 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]

As can be seen, the word "may" is used in the opening words of s 6(2) of the Singapore domestic Arbitration Act instead of "shall". Furthermore, s 6(2)(*a*) permits the court to grant a stay order if there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement.

36 I turn now to the position in England which assisted me in my deliberations. Apparently, the position in England before 1996 was that the English courts would consider whether there was in fact a dispute before ordering a stay as the application for a stay was often heard together with an application for summary judgment. The House of Lords' decision in *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713 is the case often cited for this proposition. Thus, *Russell on Arbitration* (Sweet & Maxwell, 22nd Ed, 2003) states at para 7-019:

> Before the Arbitration Act 1996 was enacted a stay of court proceedings, even in the case of a non-domestic arbitration agreement, would not be granted if the court was satisfied that there was in fact no dispute between the parties with regard to the matter agreed to be referred. This situation arose out of a controversial provision in a previous Arbitration Act, which has been repealed. As a result of the repeal the court no longer has a discretion in the matter, and the previous case law on the subject of whether or not there is a dispute can be disregarded. Once the court is satisfied that there is a dispute, it is obliged under section 9 of the Arbitration Act 1996 to grant the respondent a stay of the legal proceedings unless the arbitration agreement is null and void, inoperative or incapable of being performed. For the purposes of section 9, the word "dispute" is to be given its ordinary meaning and includes any claim which the other party refused to admit or did not pay, whether or not there is any answer to the claim in fact or in law.

37 The judgment of the Court of Appeal in *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 WLR 726 ("*Halki*") is cited for the propositions in the last two sentences of the above passage. In that case, the plaintiff owners of a vessel were claiming damages from the defendant charterers. The defendant applied for a stay under s 9 of the English Arbitration Act 1996 (c 23) and the plaintiff applied for summary judgment under the UK Rules of the Supreme Court O 14.

38 The judgment of Clarke J in the court of first instance is reported in [1998] 1 Lloyd's Rep 49.

The headnotes state:

> The issue for decision was whether the action brought by the plaintiffs was in respect of a matter which under the charter was to be referred to arbitration since only in such a case might an application be made under s. 9(1) of the Arbitration Act, 1996; and whether on the true construction of the arbitration clause in the charter there was any relevant dispute between the parties.
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> **Held**, by Q.B. (Adm. Ct.) (Clarke, J.), that (1) there was indeed a dispute relating to demurrage; it seemed to make no commercial sense to hold that the parties intended that the arbitrators should have jurisdiction over those parts of either party's claim in respect of which the other party had an arguable defence but not otherwise; it made more sense to hold that the parties intended that the arbitrators should have jurisdiction over all claims which either party had refused to pay; thus it was contemplated that all such claims should be determined by private arbitration before commercial men and not by the Courts … ;
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> (2) … all the charterers had to do was to say that they disputed the amount due or indeed failed to pay anything; in either of those events there was in ordinary language a dispute as to the amount due; that dispute was then a dispute arising from or in connection with this charter within the expression in cl. 9 and therefore should be referred to arbitration … ;
>
> (3) however indisputable the plaintiffs' claim there remained a dispute between the parties which they agreed to refer to arbitration; the construction agreement was not null and void, inoperative or incapable of being performed; it followed that the defendants were entitled to a stay of this action under s.9(4) of the Arbitration Act, 1996 and the plaintiffs were not entitled to judgment under R.S.C., O. 14, for any part of their claim … ;

39 The plaintiff appealed. The appeal was dismissed by the majority of the Court of Appeal. The judgment of Swinton Thomas LJ, who was one of the majority, sets out the legislative history leading to s 9(1)(4) of the Arbitration Act 1996 and his reasons. He said at 754 to 756:

> Section 1(1) of the Arbitration Clauses (Protocol) Act 1924 provided:
>
> > Notwithstanding anything in the Arbitration Act 1889 [52 & 53 Vict. c. 49], if any party to a submission made in pursuance of an agreement to which the said protocol applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, shall make an order staying the proceedings.
>
> The MacKinnon Committee Report of 1927 (Cmd. 2817) reads, at para. 43:
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> > Our attention has been called to a point that arises under the Arbitration Clauses (Protocol) Act 1924. Section 1 of that Act in relation to a submission to which the protocol applies deprives the English court of any discretion as regards granting a stay of an action. It is said that cases have already not infrequently arisen where (e.g) a writ has been issued claiming the price of goods sold and delivered. The defendant has applied to stay the action on the ground that the contract of sale contains an arbitration clause, but without being able, or

> condescending, to indicate any reason why he should not pay for the goods, or the existence of any dispute to be decided by arbitration. It seems absurd that in such a case the English court must stay the action, and we suggest that the Act might at any rate provide that the court should stay the action if satisfied that there is a real dispute to be determined by arbitration.

The report uses the words "a real dispute."

Section 1(1) of the Arbitration Clauses (Protocol) Act 1924, was then amended by section 8 of the Arbitration (Foreign Awards) Act 1930, to incorporate the words "there is not in fact any dispute between the parties with regard to the matters agreed to be referred." Those words were carried through into the Act of 1950 and the Act of 1975 and are central to the issue that arises in this case.

Section 1(1) of the Arbitration Act 1975 provides:

> If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperable or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

Clause 9 of the charterparty in the present case is in common form:

> General average and arbitration to be London, English law to apply. For arbitration the following clause to apply: Any dispute arising from or in connection with this charterparty shall be referred to arbitration in London. The owners and charterers shall each appoint an arbitrator experienced in the shipping business. English law governs this charterparty and all aspects of the arbitration.

…

The words used in clause 9 of the charterparty in relation to a referral to arbitration were "any dispute." The words in section 1(1) of the Act of 1975 are: "there is not in fact any dispute between the parties." To the layman it might appear that there is little if any difference between those words. However the legislature saw fit to draft section 1 using the phrase "not in fact any dispute." The legislature did not use the words "there is no dispute" and consequently a meaning must be given to those words and the courts have done so, although there is no general agreement as to what they mean. The distinction between the two phrases "any dispute" and "not in fact any dispute" is of central importance in understanding what underlies the cases that preceded the Act of 1996. To a large extent as a matter of policy to ensure that English law provided a speedy remedy by way of Order 14 proceedings for claimants who make out a plain case for recovery, and to prevent debtors who had no defence to the claim using arbitration as a delaying tactic, the words "not in fact any dispute" as opposed to "no dispute" have from time to time been interpreted by the courts as meaning "no genuine dispute," "no real dispute," "a case to which there is no defence," "there is no arguable defence," and later a case to which there is no answer as a matter of law or as a matter of fact, that is to say that the sum claimed "is

indisputably due." The approach of the courts has on occasions been similar to that adopted by them in Order 14 proceedings in cases where there is no arbitration clause. ….

The question that arises on this appeal is as to whether, in a case such as the present, there can be said to be a dispute between the parties when the alleged debtor has refused to pay the amount claimed and denied that there is any sum due and owing without condescending to detail by way of defence.

The case for the plaintiffs, put very shortly, is that before there can be a dispute capable of being referred to the arbitrator there must be an arguable case for disputing the claim, and if the defence put forward is unsustainable then there is no dispute or put another way, no "real" or "genuine" dispute. It is said that the plaintiffs' claim is indisputable. It is of importance, to my mind, that the clause in the agreement makes no reference to a real or genuine dispute, or any reference to whether or not the claim is indisputable, but refers only to "any dispute." The defendants submit that if the defendants to a claim refuse to pay then there is in any ordinary language a dispute and that word includes any claim which is not admitted. They stress, rightly in my view, that the parties themselves have agreed that matters in issue between them should be referred to arbitration as opposed to being adjudicated upon by the courts. Further they rely on the provisions of section 9 of the Arbitration Act 1996.

The words "dispute" and "in fact any dispute" have been considered by the courts in a number of cases.

40 Swinton Thomas LJ then continued to say at 761 to 763:

In my view, … Mr. Waller's submission is correct, and in the words of Templeman L.J. in *Ellerine Bros. (Pty.) Ltd. v. Klinger* [1982] 1 W.L.R 1375, 1383H there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable. The cases relied on by Mr. Hamblen to the opposite effect resulted from the particular interpretation that the courts have placed on the words in section 1 of the Act of 1975 and its predecessors to which I have referred. In my judgment if a party has refused to pay a sum which is claimed or had denied that it is owing then in the ordinary use of the English language there is a dispute between the parties.

I turn, then, to section 9 of the Arbitration Act 1996, which provides:

> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter. (2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures. (3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim. (4) *On application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.*
>
> [emphasis added]

The important distinction between section 9 of the Act of 1996 and section 1(1) of the Act of

1975 is the omission of the words "that there is not in fact any dispute between the parties with regard to the matter agreed to be referred." Accordingly the court no longer has to consider whether there is in fact any dispute between the parties but only where [*sic*] there is a dispute within the arbitration clause of the agreement, and the cases which turn on that distinction are now irrelevant. Mr. Hamblen submits that this amendment to the law of arbitration has made no difference in substance but is merely a simplification of the law and the court still has to resolve, when asked to do so, an issue as to whether, under the arbitration clause in the contract, there is a dispute between the parties. He submits that this issue must be resolved in accordance with the authorities prior to 1996, in particular *Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei G.m.b.H*. [1997] 1 W.L.R. 713.

Mr. Waller submits that section 9 of the Act of 1996 was enacted to make it plain in the light of the pre-existing cases that, save as otherwise provided in the section itself, a party is entitled to a stay of the proceedings unless the court concludes that the action is not brought in respect of the matter which, under the agreement, is referred to arbitration or under subsection (4). Accordingly, the problem which arose in this case and in other cases in resolving the distinction between "a dispute" in the arbitration clause of the contract and "in fact [a] dispute between the parties" in section 1 of the Act of 1975 has been resolved, and the court must grant a stay in any case in which the sum claimed is not admitted. Mr. Hamblen submits that if that was the intention of Parliament one would have expected it to have been spelt out clearly and explicitly.

The Departmental Advisory Committee on Arbitration Law in their report on the Arbitration Bill reported in February 1996, in relation to clause (as it then was) 9 at paragraph 55:

> The Arbitration Act 1975 contained a further ground for refusing a stay, namely where the court was satisfied that 'there was not in fact any dispute between the parties with regard to the matter agreed to be referred.' These words do not appear in the New York Convention and in our view are confusing and unnecessary, for the reasons given in *Hayter v. Nelson* [1990] 2 Lloyd's Rep. 265.

In his judgment in this case, Clarke J. said at p.1278: "It is not clear (at least to me) what that paragraph means."

I understand, of course, why the judge said what he did. However, one cannot overlook the fact that the chairman of the departmental advisory committee was Saville L.J., who decided *Hayter v. Nelson*. It is absolutely clear to my mind that paragraph 55 of the report was a shorthand cross-reference to the judgment in *Hayter v. Nelson* and the clearest possible indication that the intent was to incorporate the ratio decidendi of that case into section 9. In my view, the alteration to the words of section 1 of the Act of 1975 to those contained in section 9 of the Act of 1996 can only make sense if construed in that way, and I would so construe them. …

41 The position in Hong Kong in respect of the third part of Art 8 of the Model Law is the same as that under the English 1996 Act s 9(4). In *Getwick Engineers Ltd v Pilecon Engineering Ltd* (2002) 1020 HKCU 1 ("*Getwick*"), the defendant had engaged the plaintiff as its subcontractor for the supply and installation of electrical, mechanical ventilation and air-conditioning equipment and associated works for conversion and extension work that the defendant was carrying out as main contractor to various schools. The plaintiff had three parts to its claim:

(a) The first part was for sums payable under various payment certificates issued by the defendant itself to the plaintiff. The defendant had failed to pay on six payment certificates totalling HK$530,208.32. The defendant subsequently issued three cheques of which two were

honoured and the third was dishonoured. After taking into account the two cheques which were honoured, the balance payable under the payment certificates was HK$295,208.32. This figure included the HK$115,000 for which the third cheque was issued.

(b) The second part was in respect of variation works for which the plaintiff claimed HK$112,322.60.

(c) The third part was for HK$138,458.47 being additional works.

42 The plaintiff applied for summary judgment which initially was for a larger sum and was then reduced to HK$389,637.93 comprising the first part of its claim for HK$295,208.32 and the second part of its claim for HK$112,322.60. The defendant in turn applied for a stay of the action pursuant to s 6 of the Arbitration Ordinance (Cap 341) (HK). The arbitration agreement in *Getwick* stated:

18.1 If any dispute or difference arises between the Sub-Contractor and the Contractor … in connection with this Sub-Contract, and if there exist within the Main Contract provisions allowing the reference of disputes or differences between the Contractor and the Employer to mediation and/or adjudication, then either party may request that the dispute or difference be referred to mediation and/or adjudication in accordance with whichever rules or other guide-lines for mediation and/or adjudication may be specified within the Main Contract (if any), or any modifications thereof for the time being in force…

43 Hon Ma J said:

21. Where an arbitration agreement exists (and in this case, a domestic arbitration agreement within the meaning of the Ordinance) and court proceedings are brought in relation to the matters covered by the agreement, section 6(1) of the Ordinance governs the matter :

'6. Court to refer matter to arbitration in certain cases(1) Subject to subsections (2) and (3) [which are not relevant for present purposes], article 8 of the UNCITRAL Model Law (Arbitration agreement and substantive claim before court) applies to a matter that is the subject of a domestic arbitration agreement in the same way as it applies to a matter that is the subject of an international arbitration agreement.'

22. Article 8 of the UNCITRAL Model Law states :

'Article 8. Arbitration agreement and substantive claim before court (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.'

23. At the risk of repeating what are by now familiar principles in applications for stay under section 6 of the Ordinance (and Article 8 of the UNCITRAL Model Law), I set out the various steps involved in the analysis :

(1) The court first construes the relevant arbitration agreement to see just what matters are intended to be referred to arbitration. Among the most usual expressions are, for example, 'all disputes or differences between [Party A and Party B] … in connection with (or in relation to or in

respect of) this contract'. The present arbitration agreement is not unusual in this regard. (2) Where the words 'in connection with' are used, while every contract must of course be construed in accordance with its ordinary and natural meaning (and arbitration agreements are no exception), it seems to me that they are wide in nature. They would in general cover all disputes other than one entirely unrelated to the transaction covered by the contract in question : see Mustill & Boyd : Commercial Arbitration 2nd Edition, at 119.(3) The existence or non-existence of a dispute or difference as envisaged under the relevant arbitration agreement between the parties is crucial to the granting of a stay. For this purpose, a dispute will exist unless there has been a clear and unequivocal admission not only of liability but also quantum : see Louis Dreyfus v. Bonarich International (Group) Limited [1997] 3 HKC 597; Tai Hing Cotton Mill Limited v. Glencore Grain Rotterdam BV [1996] 1 HKC 363, at 375A-B. In the absence of admissions as to both these aspects, a mere denial of liability or of the quantum claimed, even in circumstances where no defence exists, will be sufficient to found a dispute for the purposes of section 6 of the Ordinance (and Article 8 UNCITRAL Model Law). Thus, finding out whether a dispute (as defined in this way) exists, is the only exercise that the court carries out in a stay application (apart of course from construing the arbitration agreement to discover its full ambit) : it does not involve itself in evaluating the merits of the claim. (4) A clear and unequivocal admission of liability and quantum can no doubt take a variety of forms. Admissions contained in correspondence or any other documents or even by conduct may, in my opinion, suffice. And, as will be apparent later in this judgment, the issuance of a cheque can (and does in the present case) suffice to establish the clear and unequivocal admission of liability and quantum (in the amount stated in the cheque). (5) Once the court comes to the view that a dispute or difference exists, the granting of a stay is mandatory. On the other hand, if the court comes to the view that no dispute or difference exists, then the matter falls to be determined in the court proceedings. Of course, the relevant dispute or difference must relate to matters which are stated to be referable to arbitration in the relevant arbitration agreement. A dispute or difference in relation to a matter not intended to be referred to arbitration obviously does not come within the arbitration agreement and no stay can be granted in such circumstances. (6) Where the court comes to the view that no dispute or difference exists, it is free to (and often, if not inevitably, will) decide the matter on an application for summary judgment. This would explain the practice of still having a plaintiff's application for summary judgment under RHC Order 14 heard at the same time as a defendant's application for a stay (although, as observed by Burrell J in Strategic Finance Relations Limited v. Chun Tai Holdings Limited, unreported, 30 November 2000, HCA 7940/2000, the stay application is heard and determined first). Before the introduction of section 6 of the Ordinance in its present form (and Article 8 of UNCITRAL Model Law) this was also the practice since the rationale was that the two applications were seen as mirror images of each other : the determination of one application determined the other. This, it is to be emphasized, however, is no longer the rationale. … In other words, the absence of an arguable defence for O.14 purposes, does not mean by itself that a stay will not be granted unless there is a clear and unequivocal admission of both liability and quantum as stated above.

24. What I have enumerated above is nothing new. The principles are distilled from many cases in this area …

25. …

26. In my judgment all three claims (except for the sum of $115,000 the amount of the dishonoured cheque) must be resolved by arbitration and a stay is therefore granted of the action to this extent (I will deal with the claim for $115,000 later):

(1) For the claim regarding variations and additional works, there is no admission of liability or

quantum on the defendant's part, much less a clear and unequivocal one. (2) On the claim regarding the six payment certificates, Mr Pun submitted that the plaintiff's claim was essentially for work done as reflected and certified by the defendant to be due under the said payment certificates. Under Clause 15.5 of the Sub-contract, payment was due under payment certificates within a stipulated time period, subject to deductions of previous payments and to retention monies being held. As these payments certificates came from the defendant, Mr Pun argued (very attractively) that they constituted clear and unambiguous admissions of liability and quantum in respect of the work carried out by the plaintiff. He referred to the underlying rationale of these interim payment certificates, being the provision of a ready cash flow to the sub-contractor. He also referred to Clause 15.6(c) of the Sub-contract which stated that if the defendant were to withhold payment under any payment certificate, it had to notify the plaintiff with written reasons no later than the date when payment was due. There was no such notification. (3) In my judgment, such interim payment certificates are not clear and unambiguous admissions of liability for work done. They merely refer to interim payments due which involve no final acceptance by the defendant either that the work carried out by the plaintiff has been up to standard or that the amount stated in the payment certificate is ultimately unequivocally and indisputably due. As stated in Hudson's Building and Engineering Contracts (11th Edition) Vol.1 at paragraph 6-187 :'As a rule, however, the payments contemplated by such provisions only represent the approximate value (or a proportion of it) of the work done, and possibly also of materials delivered to the site, at the relevant date, and, in the vast majority of cases, they will not be conclusive or binding on the owner as an expression of satisfaction with the quality of the work or materials. It makes no difference that they are frequently expressed to represent the value of work properly done, since such a qualification is an obvious one in any provision for payment on account, and will almost always be implied in any event, even if the concept of value did not itself involve the element of deduction for work containing a defect requiring to be repaired or re-instated. In addition the whole scheme of most contracts, including powers to order the removal or work exercisable at any time, to withhold the certificate of practical completion, and to order defects to be repaired during the maintenance period, is usually inconsistent with any such intention.'

Although there is provision for retention monies in the Sub-contract, nevertheless there may be claims exceeding the amount of such monies arising from the same works or even as a set-off from other works … It is only when one reaches final accounts the sums due and owing on either side become more or less finalized. I accept that, contractually, monies may become due under the payment certificates themselves at certain times, but this is different to saying that payment certificates demonstrate a clear and unequivocal admission that payment for the underlying work is indisputably due, for that can only really arise in final accounts. What then the plaintiff is essentially claiming in the present case is payment under the payment certificates pursuant to the contractual provisions in the Sub-contract. This claim, however strong it may be, is disputed because the defendant has not clearly or unequivocally admitted it.

(4) However, the cheque dated 31 September 2001 for $ 115,000 is in my view to be regarded as a clear and unequivocal admission on the defendant's part of its liability and quantum (in that amount) under payment certificates. This cheque was issued following the 28 April letter to which I have already referred above at paragraph 10. It was one of three cheques sent to the plaintiff by the defendant as an acknowledgment of its liability under payment certificates which had been issued to the plaintiff (although it only stated the sum of $ 350,000). In reaching this conclusion, I have borne in mind that cheques are to be regarded as cash and save in exceptional circumstances, no set off or counterclaim will be permitted : see Hong Kong Civil Procedure 2001 Vol.1 at paragraphs 14/4/15, 14/4/19. Two of the three cheques have been honoured. I see no reason why the third cheque should not be seen in the same light. I have not been referred to

any case in which a cheque or bill of exchange has been regarded as constituting a clear and unequivocal admission of liability and quantum, but in principle, I do not see why it cannot be so regarded.

Accordingly, Hon Ma J granted summary judgment only for the sum of HK$115,000 under the third cheque and ordered a stay of the rest of the plaintiff's claims. Apparently in Hong Kong, the current position is that Art 8 of the Model Law applies to both a domestic as well as an international arbitration agreement.

44 I have quoted passages from the judgment of Hon Ma J on payment certificates as well because the passages may have some bearing on claims in Singapore under interim payment certificates. Often, standard provisions in building contracts in Singapore stipulate that full effect be given to such certificates by way of summary judgment. It is uncertain whether that will now be affected if *Getwick* is followed in Singapore and the IAA is the applicable law. As I have mentioned, the third part of Art 8(1) of the Model Law is substantially the same as those of s 6(2) IAA. Accordingly, amendments to such standard contractual provisions may be in order to avoid any argument especially where the IAA is the applicable law. On my part, I have some reservation on the view that even payment certificates issued by a party do not amount to an admission of liability and quantum. However, I need not say any more on the point as it was not in issue on the facts before me.

45 I will, however, mention that in Singapore it is no longer the case that an application for a stay is heard together with an application for summary judgment. This is because recent amendments made to the Rules of Court (Cap 322, R 5, 2004 Rev Ed) postpone an application for summary judgment to a time after the defence is filed and served whereas an application for a stay has to be made before delivering any pleading. This generally means before filing and serving the defence. I mention this for completeness although, in my view, it has no bearing on the court's jurisdiction under s 6(2) IAA.

46 Coming back to the court's jurisdiction, it is to be noted that the words of s 1(1) of the English Arbitration Act 1975 are not identical to s 6(2) of the Singapore domestic Arbitration Act. The former states "that there is not in fact any dispute" whereas the latter states "that there is no sufficient reason". However, as I shall elaborate later, Singapore cases have followed the English pre-1996 position as regards domestic arbitration.

47 Also, while the words of s 9(4) of the English Arbitration Act 1996 are not identical to the words in the third part of Art 8(1) of the Model Law, the substance is the same. Accordingly, their substance is also the same as s 6(2) IAA.

48 I have also considered various Canadian cases referred to in footnote 2 of para 20.041 of *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003) as well as a New Zealand case in footnote 2 of para 20.042. The Canadian cases include *Gulf* and *McElhanney* which I have mentioned above. I need refer only to some of the other Canadian cases before coming to the New Zealand case.

49 In *Nanisivik Mines Ltd v Canarctic Shipping Co Ltd* (1994) 113 DLR (4th) 536 ("*Nanisivik*"), the Federal Court of Appeal considered Art 8 of the Commercial Arbitration Code which had been incorporated into Canadian domestic law. The substance of Art 8(1) of the Code is the same as Art 8(1) of the Model Law. The judgment of the court was delivered by Mahoney JA. As regards two of the issues, *ie* whether the motions judge had a discretion not to refer the claim to arbitration and whether he had a discretion to stay the court proceedings, Mahoney JA said at 541 to 542:

Discretion as to reference to arbitration

…

The international community has arrived at a consensus that compliance with commercial arbitration agreements is to be enforced by the courts provided they are in writing, not null and void nor inoperative nor incapable of performance. Canada and its provinces have given that consensus the force of domestic law. …In both its ordinary meaning and in light of the object and purpose of the Act, "shall" clearly means "must" not "may". In my opinion, the motions judge had no discretion in the circumstances but to refer the claim of Nanisivik against Canarctic to arbitration, nor had he any discretion as to the reference of Zinc Corp.'s claim provided it was bound by the arbitration agreement.

Discretion as to stay of proceedings in court

…

Under the Act, there have been two approaches in the Trial Division to a stay of proceedings after a mandatory reference has been made. In one, that taken here, the stay has been treated as a matter of discretion to be exercised according to *Seapearl*. In the other, the stay follows from the mandatory reference without an exercise of discretion.

50 Mahoney JA continued at 544:

As stated, the choice is between the stay of proceedings as between the parties to the arbitration ensuing upon the reference without an exercise of judicial discretion, or granting a discretionary stay unless there are "strong reasons" not to. All of the policy considerations that militate in favour of the mandatory legislative requirement that a dispute, subject of an arbitration agreement, be referred to that arbitration seem to me also to militate conclusively in favour of the staying of the litigation of the same issues until the arbitration award has been made. It seems far more likely that otherwise that disposition of those issues will resolve the entire litigation, if not among all the parties, at least among those party to the arbitration.

I conclude that, once a reference to arbitration has been made, there is no residual discretion in the court to refuse to stay all proceedings between the parties to the arbitration even though there may be particular issues between them not subject of the arbitration.

51 I should stress that Mahoney JA's reference to a residual discretion was not to the type of residual jurisdiction which *Gulf* and *McElhanney* were referring to, *ie* the court's jurisdiction to decide whether a dispute even comes within the scope of the arbitration agreement. If a dispute clearly does not come within the scope of the arbitration agreement, there is no discretion. The court cannot order a stay.

52 In *Automatic Systems Inc v Bracknell Corp* (1994) 113 DLR (4th) 449 ("*Automatic Systems*"), Austin JA delivering the judgment of the Ontario Court of Appeal said the following in respect of the third part of Art 8 of the Model Law at 456 and 457:

It is to be noted that the article says "shall". This is to be compared with the parallel section in the Arbitration Act, 1991, s.7(1) which also says "shall", and contrasted with the parallel section in the old Arbitrations Act, also s.7, which said "may". The change in verb suggests strongly that the legislature is even more in favour of enforcing arbitration clauses in contracts than it was

formerly.

…

Discussion

Where a stay was applied for under s.7 of the old Arbitrations Act, the court had a broad discretion whether to grant it or not, in part by reason of the use of the word "may". … In the Model Law, however, not only is the word "shall" used, but in addition the court is limited in refusing a stay to three specific situations, namely, where it finds the agreement to arbitrate null and void, inoperative or incapable of being performed.

53 However, Mr Lai relied on the Canadian case of *Methanex New Zealand Ltd v Fontaine Navigation SA* [1998] 2 FC 583 ("*Methanex*") for the proposition that a court will not order a stay if there is no genuine dispute. In that case, Hargrave Prothonotary of the Federal Court of Canada was also considering Art 8 of the Commercial Arbitration Code. After citing that provision, he said from [14]:

This is of course subject to any jurisdictional objections and indeed, to whether there is a dispute which is a subject of an arbitration agreement.

15 …

16 …

17 Indeed, a court may interpret an arbitration provision and then analyze the claim to determine if, on a proper interpretation, the matter falls within the disputes and differences to be decided by arbitration. If the claim is not in respect to a matter which the parties have agreed to arbitrate, the court has a discretion to exercise outside of the parameters imposed by Article 8(1) of the Commercial Arbitration Code … Indeed, in the *Gulf Canada Resources Ltd/ Ressources Gulf Canada Ltee v Arochem International Ltd* case Mr Justice Hinkson notes that the matter does not end when the application for a stay points to an arbitration agreement, for the court does have a residual jurisdiction when it is clear that the dispute is outside of the term of an arbitration agreement. All of this is consistent with a passage in *Nanisivik Mines Ltd v F.C.R.S. Shipping Ltd* (1994) 167 NR 294 (Fed. CA):

> In my opinion, the motions judge had no discretion in the circumstances but to refer the claim of Nanisivik against Canarctic to arbitration nor had he any discretion as to the reference of Zinc Corp's claim provided it was bound by the arbitration agreement ….

This idea of whether a party is bound by an arbitration agreement was put slightly differently, but with the same effect, by the House of Lords in *Heyman v Darwins Ltd* [1942] 1 All ER 337 (U.K. H.L.) …

The *Heyman* case certainly predates the Commercial Arbitration Code, however, the principle, of examining the nature of the dispute and whether it falls within the arbitration clause and then determining whether there might have been an intervening event making the arbitration clause ineffective, is perfectly valid today.

18 Still dealing with the examination of the dispute, or rather of the absence of any dispute, there is an interesting passage dealing with just this and with the procedural

consequences in Mustill and Boyd on the Law and Practice of Commercial Arbitration in England, Butterworths, 1989 at page 12:

> First, since most arbitration clauses express the right and obligation to arbitrate in terms of 'disputes' the claimant cannot ordinarily give a valid notice of arbitration unless his claim is disputed. Moreover, in the absence of a 'dispute' (which has been understood as meaning a genuine dispute) the Court will not order that the action should be stayed so that the matter can be referred to arbitration. The procedural consequences are important, for this principle opens the way for the plaintiff, even in a case governed by an arbitration clause, to employ the summary mechanisms of the Court where the defendant has no defence at all to the claim, or only a spurious defence. What happens is this. That claimant commences an action in the High Court, and states on affidavit his belief that there is no defence to the claim. The defendant must then respond, also on affidavit, showing reasons why he does have a defence. If the Court accepts the contention of the plaintiff, it will refuse to stay the proceedings and will instead give immediate judgment for the plaintiff.

In effect, neither may a party give notice of arbitration unless there is a disputed claim, nor will a court order a stay of an action in favour of arbitration, if there is no genuine dispute.

54 The Federal Court then concluded that as the relevant defendant (who had sought a stay because of an arbitration agreement) had remained silent in the face of a claim by the plaintiff, there was no evidence of any dispute to send to arbitration. There was also another reason in that case to deny the stay but that is not relevant for present purposes.

55 With respect, it seemed to me that the Federal Court in *Methanex* had conflated the question as to whether a dispute is the subject of an arbitration agreement with the question as to whether the court has jurisdiction to determine whether there is in fact a dispute. The reference to *Nanisivik* appears to be only in reference to the former and not the latter question. In *Nanisivik*, the Federal Court of Appeal was considering both the discretion as to a reference to arbitration and the discretion as to a stay. The passage cited in *Methanex* was in relation to the former but not the latter. Furthermore, the reference to the 1989 edition of Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) was unfortunate because, as I have elaborated, the pre-1996 English legislation is quite different from the third part of Art 8(1) of the Model Law and hence different also from Art 8(1) of the Commercial Arbitration Code.

56 However, it is true that neither *Nanisivik* nor *Automatic Systems* says that mere silence or a non-response is sufficient to constitute a dispute. Accordingly *Methanex* can be said to be authority for the proposition that mere silence by the defendant does not constitute a dispute on which to hang a stay order.

57 In the New Zealand case of *Baltimar Aps Ltd v Nalder & Biddle Ltd* [1994] 3 NZLR 129, the Court of Appeal was considering s 4 of the Arbitration (Foreign Agreements and Awards) Act 1982. The material part of s 4(2) for present purposes states:

> … and the Court shall, unless the arbitration agreement is null and void, inoperative, or incapable of being performed, make an order staying the proceedings.

This is in substance the same as s 9(4) of the English Arbitration Act 1996 and the third part of Art 8(1) Model Law and s 6(2) IAA.

58 Casey J who delivered the judgment of the Court of Appeal referred to the English pre-1996

position and the New Zealand 1982 Act. He said at 134 and 135:

> The language of s 4(1) of the 1982 Act is quite clear and follows that of art II.3 of the Convention, which the Act was passed to implement. In note 7 at p 465 Mustill and Boyd point out that the added words in the English Act:
>
> > … do not appear in the New York Convention. They owe their origin to the report of the Mackinnon Committee (Cmd 2817), which had noted complaints that s 1(1) of the Arbitration Clauses (Protocol) Act 1924, a precursor of s 1 of the 1975 Act, was being abused. The words were added by s 8 of the Arbitration (Foreign Awards) Act 1930.
>
> The clear inference from this note is that prior to 1930 the Courts had no power to investigate the reality of the dispute. In an earlier passage at p 123 the authors mount a strong criticism of this development in international arbitrations:
>
> > Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a bona fide if unsubstantial defence ought to be ruled upon by the arbitrator, not the Court. This is so especially where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law. Here the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement plainly extends to cases where the defence is unsound in fact or law. A dispute which, it can be seen in retrospect, the plaintiff was always going to win is none the less a dispute. The practice whereby the Court pre-empts the sole jurisdiction of the arbitrator can therefore be justified only if it is legitimate to treat a dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed. The correctness of this approach is not self-evident. Moreover, in all but the simplest of cases the Court will be required not merely to inspect the defence, but to enquire into it; a process which may, in matters of any complexity, take hours or even days. When carrying out the enquiry, the Court acts upon affidavits rather than oral evidence. The defendant might well object that this kind of trial in miniature by the Court is not something for which he bargained, when making an express contract to leave his rights to the sole adjudication of an arbitrator.
>
> We find this reasoning compelling, especially in this case where the parties have expressly excluded lawyers. The discussion about the Court pre-empting the arbitrator's jurisdiction goes a long way to dispel any suggestion that it retains an implied power to rule on whether there is a genuine dispute. Moreover, to hold there is such a power is to ignore the mandatory terms of s 4(1) of our Act, which are quite unambiguous. There may be a case for intervention if the party seeking the arbitration is acting in bad faith and thereby abusing the Court's process by applying for a stay, but there is no suggestion of that here. Resort to arbitration in respect of a mere refusal to pay an amount indisputably due could amount to such an abuse.

59 I find the last paragraph cited above rather interesting. It first suggests that the court there has no power under the 1982 Act to rule on whether there is a genuine dispute. It then suggests that the court may refuse to order a stay if the party seeking the stay is acting in bad faith and a mere refusal to pay an amount indisputably due can amount to bad faith.

60 I come now to the Singapore cases.

61 Counsel for each side referred to the same part of the judgment of Chan Seng Onn JC in *Coop International* ([10] *supra*) regarding a stay application. Chan JC said at [97] to [100]:

97 During the hearing, extensive submissions were placed before me concerning the applicability of the IAA to the international arbitration agreement contained in cl 12.2.

98 Since the respondents have appealed against the whole of my decision, I thought I should address these submissions for the purpose of completeness although the issues are no longer material to my decision after I have found as a matter of construction that cl 12.2 did not extend to the 4 September agreement.

99 If I am wrong in my construction, then I think the proceedings have to be stayed as the court has no discretion in the matter having regard to s 6(2) of the IAA and the terms of the arbitration agreement in cl 12.2. The fact that there is in my view no triable or arguable issue is irrelevant. For this, I would respectfully adopt the principle stated by Goh Joon Seng J in *The Dai Yun Shan* [1992] 2 SLR 508 that 'so long as the claim is not admitted, a dispute exists.' The learned judge had referred to *Hayter v Nelson Home Insurance Co* [1990] 2 Lloyd's Rep 265 and I find the reason in the following passages of Saville J's judgment most enlightening:

> In some cases the suggestion seems to be made that if it can be shown that a claim under a contract is indisputable, ie a claim that simply cannot be resisted on either the facts or the law, then there is no dispute or difference within the meaning of the arbitration clause in that contract. …
>
> To the extent that such observations are intended to define what is or is not a dispute or difference within the meaning of an arbitration clause of the kind under consideration, I am respectfully unable to agree with them – more importantly they seem to me to be in conflict with the decision of the Court of Appeal in *Ellerine Bothers (Pty) Ltd v Klinger* [1982] 1 WLR 1375. In my view, to treat the word 'disputes' or the word 'differences' in the context of an ordinary arbitration clause as bearing such a meaning leads not only to absurdity, but also involves giving those words a meaning which (though doubtless one the words are capable of bearing) in context is difficult to support.
>
> The proposition must be that if a claim is indisputable then it cannot form the subject of a 'dispute' or 'difference' within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration. To my mind such propositions have only to be stated to be rejected – as indeed they were rejected by Mr Justice Kerr (as he then was) in *The M Eregli* [1981] 2 Lloyd's Rep 169, in terms approved by Lord Justices Templeman and Fox in *Ellerine v Klinger* (sup). As Lord Justice Templeman put it (at p 1383):
>
> > There is a dispute until the defendant admits that the sum is due and payable.
>
> In my judgment in this context neither the word 'disputes' not (sic) the word 'differences' is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other

indisputably wrong does not, in my view, entail that there was therefore never any dispute between them.

In my view this ordinary meaning of the word 'dispute' or the word 'differences' should be given to those words in arbitration clauses.

62 Chan JC continued at [100] and [103]:

100 Even if I am wrong again and the stay is discretionary and not mandatory, I would have exercised my discretion to stay the action to give due weight to the international arbitration agreement which the parties had freely concluded.

…

103 More recently, the Singapore Court of Appeal had to deal with a question of discretionary stay under s 7 of the Arbitration Act (Cap 10) in *Kwan Im Tong Chinese Temple & Anor v Fong Choon Hung Construction Pte Ltd* [1998] 2 SLR 137. In the judgment delivered on 6 February 1998, the Court of Appeal held that the principles used in summary judgment proceedings should not be an exhaustive means of weighing the claims. Applications for stay under s 7 of the Arbitration Act relate to the larger issue of jurisdiction. The following passage at p 879 in the judgment of GP Selvam JC (as he then was) in *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1993] 1 SLR 876 was referred to with approval:

The common form arbitration agreement provides for disputes to be decided by arbitrators. In such a case the court should, save in obvious cases, adopt a holistic and commonsense approach to see if there is a dispute. The justification for this approach is that it is important to hold a party to his agreement and avoid double and split hearing of matters. … If the defendant, therefore, makes out a prima facie case of disputes the courts should not embark on an examination of the validity of the dispute as though it were an application for summary judgment.

63 I note that *The Dai Yun Shan* [1992] 2 SLR 508 was not a case on s 6(2) IAA but in respect of s 4 of the Arbitration (Foreign Awards) Act (Cap 10A, 1985 Rev Ed) which has since been repealed. Sections 4(2) and 4(3) of the latter stated:

(2) Where —

(*a*) any party to an arbitration agreement to which this section applies institutes any legal proceedings in any court in Singapore against any other party to the agreement; and

(*b*) the proceedings involve the determination of a dispute between the parties in respect of any matter which is required, in pursuance of the agreement, to be referred to, and which is capable of settlement by, arbitration,

any party to the agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.

(3) … the court to which an application has been made in accordance with subsection (2) shall make an order, upon such conditions or terms as it thinks fit, staying the proceedings or, as the case may be, so much of the proceedings as involves the determination of the dispute and

which refers the parties to arbitration in respect of the dispute in accordance with the arbitration agreement.

64 The wording in s 4(3) of Cap 10A is similar to s 6(2) IAA in so far as "shall" is used. However, it is important to bear in mind that the legislation considered in *Hayter v Nelson Home Insurance Co* [1990] 2 Lloyd's Rep 265 ("*Hayter*") was not the English Arbitration Act 1996 but the English Arbitration Act 1975. Section 1(1) of the English Arbitration Act 1975 had the words "or that there is not in fact any dispute" whereas the Singapore legislation considered in *The Dai Yun Shan* did not have such words. Neither does s 6(2) IAA which was considered in *Coop International*.

65 The reliance placed on *Hayter* might give the impression that Saville J did not have to consider whether there was in fact a dispute because, "There is a dispute until the defendant admits that the sum is due and payable". However, Saville J did consider whether there was in fact a dispute before him and he eventually ordered a stay on the facts before him. He said at 270 and 271:

> In a number of cases the parties (and the Courts) have assumed that where a claimant seeks summary judgment and the respondent seeks a stay under s.1 of the 1975 Act, the two applications are to be treated as the reverse sides of the same coin – see, for example, *S.L. Sethia Liners Ltd. v. State Trading Corporation of India Ltd.,* [1986] 1 Lloyd's Rep. 31 at p. 33. However, in *Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (U.K.) Ltd* [1989] 1 Lloyd's Rep. 473; the most recent authority drawn to my attention, Lord Justice Parker (with whom the other members of the Court of Appeal agreed) said this:
>
> > The purpose of O.14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived the plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the plaintiff is also entitled to judgment. But O.14 proceedings should not in my view be allowed to become a means for obtaining, in effect, an immediate trial of an action, which will be the case if the court lends itself to determining on O.14 applications points of law which may take hours or even days and the citation of many authorities before the Court is in a position to arrive at a final decision.
> >
> > In cases where there is an arbitration clause it is in my judgment the more necessary that full-scale argument should not be permitted. The parties have agreed on their chosen tribunal and a defendant is entitled prima facie to have the dispute decided by that tribunal in the first instance, to be free from the intervention of the Courts until it has been decided and thereafter, if it is in his favour, to hold it unless the plaintiff obtains leave to appeal and successfully appeals.
> >
> > In the case of a commercial arbitration the above remarks apply with even greater force, perhaps especially when the dispute turns on construction, or the implication of terms or trade practice. Arbitrators and umpires in the same business or trade as the parties are certainly as well or better able than the court to judge what the parties must be taken to have meant or intended by the words or phrases that they have used, to judge what the parties at once have replied if an innocent bystander had asked what was to happen in a certain event not dealt with by the contract and to know what are the practices of the trade. Not only is the defendant entitled to have the dispute decided in the first instance by such persons but the Court should not in my view, save in the clearest of cases, decide the question without the benefit of their views.

> In very clear cases a plaintiff is no doubt entitled to his summary judgment notwithstanding the clause, but, when a plaintiff seeks immediate judgment in other than a clear case and resists the submission of the dispute to the tribunal on which he has agreed, one is bound to wonder whether the course which he has taken is prompted by the knowledge that the chosen tribunal with its more intimate knowledge of the trade may reach a conclusion adverse to him in respect of which he might even fail to obtain leave to appeal or if he did obtain leave fail to demonstrate any error.

That case was concerned with an application for a stay under s.4 of the Arbitration Act, 1950, where of course the Court has a discretion, but to my mind the approach of the Court of Appeal must be at least equally if not more applicable to s. 1 of the 1975 Act, since in the latter case there is no discretion given to the Court at all. It seems to me to be clear from the passage quoted from Lord Justice Parker's judgment, that when considering an application for summary judgment, a factor to be taken into account is the existence of an arbitration agreement between the parties; so that only in the simplest and clearest cases, i.e. where it is readily and immediately demonstrable that the respondent has no good grounds at all for disputing the claim, should that party be deprived of his contractual right to arbitrate. In the context of the 1975 Act, this means that only in such cases can the Court be satisfied that there is not in fact any dispute between the parties with regard to the matter agreed to be referred.

66 Accordingly, *Hayter* is not authority for the proposition that the court is not to consider whether there is in fact a dispute. However, as I have mentioned, *Hayter* was dealing with legislation which was different from s 6(2) IAA.

67 It is also important to remember that the cases of *Kwan Im Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* [1998] 2 SLR 137 ("*Kwan Im Tong Chinese Temple*") and of *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1993] 1 SLR 876 ("*Uni-Navigation*"), which were referred to in *Coop International*, were under s 7(2) of the Arbitration Act (Cap 10, 1985 Rev Ed). That provision is currently s 6(2) of the Arbitration Act (Cap 10, 2002 Rev Ed) which I have referred to as "the Singapore domestic Arbitration Act". Those cases are also not authorities on the role of the court under s 6(2) IAA.

68 In *PT Budi Semesta Satria v Concordia Agritrading Pte Ltd* [1998] SGHC 127, the plaintiff seller had sold Java tapioca chips to the defendant buyer. Under an agreement subsequent to the contracts of sale, the seller confirmed its responsibility for any claim at discharge. The seller also instructed its bankers to release the shipping documents against payment of 92.5% of the purchase price. The balance of 7.5% was to be paid after discharge of the cargo at the port of destination provided the buyer did not "lodge a claim to SELLERS as per contract and GAFTA 125". This was a reference to Rule 125 of The Grain & Feed Trade Association. The cargo was discharged at Lorient, France, on 31 December 1996, and at Hamburg, Germany, on 9 January 1997. The seller sent its invoice dated 22 January 1997 for the balance 7.5% of the purchase price. No payment was received and reminders were sent. Eventually the buyer replied on 14 March 1997 to say that its sub-buyers had rejected the cargo. The buyer rejected the seller's claim for payment and sought arbitration against the seller. The seller rejected arbitration. It was also of the view that there was no defence to its claim. The seller commenced legal proceedings in the High Court. The buyer entered an appearance and applied for a stay pursuant to s 6 IAA.

69 An assistant registrar granted a stay order. On appeal, Lai Siu Chiu J affirmed the order below but on terms that the buyer was to provide full security for the seller's claim until and unless the buyer had gone to arbitration as claimants against the seller. Lai J imposed such a term because she considered the buyer to be the substantive plaintiffs. As regards the application of s 6 IAA, Lai J said

at [13] of her judgment:

> Under s 6 of the [IAA], a stay is mandatory unless the party resisting the stay satisfies the Court that the arbitration agreement is null and void, inoperative or incapable of being performed.

70 Mr Jeya Putra, counsel for Louis Dreyfus, latched onto this statement to support his submission that the court is not to consider whether there is in fact a dispute before ordering a stay. However, Lai J also said at [14] of her judgment:

> In my opinion, there was no defence to the plaintiffs' claim save for the defendants' cross claims as to the losses they suffered by reason of the cargo condition … This and the plain language of the term that the balance 7.5% was to be paid unless the defendants lodged a claim to the plaintiffs meant that logically, the defendants, rather than the plaintiffs, should be the claimants in the arbitration.

71 The reference to the absence of a defence appears to be contrary to the argument that the court should not consider whether there is in fact a dispute. However, I note that that reference was in the context of the judge's view that the buyer was the substantive plaintiff. In any event, it seemed from Lai J's judgment that the question as regards the court's jurisdiction under s 6(2) IAA was not argued before the learned judge. Accordingly, that case is not really an authority on the court's jurisdiction under s 6(2) IAA.

72 In *Mancon (BVI) Investment Holding Co Ltd v Heng Holdings SEA (Pte) Ltd* [2000] 3 SLR 220 ("*Mancon*"), the defendant applied for a stay of court proceedings under s 6 IAA while the plaintiff contended, *inter alia*, that the sums it claimed were undeniably due and owing and as such there was no dispute or difference to be referred to arbitration. The headnote states:

> (2) This is not an application for summary judgment. A dispute or difference having arisen, the mode and the place of resolution that the parties had agreed on ought to be adhered to. The defendants' apparent lack of answer to cl 4 of the SA did not mean the proceedings should be excised to proceed independently in court. As the two agreements had become one, that issue fell under the larger claim. The court was obliged under s 6 of the Arbitration Act (Cap 10) to stay the action unless satisfied that the agreement was null and void, inoperative or incapable of being performed (see ¶32–34).

73 Unfortunately, this headnote is misleading because *Mancon* was a case under s 6 IAA and not the domestic arbitration legislation. Indeed, the relevant provision of the domestic arbitration legislation would have been s 7, and not s 6, at that time. While [31] and [32] of the judgment of Tay Yong Kwang JC refer to the domestic arbitration legislation, [34] refers to both s 6 IAA and s 7 of the domestic arbitration legislation. Those paragraphs state:

> 31 Was there a dispute or difference for arbitration? In *Fasi v Specialty Laboratories Asia Pte Ltd (No 1)* [1999] 4 SLR 488, at p 495, I made the following observations on the Court of Appeal's decision in *Kwan Im Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* [1998] 2 SLR 137 which dealt with s 7 of the Arbitration Act:
>
> > The following principles can be gleaned from the Court of Appeal's judgment:
> >
> > (1) the basis of an application to stay proceedings is the contract wherein the parties have chosen arbitration over litigation in court;

(2) the parties' agreement to have their disputes decided by their chosen tribunal should be honoured by the court;

(3) the party resisting the stay of proceedings bears the burden of showing that the other party has no defence to the claim;

(4) the court should adopt a holistic and commonsense approach to see if there is a dispute save in 'obvious' or 'very clear cases';

(5) applying summary judgment principles should not be held to be an exhaustive means of weighing the claims; if the party applying for a stay makes out a prima facie case of a dispute, the court should not embark on an examination of the validity of the dispute as though it were an application for summary judgment.

32 Adopting and applying the above principles, it seemed clear to me that a dispute or difference had arisen between the parties which entitled any one of them to invoke the arbitration clause. It could well be the case that upon a detailed examination of all the evidence, a court might conclude that there is no triable issue within the meaning of O 14 of the Rules of Court but that is besides the point. A dispute or difference having arisen, the mode and the place of resolution that the parties had agreed on ought to be adhered to. The Singapore court would otherwise be usurping the position of the arbitration tribunal in Malaysia.

33 …

34 In this case, it was not in dispute that the arbitration agreement fell within the ambit of s 5 of the International Arbitration Act. That being the case, s 6 of the Act obliges the court to make an order staying the present action unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. Such a stay is mandatory under s 6(2) of the Act (see *Coop International Pte Ltd v Ebel SA* [1998] 3 SLR 670, a decision of Chan Seng Onn JC, upheld by the Court of Appeal). I have already dealt with the plaintiffs' contention that cl 16 JVA was inoperative. The plaintiffs have affirmed the existence of the arbitration clause and have not invoked any of the other two grounds mentioned in s 6(2). The myriad of factors that a court dealing with s 7 Arbitration Act might consider in deciding whether to order a stay or not thus become quite irrelevant. Accordingly, this action must be stayed.

74 The judgments in *Uni-Navigation*, *Kwan Im Tong Chinese Temple*, *Coop International* and *Mancon* demonstrate that under the then s 7(2) and the current s 6(2) of the domestic arbitration legislation, the court may determine if there is in fact a dispute before deciding to order a stay, although the court should not examine the validity of the dispute as though the stay application is an application for summary judgment. Accordingly, as I have said, the position under the Singapore domestic Arbitration Act is similar to the pre-1996 position in England.

75 As regards s 6(2) IAA, I am of the view that once there is a dispute, a stay must be ordered unless the arbitration agreement is null and void, inoperative or incapable of being performed. The court is not to consider if there is in fact a dispute or whether there is a genuine dispute. The more difficult question is when it can be said that a dispute exists. For example, is there a dispute when the defendant simply refuses to pay or to admit the claim or remains silent? Although there have been statements that suggest that such conduct is sufficient to constitute a dispute I do not share that view. A defendant may refuse to pay or to admit a debt or remain silent because he has no money to pay or simply because he is intransigent. To my mind that is not a dispute. It is different if the defendant at least makes a positive assertion that he is disputing the claim. If he is prepared to and

does assert that, then there is a dispute even though it can be easily demonstrated that he is wrong. However, an admission by a defendant will, generally speaking, be contrary to a dispute but not every admission will necessarily avoid a stay order.

76 The above approach is not inconsistent with the concept of minimal court involvement which is the regime under the IAA and the Model Law. On 31 October 1994, when the International Arbitration Bill (No 14 of 1994) was read for the second time, Assoc Prof Ho Peng Kee, who was then the Parliamentary Secretary to the Minister for Law, said:

> [T]he Model Law accords full liberty to parties in non-domestic arbitrations to choose laws and arbitrators to resolve their disputes with minimal intervention from domestic courts. Domestic arbitrations will continue to be governed by the existing Arbitration Act (Cap. 10) where a greater degree of judicial supervision is imposed.

77 It also seems to me that s 6(2) IAA could have been drafted in terms adopting the previous s 7(2) of the domestic arbitration legislation (before s 6(2) of the Singapore domestic Arbitration Act was enacted) if the intention was to allow the court to consider whether there is in fact a dispute. In my view, the difference in the wording of s 6(2) IAA and the previous s 7(2) of the domestic arbitration legislation is meant to reflect the difference as enunciated by Swinton Thomas LJ in *Halki*, although the legislative history behind the enactment of s 9(4) of the English Arbitration Act 1996 is not exactly the same as that behind the enactment of s 6(2) IAA.

78 There is one other point I should mention. Mr Jeya Putra had stressed that Mr Lai had conceded before the assistant registrar that a stay must be ordered *vis-à-vis* DHE's claim and that by parity of reasoning, a stay should also be ordered as against DJOM's claim. I noted that the minutes recorded by the assistant registrar state that Mr Lai had conceded that there was a subsisting arbitration agreement between DHE and Louis Dreyfus. In my view, that was not a concession that there should be a stay order *vis-à-vis* DHE's claim. Neither was it a concession that the set-off issue was within the scope of the arbitration agreement.

Appeal allowed.