

JUDGMENT Express

[2026] 5 MLRA

Universiti Malaya
v. ESA Jurutera Perunding Sdn Bhd

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UNIVERSITI MALAYA

v.

ESA JURUTERA PERUNDING SDN BHD

Federal Court, Putrajaya
Hasnah Mohammed Hashim CJM, Zabariah Mohd Yusof, Ahmad Terrirudin
Mohd Salleh FCJJ
[Civil Appeal No: 01(i)-20-07-2024(W)]
14 May 2026

Arbitration: Stay of proceedings — Application for stay of court proceedings pending arbitration — Plaintiff commenced writ action against defendant despite arbitration agreement — Defendant requested extensions of time to file defence and served notice to produce documents referred to in pleadings prior to filing stay application — Whether requests for extensions of time to file defence evinced unequivocal intention to proceed with suit and amounted to taking a step in proceedings under s 10(1) Arbitration Act 2005 — Whether service of notice to produce documents constituted a necessary peripheral investigative action or a step in proceedings — Whether general reservation of rights in correspondence provided sufficient notice of defendant's intention to arbitrate — Whether earlier apex court observations classifying a request for extension of time as a step in proceedings were binding or mere obiter dicta — Whether determination of unequivocal intention to submit to jurisdiction required holistic factual assessment rather than rigid application of procedural rules

Pursuant to a letter of appointment and acceptance in February 2008, the plaintiff and the defendant executed a Memorandum of Agreement on 3 June 2008 to engage the defendant as a civil and structural engineering consultant. The agreement incorporated Conditions of Engagement, which contained an arbitration clause at cl 4. On 6 October 2022, following alleged delays in the issuance of a Certificate of Completion and Compliance for the project, the plaintiff filed a Writ and Statement of Claim at the High Court. The plaintiff sought specific performance of the defendant's statutory duties to submit forms and endorse drawings, an indemnity against statutory penalties under the Street, Drainage and Building Act 1974 and the Fire Services Act 1988, damages to be assessed, interest, and costs. The defendant entered an appearance on 17 October 2022. During case management on 20 October 2022, the High Court directed the defendant to file its defence by 3 November 2022. On 28 October 2022 and subsequently on 14 November 2022, the defendant requested, and the plaintiff agreed to grant, two extensions of time to file the defence, ultimately extending the deadline to 1 December 2022. On 24 November 2022, the defendant served on the plaintiff a Notice to Produce Documents Referred to in Pleadings pursuant to O 24 r 10 of the Rules of Court 2012, accompanied by a covering letter expressly stating that all of the defendant's rights were reserved. On 30 November 2022, the plaintiff served a Notice Where Documents May



Be Inspected and provided the requested documents. On 1 December 2022, the defendant issued a Notice of Arbitration on the plaintiff pursuant to cl 4 of the Conditions of Engagement. On 2 December 2022, the defendant filed a Notice of Application for a stay of the High Court proceedings pending arbitration under s 10(1) of the Arbitration Act 2005. On 21 February 2023, the High Court dismissed the stay application and directed the defendant to file its defence. On 7 March 2023, the defendant filed its Statement of Defence and Counterclaim under the compulsion of the court's direction, expressly reserving its right to arbitrate in its pleadings, while concurrently appealing the High Court's dismissal of the stay. On 1 March 2024, the Court of Appeal allowed the defendant's appeal and set aside the High Court's decision. On 3 July 2024, the Federal Court granted the plaintiff leave to appeal. The issue before the Federal Court was whether a request for an extension of time to file a defence, and/or the service of a Notice to Produce Documents referred to in Pleadings pursuant to O 24 r 10 of the Rules of Court 2012 amounted to a step in the court proceedings under s 10(1) of the Arbitration Act 2005, thereby precluding the applicant from obtaining a stay of proceedings.

Held (dismissing the plaintiff's appeal):

(1) The defendant's requests for extensions of time to file a defence, as well as a mere indication in correspondence of an intention to do so, did not evince an unequivocal intention to proceed with the suit and, consequently, did not amount to taking steps in the proceedings within the meaning of s 10(1) of the Arbitration Act 2005. These requests were reasonable, necessary, and made in good faith, particularly as the Defendant required time to obtain relevant documents dating back to 2008 that were not in its possession. (para 129)

(2) The issuance and service of a Notice to Produce Documents referred to in the Pleadings pursuant to O 24 r 10 of the Rules of Court 2012 was a necessary but peripheral action that did not touch on the merits of the substantive dispute. Because it was an investigative measure to inspect pleaded documents rather than a pleading itself, serving the Notice did not indicate an intention to waive arbitration rights and did not constitute a step in the proceedings. (para 131)

(3) Applying a holistic approach, the general reservation of rights in the defendant's covering letters, Notice of Arbitration, and Statement of Defence was sufficiently clear and broad to provide ample notice of the defendant's position and its reservation of the right to arbitrate. Viewed against the overall chronology of events, the defendant acted with reasonable expedition and did not acquiesce to the court's jurisdiction through any undue lapse of time. (paras 135-136)

(4) In clarifying precedent, the Court ruled that previous remarks in *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor*, which suggested a request for an extension of time to file a defence automatically constituted a step in the proceedings, were *obiter dicta* and not binding. The Court held that whether a party demonstrated a clear and unequivocal intention to submit



to the court's jurisdiction remained a question of fact to be determined holistically, rather than by a rigid or mechanical application of procedural rules. (paras 77, 117, 118 & 119)

Case(s) referred to:

- Airbus Helicopters Malaysia Sdn Bhd v. Aerial Power Lines Sdn Bhd* [2024] 3 MLRA 152 (refd)
- Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd* [2009] 4 MLRA 488 (refd)
- Amoe Pte Ltd v. Otto Marine Ltd* [2014] 1 SLR 724 (refd)
- Apex Marble Sdn Bhd & Anor v. Leong Tat Yan* [2021] 4 MLRA 63 (refd)
- Arab African Energy v. Olie Produkten* [1983] 2 Lloyd's Rep 419 (refd)
- Ayscough v. Sheed Thomson* [1923] 14 Ll. L. Rep 209 (refd)
- Brighton Marine Palace And Pier Ltd v. Woodhouse* [1893] 2 Ch 486 (refd)
- Bristol Corporation v. John Aird & Co* [1913] AC 241 (refd)
- C&B Global Sdn Bhd v. Getthiss (M) Sdn Bhd* [2020] 2 MLRH 341 (refd)
- Carona Holdings Pte Ltd and Others v. Go Go Delicacy Pte Ltd* [2008] 4 SLR 460 (folld)
- CGU Workers Compensation (NSW) Ltd v. Garcia* (2007) 69 NSWLR 680 (refd)
- Chappell v. North* [1891] 2 QB 252 (refd)
- CLLS Power System Sdn Bhd v. Sara-Timur Sdn Bhd* [2015] MLRHU 25 (not folld)
- Comos Industry Solution GmbH v. Jacob And Toralf Consulting Letrikon Sdn Bhd & Ors* [2012] 4 MLRA 178 (refd)
- Fairpark Estates Ltd And Others v. Heals Property Developments Ltd* [2023] 1 All ER (Comm) 250 (refd)
- FAMG Idaman Resources v. Jasmadu Sdn Bhd* [2018] MLRHU 869 (refd)
- Farah Constructions Pty Ltd v. Say-Dee Pty Ltd* (2007) 236 ALR 209 (refd)
- Firdaus Khan Parit Khan & Anor v. CIMB Bank Berhad* [2024] 5 MLRA 108 (refd)
- Ford's Hotel Company Ltd v. Bartlett* [1896] AC 1 (refd)
- IFCI Limited v. Archipelago Insurance Limited* [2022] 2 MLRA 462 (not folld)
- Kem Krest LLC v. R P Trust Inc & Ors* [2021] MLRHU 1836 (not folld)
- Kursell v. Timber Operators And Contractors Limited* [1923] 2 KB 202 (refd)
- Life Plaza Sdn Bhd v. Pasukhas Construction Sdn Bhd* [2012] 5 MLRH 492 (folld)
- Malaysian European Production System Sdn Bhd v. Zurich Insurance (Malaysia) Bhd* [2003] 2 MLRH 68 (refd)
- Metropolitan Tunnel And Public Works, Limited v. London Electric Railway Company* [1926] Ch 371 (refd)
- MISC Berhad v. Cockett Marine Oil (Asia) Pte Ltd (Encls 16 & 22)* [2021] MLRHU 364 (refd)
- Mun Seng Fook v. AIG Malaysia Insurance Berhad* [2018] 3 MLRH 203 (refd)
- Pape v. Federal Commissioner Of Taxation* (2009) 238 CLR 1 (refd)



- Perbadanan Kemajuan Negeri Perak v. ASEAN Security Paper Mill Sdn Bhd [1991] 1 MLRA 192 (refd)*
- Pioneer Shipping Ltd v. BTP Tioxide Ltd (The Nema) [1982] AC 724 (refd)*
- Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Berhad [2016] 5 MLRA 529 (folld)*
- Richard West And Partners (Inverness) Ltd v. Dick [1969] 2 Ch 424 (refd)*
- Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor [2002] 1 MLRA 156 (folld)*
- Seaford Court Estates Ltd v. Asher [1949] 2 KB 481 (CA) (refd)*
- Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd [1994] 1 MLRA 179 (folld)*
- Sim Hiang Kiaw & Ors v. Lee Hoi Kim Construction Co [1985] 2 MLRH 546 (refd)*
- Sime AXA Assurance Bhd v. Interscope Versicherung Sdn Bhd (Federal Court Civil Appeal No 02-08-2000(W)) (refd)*
- Sumber Khazanah Sdn Bhd (In Liquidation) v. Apex Communications Sdn Bhd [2023] MLRHU 1659 (refd)*
- Tetuan Wan Shahrizal, Hari & Co v. PP [2023] 4 MLRA 11 (refd)*
- The Londonderry Port And Harbour Commissioners v. W S Atkins Consultants Ltd And Charles Brand Ltd [2011] NIQB 74 (refd)*
- Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd & Another Appeal [2020] 2 MLRA 264 (folld)*
- Usahabina v. Anuar Yahya [1998] 1 MLRH 71 (not folld)*
- W B Anderson & Sons Ltd And Others v. Rhodes (Liverpool) Ltd And Others [1967] 2 All ER 850 (refd)*
- Yeo Eng Lam v. Infinity Vantage Sdn Bhd (02(i)-20-03/2019(W)) (folld)*
- Winsin Enterprise Sdn Bhd v. Oxford Talent (M) Sdn Bhd [2009] 3 MLRH 699 (not folld)*
- Zotti v. Australian Associated Motor Insurers Ltd (2009) 54 MVR 111 (refd)*

Legislation referred to:

- Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss 50(1), 51(1)
- Arbitration Act 1889 [UK], s 4
- Arbitration Act 1952, s 6
- Arbitration Act 1979 [UK], s 1
- Arbitration Act 2001 [Sing], s 6(1)
- Arbitration Act 2005, ss 8, 10(1)
- Fire Services Act 1988, s 33
- Rules of Court 2012, O 3 r 5(1), (3), O 18 r 2(1), O 24 r 10, O 24 r 11
- Rules of the High Court 1980, O 3 r 5(3)
- Street, Drainage and Building Act 1974, s 70(27)(f)



Other(s) referred to:

Halsbury's Laws of England, 1991, 4th edn, Vol 2, para 627, pp 347-348
Moulton JB, *Law and Manners*, The Atlantic Monthly (1924), 134, pp 1-5

Counsel:

For the appellant: Karen Lee Foong Voon (See Yen Lin with her); M/s Wong Kian Kheong

For the respondent: Anantha Krishnan (Ragumaren Gopal, Darryl Ragumaren & Farhanah Jahn with him); M/s G Ragumaren & Co

[For the Court of Appeal judgment, please refer to *ESA Jurutera Perunding Sdn Bhd v. Universiti Malaya* [2025] 3 MLRA 431]

JUDGMENT**Ahmad Terrirudin Mohd Salleh FCJ:****A. Introduction**

[1] Appeals concerning judicial determination of application for a stay of proceedings and the construction of “before taking any other steps in the proceedings” under subsection 10(1) of the Arbitration Act 2005 [Act 646] generally follow a familiar pattern. Where a Plaintiff who has agreed to arbitrate nevertheless commences proceedings in Court, the Defendant will ordinarily be entitled to seek a stay of the proceedings in favour of arbitration, provided the application is made before delivering any pleadings or taking any other steps in the proceedings. Our Courts have treated the legislative amendment to Act 646 as reflecting Parliament’s intention to that effect.

[2] In other words, the right to a stay and to arbitrate will be lost, and the Defendant may be deemed to have abandoned its right for arbitration if he, prior to making an application for a stay, takes any other steps in the proceedings in response to the Plaintiff’s substantive claim. However, as demonstrated in our jurisdiction, certain conduct by a Defendant does not amount to taking steps in the proceedings. The Court’s task then turns to whether the Defendant’s conduct in question constitutes, figuratively speaking, a misstep or step too far. A relevant consideration is whether the Defendant has reserved its position as to the Court’s jurisdiction in its correspondence with the Plaintiff or the Court, or in any application before the Court. Further, it is necessary to consider whether such an act engages the merits of the dispute, and whether it constitutes an interlocutory application by the Defendant from which a formal order is expected to be issued by the Court.

[3] In the present appeal, it is not readily apparent on the face of s 10(1) of Act 646 whether (i) a request for an extension of time to file a Defence and (ii) the service of a Notice to Produce Documents Referred to in the Pleadings pursuant to O 24 r 10 of the Rules of Court 2012 [P.U.(A) 205/2012], amount



to steps in the proceedings. The attribution of meaning to undefined phrases in a statute presents no easy task. Denning LJ in *Seaford Court Estates Ltd v. Asher* [1949] 2 KB 481 (CA) rightly pointed out at p 498 as follows:

“Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for the main terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. **A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give “force and life” to the intention of the legislature.**”

[Emphasis Added]

Admittedly, existing local precedents on relatively similar issues may hint at an answer, such that some may have regarded the matter as settled. The factual context of the present appeal, however, suggests otherwise. For ease of reference, we shall refer to the parties as they were in the High Court.

[4] The wisdom embodied in this Court’s previous rulings provides the scaffolding for our approach to the present appeal. This Court had, under limb (c) of the oft-cited summation in *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor* [2002] 1 MLRA 156, left open the possibility that such actions may not constitute steps in the proceedings, depending on their nature and whether they evince an unequivocal intention to proceed with the writ action and to abandon the right to have the dispute disposed of by arbitration.

[5] Another ruling worth noting is *Yeo Eng Lam lwn. Infinity Vantage Sdn Bhd* (02(i)-20-03/2019(W)), where this Court considered whether an application to disqualify the opposing solicitors constituted a step in the proceedings, thereby precluding the Defendant from applying for a stay under s 10(1) of Act 646. This Court, in that appeal, delivered its broad grounds of judgment on 24 February 2021, from which the *ratio decidendi* may be clearly discerned and to which we shall turn in the ensuing part of this judgment. It represents, thus far, a recent ruling relevant to the matter before us. Seasons passed, and youth yielded to reflection. As learned counsel for the Defendant has made it plain to us, the case remains unreported and no full grounds of judgment have been issued. Once the hearing of the present matter concluded, we consulted the



Registry and allowed further time to confirm the position. Consistency is, after all, the lifeblood of justice. Upon verification of the records and archives, we are satisfied that this is indeed the case. In this regard, we are in a quite similar position to that of the panel in *Sanwell*, where Mohtar Abdullah FCJ remarked at pp 156 and 159 as follows:

“In the present appeal, the question posed to this court is ‘whether the function to be served by an entry of appearance in one statute, ie the Rules of the High Court 1980 (‘the RHC’) is the same as the function to be served by the words ‘steps in the proceedings’ in s 6 of the Arbitration Act 1952 (‘the Act’).”

In *Sime Axa Assurance Bhd v. Interscope Versicherung Sdn Bhd* Federal Court Civil Appeal No: 02082000(W) (*‘Sime Axa Assurance’*), a similar question was posed before a different panel of this court, *viz*, ‘whether an entry of an unconditional appearance constitutes a step in the proceeding within the meaning of s 6 of the Act. **That question was answered in the negative. Unfortunately, there was no written judgment delivered.**

...

The Court of Appeal’s decision in *Interscope* has been overruled by the Federal Court on 18 September 1999, in *Sime Axa Assurance*. The Federal Court ruled that the entry of an unconditional appearance did not constitute a step in the proceedings by answering the relevant question in the negative. No reference to the decision of the Federal Court in *Sime Axa Assurance* was made by Shaik Daud JCA who delivered the Court of Appeal’s judgment in *Trans Resources* on 13 November 2000, slightly over a year after *Sime Axa Assurance* was decided. So the latest decision on this point in the Federal Court is *Sime Axa Assurance*. **As mentioned earlier, no written judgment was delivered.** Thus, we do not have the benefit of knowing the reasons for rejecting the decision of the Court of Appeal which adopted and affirmed the reasonings of the learned JC in *Usahabina*.”

[Emphasis Added]

[6] To complicate the issue further, there exists a body of authorities indicating that a request for an extension of time to file a Defence constitutes a step in the proceedings (see, for instance, *IFCI Limited v. Archipelago Insurance Limited* [2022] 2 MLRA 462; *Winsin Enterprise Sdn Bhd v. Oxford Talent (M) Sdn Bhd* [2009] 3 MLRH 699; *Kem Krest LLC v. R P Trust Inc & Ors* [2021] MLRHU 1836; *Mun Seng Fook v. AIG Malaysia Insurance Berhad* [2018] 3 MLRH 203) and others to the contrary (see, for instance, *Airbus Helicopters Malaysia Sdn Bhd v. Aerial Power Lines Sdn Bhd* [2024] 3 MLRA 152; *Sumber Khazanah Sdn Bhd (In Liquidation) v. Apex Communications Sdn Bhd* [2023] MLRHU 1659).

[7] Additionally, authorities are divided on whether service of Notice to Produce Documents Referred to in Pleadings is a step in the proceedings (see, for instance, *CLLS Power System Sdn Bhd v. Sara-Timur Sdn Bhd* [2015] MLRHU 25 and *Life Plaza Sdn Bhd v. Pasukhas Construction Sdn Bhd* [2012] 5 MLRH 492).



In light of the divergence in the authorities, it falls to this Court to address them, and the determination of this appeal assumes particular importance.

[8] The leave questions were framed and argued, in material respect, mirroring the above context. We heard the present appeal on 14 May 2025. After hearing both learned counsel and giving the matter due consideration, we were constrained to dismiss the appeal and delivered our broad grounds of judgment. On that day, learned counsel for the Defendant requested that full grounds of judgment be issued in the interest of providing guidance to the industry, having regard to the importance of the leave questions. What follows is the full grounds of judgment of our unanimous decision, reflecting our consensus on the date of the hearing from our deliberations and notes, explaining why we are entirely in agreement with the Defendant and highlighting the gaps in the Plaintiff's overall appeal and submissions.

B. Background Of Facts

[9] The Plaintiff is a university incorporated under the University of Malaya Act 1961 [Act 682], whereas the Defendant is a company incorporated in Malaysia and registered under the Registration of Engineers Act 1967 [Act 138].

[10] Pursuant to a letter of appointment dated 14 February 2008, the Plaintiff appointed the Defendant as the civil and structural engineering consultant to construct and complete the project known as "Cadangan Pembinaan Bangunan Tambahan Dewan Peperiksaan/Dewan Kuliah, Universiti Malaya". The Defendant, having acknowledged receipt of the said letter and agreed to accept the appointment, executed the letter of acceptance on 25 February 2008. The parties' contractual arrangement, thereafter, culminated in the execution of a Memorandum of Agreement ("MoA") dated 3 June 2008.

[11] Clause 2 of the MoA provides that the Agreement between the parties comprises the said MoA, the Conditions of Engagement of Consulting Engineer for Professional Services ("CoE"), and the Schedule to the Conditions of Engagement ("Schedule"):

"2. This Memorandum of Agreement, the Conditions of Engagement and the schedule to the conditions of engagement of (hereinafter called "the Schedule") shall together constitute the Agreement between the CLIENT and the Consulting Engineer."

[12] Further, cl 4 of the CoE provides for an arbitration clause and the *lex loci arbitri*:

"4. SETTLEMENT OF DISPUTES

- (1) If at any time any question, dispute, or difference of opinion shall arise between the CLIENT and the Consulting Engineer upon or in relation to or in connection with this Agreement or any part thereof either party may forthwith give to the other notice in writing of the



existence of such question, dispute or difference of opinion and the same shall be referred to the arbitration of a person to be mutually agreed upon or failing agreement within (2) two months from the date of the notice then to such person appointed by the President of the Board of Engineers, Malaysia and such reference shall be deemed to be a submission under the Arbitration Act 1952 and any statutory modification or re-enactment thereof for the time being and the award of the Arbitrator shall be final and binding upon the parties. Pending the award of the arbitration, the Consulting Engineer, upon being directed by the CLIENT at any time, shall continue to perform the remaining part of the services in accordance with the programme as set out in the work schedules and no payment of the liability for which is not in issue or contingent upon the results of the proceedings shall be withheld on account of such proceedings.

- (2) The arbitration shall be held at the Regional Centre for Arbitration at Kuala Lumpur using the facilities and assistance available at the Centre.”

[13] The Certificate of Practical Completion for the project was eventually issued on 22 June 2011. However, following the alleged failure, refusal and/or neglect on the part of the Defendant to fulfil its obligations under the Agreement and its statutory duties which, according to the Plaintiff, resulted in the delay in issuance of the Certificate of Completion and Compliance (“CCC”), the Plaintiff had filed a Writ and Statement of Claim against the Defendant in the Kuala Lumpur High Court on 6 October 2022.

[14] Interestingly, the Statement of Claim made several specific references to the terms of the Agreement:

- (a) paragraph 1 of the MoA:

“The CLIENT hereby appoints the Consulting Engineer to provide the professional engineering services for the Works subject to and in accordance with the Conditions of Engagement hereinafter set out and the Consulting Engineer hereby accepts the appointment for the purpose of providing the professional services for the same subject to and in accordance with the Conditions of Engagement”.

- (b) paragraph 5(1) of the CoE:

“The Consulting Engineer shall exercise all reasonable skill, care and diligence in the discharge of his professional services ...”

- (c) paragraph 1(1), Part A of the Schedule:

“The professional services to be rendered by the consulting engineer in this paragraph comprise the provision of all technical advice and skills which are normally required for the works for which the consulting engineer has been engaged”.



(d) paragraph 1(1)(a)(v), Part A of the Schedule:

“... consulting any local or other approving authorities on matters of principle in connection with the works”.

(e) paragraph 1(1)(a)(vi), Part A of the Schedule:

“consulting any architect appointed by the client in connection with the architectural treatment of the works”

(f) paragraph 1(1)(a)(vii), Part A of the Schedule:

“preparing such reports and documents as are reasonably necessary to enable the client to consider the consulting engineer’s proposals, including alternative proposals, for the construction of the works in the light of the investigations carried out by him at this stage, and to enable the client to apply for approval in principle from the appropriate authorities for the execution of the works in accordance with the proposals”

(g) paragraph 1(1)(d)(vi), Part A of the Schedule:

“examining and approving the contractor’s proposals and his working drawings relating to the works”

(h) paragraph 1(1)(d)(vii), Part A of the Schedule:

“making such visits to the site as the consulting engineer considers necessary to satisfy himself as to the performance of any site staff appointed pursuant to paragraph 3 of this Part and to satisfy himself that the works are executed generally according to contract or otherwise in accordance with good engineering practice”

(i) paragraph 1(1)(d)(ix), Part A of the Schedule:

“issuing all certificates as are required in the contract”

(j) paragraph 1(1)(d)(x), Part A of the Schedule:

“performing any duties which the consulting engineer may be required to carry out under any document which he has prepared for the execution of the work”

(k) paragraph 1(1)(d)(xi), Part A of the Schedule:

“delivering to the client on the completion of the works such records and manufacturer’s manuals as are reasonably necessary to enable the client to operate and maintain the works”

Additionally, at the end of para 8 of the Statement of Claim, the Plaintiff states that it will refer to the Agreement at the hearing of any interlocutory application and or at the trial of this action for its full terms and effect.

[15] Under the Statement of Claim, the Plaintiff sought the following relief:



- (a) an order for specific performance of the Agreement by the Defendant;
- (b) an order that the Defendant shall take all necessary steps as provided under the Water Services Industry Act 2006 [Act 655] read together with the Water Services Industry (Planning, Design and Construction of Sewerage Systems and Septic Tanks) Rules 2013 [P.U.(A) 214/2013] and the Malaysian Sewerage Industry Guidelines (Volume II) Edition 2 Amendment V1 July 2013, including but not limited to the following, for the submission of Forms PDC 7, PDC 8 and PDC 9 and the issuance of the Certificate of Completion and Compliance for the said Project:
 - (i) to submit the Defendant's feedback on the CCTV report and CCTV recording furnished to the Defendant via letter dated 24 May 2022.
 - (ii) to submit the Defendant's feedback on and endorsement of the "As Built Sewerage Manhole Line" drawings; and
 - (iii) to sign Forms PDC 7, PDC 8 and PDC 9;
- (c) a declaration that the Defendant shall indemnify the Plaintiff in the event that any penalty is imposed on the Plaintiff under s 70(27)(f) of the Street, Drainage and Building Act 1974 [Act 133] and s 33 of the Fire Services Act 1988 [Act 341];
- (d) damages in addition to specific performance to be assessed by the Registrar (Damages to be Assessed);
- (e) interest at the rate of 5% per annum on the Damages to be Assessed from the date of assessment until full and final settlement;
- (f) exemplary damages;
- (g) costs; and
- (h) such further or other relief as the Court deems just.

[16] The Defendant was served with the Writ and Statement of Claim on 6 October 2022. All this was done despite cl 4 of the CoE. What unfolded, thereafter, is of critical importance and forms the central subject of the parties' contention:

- (a) The Defendant entered appearance on 17 October 2022.
- (b) On 20 October 2022, during a case management session, the Plaintiff's solicitors informed the Court that the Writ and Statement of Claim had been served on the Defendant on 6 October 2022 and sought directions in relation to the filing of the Defence



and any Reply to Defence. The Defendant's solicitors confirmed that their client had been served with the relevant cause papers, that they were awaiting further instructions with a likelihood of requesting further and better particulars, and that pursuant to the Rules of Court 2012 [P.U.(A) 205/2012], the Defendant had until 3 November 2022 to file its Defence. They then sought a further date to update the Court on the status of the intended request and the filing of the Defence. The learned Registrar thereafter directed the Defendant to file its Defence by 3 November 2022.

- (c) On 28 October 2022, the Defendant requested and the Plaintiff agreed to grant an extension of time until 17 November 2022 for the Defendant to file its Defence.
- (d) By a letter dated 31 October 2022 (Enclosure 5) addressed to the Court, the Defendant, having discussed with the Plaintiff and obtained the Plaintiff's consent to an extension of time until 17 November 2022, wrote to the Court for a corresponding extension of time in terms agreed between the parties to file its Defence. Apparently, the letter does not expressly contain any reservation of the Defendant's rights in relation to cl 4 of the CoE:

"Kami merujuk kepada perkara di atas dan pengurusan kes secara e-review pada 20 Oktober 2022. Kami mewakili ESA Jurutera Perunding Sdn Bhd, pihak Defendan dalam tindakan ini.

Pada pengurusan kes secara e-review pada 20 Oktober 2022, arahan Tuan adalah bahawa Defendan memfailkan Pernyataan Pembelaan pada atau sebelum 3 November 2022.

Kami menulis di sini untuk memaklumkan bahawa pihak kami memerlukan tambahan tempoh masa untuk menyediakan dan memuktamadkan Pernyataan Pembelaan Defendan. Dalam pada itu, kami telah berbincang dengan peguamcara Plaintiff yang telah bersetuju untuk pelanjutan masa sehingga 17 November 2022 bagi pemfailan Pernyataan Pembelaan Defendan.

Oleh yang demikian, kami dengan rendah diri memohon daripada Mahkamah Yang Mulia ini untuk tempoh masa sehingga 17 November 2022 untuk memfailkan Pernyataan Pembelaan Defendan tersebut.

Segala pertimbangan atas pihak Tuan dalam perkara di sini adalah dihargai.

Sekian, terima kasih."

- (e) Again, on 14 November 2022, the Defendant requested and the Plaintiff agreed to grant a second extension of time until 1 December 2022 for the Defendant to file its Defence.



- (f) Thereafter, the Defendant issued and served on the Plaintiff a Notice to Produce Documents Referred to in Pleadings dated 24 November 2022 under O 24 r 10 of the Rules of Court 2012 [P.U.(A) 205/2012]. In the covering letter dated 24 November 2022, the Defendant's solicitors state:

"First and foremost, we extend our utmost gratitude for granting us an extension of time for two (2) weeks from 17 November 2022 to file our Statement of Defence subject to the same courtesy being extended to you.

Please find enclosed our 'Notis untuk mengemukakan dokumen yang disebut dalam pliding' dated 24 November 2022 for your attention and further action.

We sincerely hope that you can furnish us with the abovementioned documents on an urgent basis in order for us to prepare a Statement of Defence and for the pre-trial Case Management to run smoothly.

In the meantime, all of our Client's rights are reserved.

Kindly acknowledge receipt."

- (g) The Plaintiff's solicitors served a copy of the Notice Where Documents May Be Inspected dated 30 November 2022 and provided all documents requested by the Defendant by way of the said Notice to Produce Documents. In its letter to the Defendant's solicitor, the Plaintiff's solicitors state:

"We refer to -

- (a) the above matter;
 - (b) "Notis untuk Mengemukakan Dokumen yang Disebut dalam Pliding" dated 24 November 2022 which we received on 24 November 2022 at 6.01pm by e-mail; and
 - (c) the telephone conversation between your Mr. Darryl Ragumaren and our Cheah Kha Mun on 30 November 2022 (Conversation).
2. We enclose, by way of service, a copy of the "Notis yang Dokumen boleh Diperiksa" dated 30 November 2022.
 3. Further, as discussed during the Conversation, instead of you coming to our office to inspect the documents requested, we will provide a copy of the documents requested to you by e-mail.
 4. In this regard, we enclose a copy of the following documents for your attention:
 - (a) e-mail dated 26 June 2019 from our client to your client;
 - (b) e-mail dated 13 July 2020 from our client to your client;



- (c) letter dated 22 July 2020 from our client to your client;
- (d) minutes of meeting dated 24 August 2020;
- (e) letter dated 20 October 2020 from your client to our client,
- (f) minutes of meeting dated 29 December 2021,
- (g) letter dated 24 May 2022 from our client to your client, and
- (h) letter dated 1 September 2022 from us to you.

5. Kindly acknowledge receipt.”

- (h) On 30 November 2022, the Defendant informed the Plaintiff via email that it required further time to finalise and file its Defence and would do so on or before 5 December 2022:

“Further to our email to you this morning, upon receipt of the requested documents forwarded to us via email this morning, we require further time to finalize and file the Defendant’s Statement of Defence.

As such and as informed in the said telephone conversation, we will be filing the Statement of Defence on or before 5 December 2022.

Thank you.”

- (i) On 1 December 2022, the Defendant’s solicitors issued a Notice of Arbitration pursuant to cl 4 of the CoE on the Plaintiff and its solicitors:

“Further, we also refer to the Writ and Statement of Claim both dated 6 October 2022 (Kuala Lumpur High Court Suit No: WA-22C-73-10/2022 *Universiti Malaya -v- ESA Jurutera Perunding Sdn Bhd*) (“Court Action”).

In view of the above, disputes have arisen between ESA Jurutera Perunding Sdn Bhd and Universiti Malaya with regard to the Project.

As such, our Client has instructed us to issue this Notice of Arbitration pursuant to cl 4 (Settlement of Disputes) of the Memorandum of Agreement which forms part of the Letter of Appointment dated 14 February 2008, that the disputes between the parties be referred to Arbitration, (A copy of the relevant Clause is enclosed herewith as “Attachment A” for your attention).

Considering the commencement of the Court Action, we are instructed to file an application to stay the Court Action and for the disputes be referred to Arbitration pursuant to s 10 of the Arbitration Act 2005.

Please do not hesitate to contact us should you have any clarification on the matter.

In the *interim*, all of our Client’s rights are reserved.”



- (j) On 2 December 2022, the Defendant filed the stay application by way of a Notice of Application (“Enclosure 7”). Thereafter, the Defendant’s solicitors issued a letter dated 8 December 2022 to the Court, setting out their position in relation to encl 7 and the earlier extensions of time sought by the Defendant:

“Setakat ini, Defendan hanya memfailkan Memorandum Kehadiran kerana ingin mengelakkan sebarang Penghakiman Ingkar Kehadiran dimasukkan terhadapnya. Dalam pada itu, permohonan lanjutan masa yang diminta oleh kami sebelum ini adalah bertujuan untuk mengetahui, memahami dan menilai keseluruhan fakta-fakta dan isu berhubung tuntutan Plaintiff terhadap Defendan melalui Pernyataan Tuntutan Plaintiff bertarikh 6 Oktober 2022.

Akan tetapi, pihak Plaintiff dalam Pengurusan Kes tersebut telah memberikan gambaran bahawa -

“Defendan telah mengambil langkah-langkah dalam prosiding ini termasuk meminta lanjutan-lanjutan masa untuk memfailkan pembelaan, mereka juga telah memaklumkan Mahkamah yang Mulia ini melalui surat bertarikh 31 October 2022 bahawa mereka akan memfailkan pembelaan, mereka juga menyerahkan Notis untuk Mengemukakan Dokumen dirujuk dalam Pliding atas kami. Kami akan berhujah secara lebih lanjut dalam Lamp. 7.’

Pihak kami dengan segala hormatnya tidak bersetuju dengan pernyataan pihak Plaintiff tersebut dan ingin memberi klarifikasi bahawa permintaan untuk dokumen bagi rujukan Anakguam kami tidak boleh dalam apa jua cara ditafsirkan sebagai ‘mengambil langkah-langkah dalam prosiding ini’ atau ‘mengambil kedudukan bertentangan’. Pihak kami akan berhujah lebih lanjut dalam permohonan Kandungan 7 tersebut.

Pihak kami tidak mempunyai salinan dokumen yang lengkap yang dirujuk dalam Pernyataan Tuntutan Plaintiff bertarikh 6 October 2022 untuk membuat sebarang keputusan yang berkenaan dan mengambil tindakan lanjut dalam tindakan Mahkamah di sini ...”

- (k) During the case management session held on 14 December 2022, the High Court directed that the Defendant need not file its Defence pending the disposal of encl 7.
- (l) Further, in its *Affidavit* in Reply affirmed on 4 January 2023 in response to the Plaintiff’s *Affidavit* in Reply, the Defendant deposed as follows:

“11.1 Sebagai jawapan kepada perenggan 7(b)(i) AJP, setelah Defendan diserahkan dengan Writ dan Pernyataan Tuntutan Plaintiff tersebut, Defendan dan peguamcara Defendan memerlukan lebih masa untuk semak dan meneliti fakta-fakta dan isu dalam Pernyataan Tuntutan Plaintiff tersebut kerana dakwaan-dakwaan dalam Pernyataan Tuntutan



Plaintif tersebut memerlukan rujukan kepada dokumen-dokumen dan suratcara untuk projek yang wujud sejak tahun 2008.

...

11.3 Sebagai jawapan kepada perenggan-perenggan 7(b)(iii) sehingga 7(b)(ix) AJP, Defendan memerlukan lanjutan masa untuk semak dan meneliti semua dokumen yang berkenaan dengan Pernyataan Tuntutan Plaintif tersebut yang telah memplidkan atau merujuk di dalamnya kepada dokumen-dokumen sejak tahun 2008 dan yang beberapa tidak dalam milikan Defendan.”

- (m) On 21 February 2023, the learned High Court Judge, having heard both parties, dismissed encl 7, following which the Defendant applied for an *ad interim* stay of the said High Court decision. The application was dismissed and the Defendant was directed to file its Defence by 7 March 2023.
- (n) On 2 March 2023, the Defendant filed a notice of appeal to the Court of Appeal against the said High Court decision and an application for a stay of all proceedings in the High Court pending the disposal of the appeal (Enclosure 28).
- (o) On 6 March 2023, the Defendant filed another application for an *ad interim* stay order pending the disposal of encl 28.
- (p) On 7 March 2023, the Defendant filed its Statement of Defence and Counterclaim as per the earlier directions of the High Court (Enclosure 34). In its covering letter dated 7 March 2023 (Enclosure 33), the Defendant had expressly reserved its right to refer the dispute to arbitration:

“Kami merujuk kepada perkara di atas.

Kami mewakili ESA Jurutera Perunding Sdn Bhd, pihak Defendan dalam tindakan ini.

Sepertimana arahan Mahkamah ini dan tanpa prejudis kepada hak Defendan untuk merujuk pertikaian antara Plaintif dan Defendan di sini kepada prosiding timbang tara, dilampirkan di sini sesalinan Pembelaan dan Tuntutan Balas Defendan bertarikh 7 Mac 2023 untuk tujuan pemfailan dan serahan kepada Mahkamah.

Sekian, terima kasih.”

Consistent with the Defendant’s position in encl 33, encl 34 states as follows:

- “1. At the outset, the Defendant states that this Defence & Counterclaim (“D&C”) is filed without prejudice to the Defendant’s rights to refer the parties disputes herein to arbitration proceedings (as contractually agreed by the parties cl 4, Memorandum of Agreement), raise any



preliminary objections and/or file any interlocutory applications against the Plaintiff, including an application to strike out the Writ and Statement of Claim herein *inter alia*, on grounds that the same is frivolous and/or vexatious, scandalous and/or otherwise an abuse of process of this Honourable Court.

2. The Defendant intends to refer the parties disputes herein to arbitration proceedings and not to proceed with the court action herein. To that, the Defendant had filed an application for a stay of the proceedings herein and for the matter be referred to arbitration proceedings (Enclosure 7) but was dismissed by the Honourable Court. To that, the Defendant has appealed to the Court of Appeal on the dismissal of encl 7. Further, the Defendant has filed an application for a stay of the proceedings herein pending the disposal of the appeal at the Court of Appeal (Enclosure 28). In the meantime, this Court has ordered for the Defendant to file its defence & counterclaim by 7 March 2023 and to that the Defendant is compelled to file the D&C.”

- (q) On 18 April 2023, the learned High Court Judge dismissed encl 28.

C. Antecedent Proceedings And Judgment Below

[17] The main plank of the Plaintiff’s opposition to encl 7 is that the Defendant had taken steps in the proceedings before the filing of encl 7, as evinced by its conduct, thereby indicating an intention to defend the action in Court. In particular, the Defendant (i) requested at least two (2) extensions of time from the Plaintiff to file its Defence; (ii) indicated on three (3) occasions that it would file its Defence; (iii) stated in a letter dated 24 November 2022 from its solicitors that it was prepared to proceed to pre-trial case management; (iv) served the Notice to Produce documents pursuant to O 24 r 10 of the Rules of Court 2012 [P.U.(A) 205/2012] on the Plaintiff’s solicitors without making express or unequivocal reservation of its rights to refer the matter to arbitration.

[18] Further, there was a lapse of one (1) month between the time the Defendant was required to file its Defence and the filing of encl 7, during which the Defendant repeatedly indicated its intention to file its Defence. The Defendant has also not offered any cogent reason why the Court proceedings ought not to proceed.

[19] Taken in totality, the Plaintiff submits that the Defendant has thereby lost its right to invoke s 10(1) to stay the proceedings, submitted to the jurisdiction of the Court, and abandoned its right to rely on cl 4 of the CoE. It is further contended that the Defendant ought not to have taken any steps in the proceedings, should instead have applied for a stay immediately if it intended to pursue arbitration, and is estopped from adopting an inconsistent position in seeking to refer the dispute to arbitration.



[20] The Defendant sought to overcome that argument by asserting the existence of a valid and binding arbitration agreement between the parties which satisfies the requirements of s 10(1), such that effect must be given to the parties' intention with minimal interference in their contractual choices. The Defendant contended that the Plaintiff's claims as pleaded in the Statement of Claim arise out of the contract between the parties and fall within the ambit of the arbitration agreement and ought, therefore, to be referred to arbitration. Accordingly, the Defendant submitted that the Plaintiff's commencement of the suit constitutes an abuse of the Court's process, given that it clearly knew that the proper forum is arbitration.

[21] It was also submitted that the Defendant had not taken any positive steps in the proceedings and had not waived its right to rely on cl 4 of the CoE. The Defendant merely filed a Memorandum of Appearance, which is a mandatory procedural requirement and nothing further. The requests for extensions of time were necessitated by the need to review and consider the matters pleaded in the Statement of Claim, which referred to documents dating back to 2008, some of which were not in the Defendant's possession. In respect of those documents, the Defendant's solicitors wrote to the Plaintiff's solicitors requesting copies. With the benefit of those documents, the Defendant was in a position to make an informed decision as to how to proceed. Thereafter, the Defendant filed encl 7 and did not file or serve any pleadings.

[22] In a nutshell, the Defendant maintained that its requests for extensions of time and for copies of documents from the Plaintiff did not constitute positive steps in the proceedings, but were merely precautionary measures preparatory to taking a further step. There was, it is said, a valid basis for those requests, as they were necessary for the Defendant to properly consider its position. Accordingly, the Defendant argued that any submission to the jurisdiction of the Court must be clear and unequivocal, which is not the case here. Further, encl 7 was filed within two (2) days of receipt of the requested documents from the Plaintiff and represents a *bona fide* move taken to assert the contractual terms governing the parties.

[23] The main findings of the learned High Court Judge may be summarised as follows:

- (a) Following the principles in *Sanwell*, the entry of appearance by the Defendant does not amount to a step in the proceedings within the meaning of s 10(1) of Act 646.
- (b) Based on the Defendant's letters dated 31 October 2022 and 24 November 2022, its email dated 30 November 2022 (in which the intention to file the Defence was expressed in affirmative terms without any reservation of rights), and paragraphs 11.1 and 11.3 of its *Affidavit* in Reply, the Defendant, irrespective of its justification for seeking extensions of time, unequivocally evinced



an intention to submit to the Court's jurisdiction by indicating that it would file its Defence within the time allowed.

- (c) Following *Sanwell and Kem Krest LLC v. R P Trust Inc & Ors* [2021] MLRHU 1836, by twice requesting extensions of time to file its Defence and thrice indicating that it would do so, the Defendant clearly evinced an intention to deliver such pleadings and to defend the action in Court, thereby abandoning its right to arbitration.
- (d) Citing *CLLS Power System Sdn Bhd v. Sara-Timur Sdn Bhd* [2015] MLRHU 25 and *Apex Marble Sdn Bhd & Anor v. Leong Tat Yan* [2021] 4 MLRA 63, the learned High Court Judge ruled that the Defendant had taken another step in the Court proceedings by serving the Notice to Produce Documents on the Plaintiff's solicitors without making any express or unequivocal reservation of its rights to refer the matter to arbitration.
- (e) The facts of the present case are distinguishable from those in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Berhad* [2016] 5 MLRA 529, *Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd & Another Appeal* [2020] 2 MLRA 264 and *FAMG Idaman Resources v. Jasmadu Sdn Bhd* [2018] MLRHU 869, where stays of proceedings pending arbitration were granted, as the Defendants in those cases neither requested extensions of time to file their Defences nor served Notices to Produce Documents on the Plaintiffs, unlike in the present case.
- (f) The Defendant "did not repeatedly and vehemently" reserve its right to refer the dispute to arbitration in contrast to the "many protestations by the Defendant's counsel" in *Life Plaza Sdn Bhd v. Pasukhas Construction Sdn Bhd* [2012] 5 MLRH 492 that there had been no abandonment of the rights to refer the dispute to arbitration.
- (g) Therefore, the Defendant has submitted to the Court's jurisdiction and has abandoned its right to rely on cl 4 of the CoE to refer the dispute to arbitration. Enclosure 7 was dismissed with costs.

[24] Dissatisfied with the decision, the Defendant lodged an appeal by way of a notice of appeal dated 2 March 2023. On 1 March 2024, the Court of Appeal allowed the appeal, set aside the High Court's decision dated 21 February 2023, with costs.

[25] The main findings of the learned panel of the Court of Appeal may be summarised as follows:

- (a) Based on the clear and unambiguous words in cl 4 of the CoE, there is no doubt that the Plaintiff and the Defendant had agreed to refer any dispute arising from the Agreement to arbitration.



While the parties should honour this agreement, s 10(1) of Act 646 allows the Plaintiff to commence a writ action in the Court provided that it can show that the Defendant had taken any other steps in the proceedings.

- (b) At the High Court, the Defendant filed its Defence pursuant to the Court's directions following the dismissal of its stay application. Save for the filing of a Notice to Produce Documents Referred to in the Pleadings, the Defendant had not filed any pleadings for the purpose of trial. Accordingly, limbs (a) and (b) in *Sanwell* are not applicable. Rather, the issue for determination is whether the present case falls within limb (c), namely, whether the Defendant's conduct evinced an intention not to be bound by the arbitration agreement but instead to proceed with the writ action, a question of fact to be determined on the facts and circumstances of the case.
- (c) On the strength of the Singapore Court of Appeal case of *Carona Holdings Pte Ltd & Ors v. Go Go Delicacy Pte Ltd* [2008] 4 SLR 460 (CA), the learned panel of the Court of Appeal observed that the pertinent question to ask is whether the request for the extension of time and the filing of the Notice to Produce Document Referred to in the Pleadings are "steps in furtherance of the action by advancing the hearing of the matter in Court in contrast to one that serves to smother the action and stop the proceedings dead in its tracks".
- (d) In its covering letter accompanying the service of the Notice to Produce Documents Referred to in the Pleadings, which was not considered by the High Court, the Defendant had expressed its intention of preserving its right to refer the dispute to arbitration and that the phrase "all of our client's rights" should be read to include the Defendant's right to invoke the arbitration clause.
- (e) The extension of time sought does not establish that the Defendant would file its Defence. Although the Defendant informed the High Court at case management that it would do so by 3 November 2022, the extension was sought to prepare and finalise the Defence and does not indicate that it would in fact be filed. Given that the contract between the parties was entered into in 2008, it is reasonable to infer that the Defendant, by its Notice to Produce and requests for extension of time, was ascertaining the nature of the parties' agreement, including the arbitration clause. The general reservation of rights in the letter dated 24 November 2022 demonstrates that the Defendant was preparing to take other steps in the proceedings, including a stay application. This is reinforced by the Defendant's filing of the stay application on 2 December



2022, two (2) days after service of the Notice Where Documents May Be Inspected dated 30 November 2022 together with the requested documents. A Notice of Arbitration was also served on the Plaintiff on 1 December 2022.

- (f) The Statement of Defence was filed by the Defendant pursuant to the Court's directions at case management, following the dismissal of its application for an *interim* stay of the High Court order. The Defendant also reserved its right to refer the dispute to arbitration in its covering letter dated 7 March 2023 when filing the Defence, as well as in the Statement of Defence and Counterclaim.
- (g) The facts, taken holistically, did not show that the Defendant is submitting to the Court's jurisdiction. Subsection 10 of Act 646 should be construed so that there would be minimum intervention of the Court pertaining to the parties' agreement to the arbitration clause. The Court should, so far as possible, lean in favour of the arbitration agreement to which the parties had, at the outset, agreed, particularly where one party has acted in breach of that agreement. Even where the intention is not entirely clear, but the conduct falls short of a decisive step in the proceedings and remains confined to preliminary or peripheral matters, the Court should give every encouragement to the parties to abide by their agreement to resolve disputes by arbitration.

D. Leave Questions

[26] On 3 July 2024, the Plaintiff was granted leave to appeal to this Court on the following questions of law:

- (a) QUESTION 1: Whether-
 - 1.1 a request for extension of time to file Defence; and/or
 - 1.2 service of Notice to Produce Documents Referred to in Pleadings pursuant to O 24 Rule 10 of the Rules of Court 2012 [P.U.(A) 205/2012] amount to a step in the Court proceedings under s 10(1) of the Arbitration Act 2005 [Act 646]?
- (b) QUESTION 2: Is there a legal distinction between steps taken in preparatory to proceedings and steps in Court proceedings?
- (c) QUESTION 3: Whether the actions taken as set out in paragraphs 1.1 and 1.2 above indicate an unequivocal intention to proceed with the Court proceedings and to abandon the right to have the dispute disposed of by arbitration.
- (d) QUESTION 4: There are conflicting decisions on whether request for an extension of time to file Defence is a step in proceedings



4.1 the following authorities which held that request for an extension of time to file Defence is a step in proceedings

- (i) *IFCI Limited v. Archipelago Insurance Limited* [2022] 2 MLRA 462;
- (ii) *Winsin Enterprise Sdn Bhd v. Oxford Talent (M) Sdn Bhd* [2009] 3 MLRH 699;
- (iii) *Kem Krest LLC v. R P Trust Inc & Ors* [2021] MLRHU 1836 ; and
- (iv) *Mun Seng Fook v. AIG Malaysia Insurance Berhad* [2018] 3 MLRH 203; and

4.2 the following authorities which held that request for an extension of time to file Defence is not a step in proceedings:

- (i) *Airbus Helicopters Malaysia Sdn Bhd v. Aerial Power Lines Sdn Bhd* [2024] 3 MLRA 152 and
- (ii) *Sumber Khazanah Sdn Bhd (In Liquidation) v. Apex Communications Sdn Bhd* [2023] MLRHU 1659.

- (e) QUESTION 5: There are conflicting decisions on whether service of Notice to Produce Documents Referred to in Pleadings is a step in proceedings:

5.1 the authority of *CLLS Power System Sdn Bhd v. Sara-Timur Sdn Bhd* [2015] MLRHU 25 which held that service of Notice to Produce Documents Referred to in Pleadings is a step in proceedings; and

5.2 the authority of *Life Plaza Sdn Bhd v. Pasukhas Construction Sdn Bhd* [2012] 5 MLRH 492 which held that service of Notice to Produce Documents Referred to in Pleadings is not a step in proceedings.

- (f) QUESTION 6: Are the aforesaid authorities consistent with the Federal Court's decision in *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor* [2002] 1 MLRA 156?

[27] We pause to note that, at the centre of these questions, lies a single issue for determination, namely whether a request for an extension of time to file a Defence and the service of a Notice to Produce Documents constitute steps in the proceedings so as to preclude the Defendant from obtaining a stay under s 10(1) of Act 646. In that context, Questions 4 and 5 do not raise leave questions, but are merely statements. Questions 2, 3 and 6 are derivative, redundant and irrelevant, having regard to our answer to Question 1. Accordingly, we are of the considered view that the only question that truly reflects the essence of the Court of Appeal's grounds of judgment is Question 1.



E. Our Analysis And Decision

(i) Legislative History Of Subsection 10(1) Of Act 646

[28] Those familiar with English legal history would recognise that, contrary to the prevailing narrative of traditional hostility by the English courts towards arbitration, a favourable statutory framework for the enforcement of arbitration agreements and awards had been introduced as early as the late seventeenth century, with the enactment of the Arbitration Act 1698 (the “Locke Act”), followed by further legislative developments in the nineteenth century, including the Common Law Procedure Act 1854 and the Arbitration Act 1889. By the twentieth century, this statutory policy favouring arbitration was further strengthened by the Arbitration Acts of 1934, 1950, 1979 and 1996. It is axiomatic that the legal framework governing statutory arbitration differs from that applicable to arbitration at common law.

[29] The continuity between past and present in this area of law remains evident across centuries. No attempt will be made here to provide an exhaustive account, but the authorities show that the English courts, applying the then subsisting statutory regime, were primarily concerned with giving effect to arbitration agreements and the intention of Parliament. For reasons that will become apparent, it will be necessary to revisit some of them. The English judicial attitude of routine respect for party autonomy in arbitration furthers the policy in favour of arbitration and ensures certainty in commercial relationships. For instance, in *Bristol Corporation v. John Aird & Co* [1913] AC 241, the House of Lords, per Lord Moulton at p 258, observed as follows:

“Therefore the Court should start with an earnest desire to keep the parties to the domestic tribunal which was contemplated both in the contract and throughout the execution of the works. But, on the other hand, I do not think that the Legislature has ever made it incumbent on a Court to drive a man to a tribunal which would probably be unfair, however much he may have bound himself to accept it; and therefore the Court must ask itself whether it is fair for this man to be refused the assistance of the Court in settling his dispute. But the Court must always remember that the parties themselves are estopped from saying that the tribunal in its constitution is unfair, because it is the one which they accepted as the basis of the contract.”

[Emphasis Added]

[30] Scrutton LJ in *Ayscough v. Sheed Thomson* [1923] 14 LI. L. Rep 209 at p 211, observed as follows:

“The arbitrators to whom the plaintiff and defendants went decided against the plaintiff on the ground apparently, that under the rules he was out of time. Thereupon the commercial man, who has made a contract shutting out the King’s Courts, at once rushes to the King’s Courts as soon as his chosen arbitrators decide against him. **As I have said frequently, if people do not like the Courts they should keep clear of them, and if they go to arbitrators**



they should stand by their decision when it is given and not try to upset it in the Courts.”

[Emphasis Added]

[31] Again, Scrutton LJ in his supporting judgment in the English Court of Appeal case of *Metropolitan Tunnel and Public Works, Limited v. London Electric Railway Company* [1926] Ch 371 at p 388 enunciated:

“It is becoming increasingly the practice to insert in contracts for the sale of goods, contracts for the charter of ships, contracts for insurance of all sorts, building contracts, and engineering contracts of all sorts, a clause by which the parties agree to refer all their disputes, or a certain class of them, to an arbitrator. It is also a very common practice for a party who has agreed to refer all his disputes to an arbitrator to say, when a question arises, that he would rather not do so, and to bring an action in the King’s Courts. There usually follows, both in the Chancery Division and in the King’s Bench Division, an application by the other party to the contract to stay the action on the ground that the parties have agreed to refer their disputes to a private arbitrator, and the decision to be come to by the Courts is often a matter of very considerable difficulty. It is still more difficult to lay down principles on which the Courts should proceed. On the one hand, it is eminently desirable, in all business matters, that parties who have made a contract should keep it.”

[Emphasis Added]

[32] Given Parliament’s intention to limit judicial intervention by giving effect to arbitration wherever possible, commercial parties are assured that the arbitral process, within its statutory framework, is directed towards finality. Salter J in *Kursell v. Timber Operators And Contractors Limited* [1923] 2 KB 202 articulated at pp 211-212 as follows:

“In modern times Parliament has shown a constantly increasing desire to aid and encourage private arbitration. We think that our decision is in accordance with the letter and spirit of the Arbitration Act, 1889, when read in the light of the earlier statutes regulating arbitration, which it repeals and supersedes.”

[Emphasis Added]

[33] *Arab African Energy v. Olie Produkten* [1983] 2 Lloyd’s Rep 419 further underscores that the public policy governing the relationship between the English courts and arbitration came to be anchored in the need for finality, with the pursuit of legal accuracy yielding to considerations of commercial expediency. Leggatt J, in deciding an application for leave to appeal under s 1 of the Arbitration Act 1979 and whether there was a valid exclusion agreement which precluded such leave, observed at p 423:

“Section 3(1) of the 1979 Act does not require the overt demonstration of an intention to exclude the right of appeal. True it is, that formerly the Court was careful to maintain its supervisory jurisdiction over arbitrators and their



awards. **But that aspect of public policy has now given way to the need for finality. In this respect the striving for legal accuracy may be said to have been overtaken by commercial expediency.** Since public policy has now changed its stance, I see no reason to continue to adopt an approach to the construction of exclusion agreements which might well have been appropriate before it had done so.”

[Emphasis Added]

[34] Further evidence of a restrained approach in arbitral matters, consonant with a pro-arbitration stance, may be gleaned from *Pioneer Shipping Ltd v. BTP Tioxide Ltd (The Nema)* [1982] AC 724. Notwithstanding that the Arbitration Act 1979 expressly allowed appeals against awards, the House of Lords held that the grant of leave should be guided by the legislative intention to promote finality in arbitral awards. Lord Diplock opined at pp 739-740 as follows:

“My Lords, in weighing the rival merits of finality and meticulous legal accuracy there are, in my view, several indications in the Act itself of a parliamentary intention to give effect to the turn of the tide in favour of finality in arbitral awards (particularly in non-domestic arbitrations of which the instant case is one), at any rate where this does not involve exposing arbitrators to a temptation to depart from settled principles of law.”

[Emphasis Added]

[35] At page 742, His Lordship went further to state the following:

“My Lords, in view of the cumulative effect of all these indications of Parliament’s intention to promote greater finality in arbitral awards than was being achieved under the previous procedure as it was applied in practice, it would, in my view, defeat the main purpose of the first four sections of the Act if judges when determining whether a case was one in which the new discretion to grant leave to appeal should be exercised in favour of an applicant against objection by any other party to the reference, did not apply much stricter criteria than those stated in *The Lysland* [1973] Q.B. 843 which used to be applied in exercising the former discretion to require an arbitrator to state a special case for the opinion of the court.”

[Emphasis Added]

[36] Given its historical roots in English law, is the position in Malaysia any different from that in mother England? In the shifting tide of mainstream argumentation, where this Court is routinely invited to construe statutory provisions as bearing meanings other than those they plainly express, the Defendant’s case is, by contrast, conventionally straightforward. Consistent with its submissions before the High Court, the Court of Appeal and now before us, the Defendant maintains the position that the pro-arbitration policy reflected in the legislative amendment to subsection 10(1) of Act 646 signifies that referral to arbitration is mandatory where no question arises as to the validity of cl 4 of the CoE. Reliance was placed on this Court’s observation in



Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Berhad [2016] 5 MLRA 529, where Ramly Ali FCJ enunciated at pp 540 and 552 as follows:

“[32] The clear effect of the present s 10(1) of the 2005 Act is to render a stay mandatory if the court finds that all the relevant requirements have been fulfilled; while under s 6 of the repealed 1952 Act, the court had a discretion whether to order a stay or otherwise.

[33] What the court needs to consider in determining whether to grant a stay order under the present s 10(1) (after the 2011 Amendment) is whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed. The court is no longer required to delve into the details of the dispute or difference (see *TNB Fuel Services Sdn Bhd (supra)*). In fact the question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under s 10(1). It is an issue to be decided by the arbitral tribunal.

...

[88] The court should lean more towards granting a stay pending arbitration under s 10(1) of the 2005 Act, even in cases where the court is in some doubt about the validity of the arbitration clause or where it is arguable whether the subject matter of the claim falls within or outside the ambit of the arbitration clause ...”

[Emphasis Added]

[37] We observe, however, that the Plaintiff has no objection to this line of argument advanced by the Defendant, as we understand that the Plaintiff maintains that the Defendant had taken steps in the proceedings, which constitute an important disqualifying criterion under subsection 10(1).

[38] In our perusal, the phrase “before taking any other steps in the proceedings” is of considerably earlier provenance. It predates the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 (“UNCITRAL Model Law 1985”), upon which Act 646 is modelled, and appears in the United Kingdom Arbitration Act 1950, with its lineage traceable to s 4 of the United Kingdom Arbitration Act 1889, from which our repealed Arbitration Act 1952 [Act 93] was derived.

[39] In relation to Court intervention and the stay of Court proceedings as governed by ss 8 and 10 of Act 646 respectively, we note that paragraphs 12 and 14 of the Explanatory Statement to the Arbitration Bill 2005 provide:



Section	Paragraph/Explanatory Statement
8	12. Clause 8 provides that <u>no court shall intervene in any matter governed by this Bill except where the Bill provides otherwise.</u>
10	14. Clause 10 provides that the court <u>shall stay proceedings</u> brought before it provided that a party makes an application to the court before taking any other steps in the proceedings. The court may refuse a stay where it finds that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is in fact no dispute between the parties with regard to the matters referred to it. Clause 10 also provides that the arbitral proceedings may nevertheless still be commenced or continued while the issue is still pending before the court.

Table 1.0: Explanatory Statement to the Arbitration Bill 2005

[40] In a subsequent legislative initiative, a more specific expression was employed in paragraphs 4 and 5 of the Explanatory Statement to the Arbitration (Amendment) Bill 2010 in respect of the same provisions, which read as follows:

Section	Paragraph/Explanatory Statement
8	4. Clause 3 seeks to amend section 8 of Act 646 <u>to adopt, with modification, the language used in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985. This provision is to limit court intervention to situations specifically covered by Act 646 and to discourage the use of inherent powers.</u>
10	5. Clause 4 seeks to amend subsection 10(1) of Act 646 and to introduce new subsections (2a), (2b), (2c) and (4). <u>Subsection 10(1) is amended to delete unnecessary provision.</u> The new subsections (2a) and (2b) empower the court to order the retention of the property or provision of security pending the determination of the arbitration proceedings related to admiralty disputes. The new subsection (2c) is to provide for the definition of "admiralty proceeding". The new subsection (4) empowers the Malaysian court to grant stay of proceedings if the seat of arbitration is outside Malaysia.

Table 2.0: Explanatory Statement to the Arbitration (Amendment) Bill 2010



[41] The comparative table below illustrates the evolution of the present subsection 10(1) of Act 646 from its antecedent in s 6 of Act 93. Although the relevant phrase has remained intact, modifications to other parts of the provision have resulted in a substantially different implication.

Arbitration Act 1952 [Act 93]	<p>Section 6. Power to stay proceedings where there is submission to arbitration</p> <p>If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, <u>before taking any other steps in the proceedings</u>, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, <u>may</u> make an order staying the proceedings.</p>
Arbitration Act 2005 [Act 646] (pre-2011 amendment)	<p>Section 10. Arbitration agreement and substantive claim before court</p> <p>(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement <u>shall</u>, where a party makes an application <u>before taking any other steps in the proceedings</u>, stay those proceedings and refer the parties to arbitration unless it finds –</p> <p>(a) that the agreement is null and void, inoperative or incapable of being performed; or</p> <p>(b) that there is in fact no dispute between the parties with regard to the matters to be referred.</p>
Arbitration Act 2005 [Act 646] (post-2011 amendment)	<p>Arbitration agreement and substantive claim before court</p> <p>10. (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement <u>shall</u>, where a party makes an application <u>before taking any other steps in the proceedings</u>, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.</p>

Table 3.0: Evolution of subsection 10(1) of Act 646

[42] The prevailing judicial attitude in past years towards s 6 of Act 93 is that compliance with its requirements does not *ipso facto* entitle an Applicant to a stay of Court proceedings as of right. The Court retains a discretion to grant or refuse a stay, which must be exercised judicially. In *Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 1 MLRA 179, Edgar Joseph Jr SCJ opined at p 190:

“It is well known that if a party can satisfy the court that the conditions for the grant of a stay under s 6 of the Act are satisfied, it does not *ipso facto* follow that he will be entitled, as of right, to a stay, for the court still retains a discretion to refuse it. But, generally, as the judge rightly recognized, the approach of the court will be that those who make a contract to arbitrate their disputes, should be held to their bargain for, in the oft-quoted words of Martin B in *Wickham v. Harding* [1859] 28 LJ Ex 215, “A bargain is a bargain, and the parties ought to abide by it, unless a clear reason applies for their not doing so.”

[Emphasis Added]

[43] Similarly, in *Perbadanan Kemajuan Negeri Perak v. ASEAN Security Paper Mill Sdn Bhd* [1991] 1 MLRA 192, Hashim Yeop A Sani CJM propounded at pp 197 and 200 as follows:

“In an application pursuant to s 6 of the Act, the court had a discretion whether or not to grant stay. Lord Denning in his dissenting judgment in ‘*The Fuohsan Maru*’ [1978] 1 Lloyds Rep; [1978] 2 All ER 254 observed that unlike the English Arbitration Act 1975 which does not apply to domestic arbitration agreements but only to international arbitration agreements, under



the English 1950 Act the courts have a discretion whether to grant a stay or not.

The language of s 6 of the Act is such that if the party which opposes the application for stay can show sufficient reason why the matter should not go to arbitration, the court should not normally grant stay. It is of course the court which must be satisfied that there is sufficient reason for the arbitration provision not to be complied with.

...

To summarize, once the party asking for the stay has satisfied the court that there is a dispute, difference or question between the parties within the meaning of the arbitration clause, then it is a question of exercising the discretion to grant or not to grant the stay. This discretion of the court must of course be exercised judicially and exercised according to the proper principles of law. If the appellate court is satisfied that the discretion was properly exercised, the order granted should not be disturbed."

[Emphasis Added]

[44] Act 93 was repealed by Act 646, which came into force on 30 December 2005, whereby s 6 of Act 93 was replaced by subsection 10(1) of Act 646, which was subsequently amended and came into force on 1 July 2011 to its current form. As is apparent from Table 3.0, in subsection 10(1) of Act 646 prior to the 2011 amendment, the Court's discretion had been removed, as the permissive word "may" in s 6 of Act 93 was replaced with the peremptory word "shall". The 2011 amendment further reduced the involvement of the Court by removing the requirement to determine whether there was a dispute between the parties in relation to the matter to be referred. As a result, referral to arbitration is now mandatory, provided the arbitration agreement is operative and neither null and void nor incapable of being performed. In this regard, we agree with learned counsel for the Defendant.

[45] It is important to note that *Sanwell* was decided in 2002, before the legislative developments that solidified the pro-arbitration stance took place, at a time when the grant of a stay of Court proceedings pending reference to arbitration was a matter within the Courts' discretion.

[46] Additionally, we observe that the use of the words "shall" or "must" is a common feature in the relevant legislation of other Commonwealth jurisdictions with statutory arbitration regimes adopting the UNCITRAL Model Law 1985:



Country	Statutory provision
<p>India Arbitration and Conciliation Act, 1996</p>	<p>Section 8. Power to refer parties to arbitration where there is an arbitration agreement. (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement <u>shall</u>, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.</p>
<p>Hong Kong Arbitration Ordinance (Cap 609)</p>	<p>20. Article 8 of UNCITRAL Model Law (Arbitration agreement and substantive claim before court) (1) Article 8 of the UNCITRAL Model Law, the text of which is set out below, has effect – <i>"Article 8. Arbitration agreement and substantive claim before court</i> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement <u>shall</u>, 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." ... (5) If the court refers the parties in an action to arbitration, it <u>must</u> make an order staying the legal proceedings in that action.</p>



<p>New Zealand Arbitration Act 1996</p>	<p>8 Arbitration agreement and substantive claim before court (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement <u>shall</u>, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.</p>
<p>United Kingdom Arbitration Act 1996</p>	<p>9 Stay of legal proceedings. (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter. ... (4) On an application under this section the court <u>shall</u> grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.</p>
<p>Nigeria Arbitration and Mediation Act, 2023</p>	<p>Power to stay court proceedings on the same substantive claim 5. (1) Notwithstanding the provisions of any other law, a court before which an action is brought in a matter, which is the subject of an arbitration agreement <u>shall</u>, if any of the parties request, not later than when submitting their first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is void, inoperative or incapable of being performed. (See section 5 of the repealed Arbitration and Conciliation Act of 1988: 5. Power to stay proceedings (1) If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration 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. (2) A court to which an application is made under subsection (1) of his section <u>may</u>, if it is satisfied – (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and</p>



	(b) that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.)
<p>Canada</p> <p>Ontario Arbitration Act, 1991</p> <p>British Columbia Arbitration Act [SBC 2020] Chapter 2</p>	<p>Ontario Arbitration Act, 1991</p> <p>Stay</p> <p>7 (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.</p> <p>British Columbia Arbitration Act [SBC 2020] Chapter 2</p> <p>Stay of court proceedings</p> <p>7 (1) If a party commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first response on the substance of the dispute, apply to that court to stay the legal proceedings.</p> <p>(2) In an application under subsection (1), the court <u>must</u> make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.</p>
<p>Jamaica</p> <p>Arbitration Act, 2017</p>	<p>Arbitration agreement and substantive claim before court</p> <p>11. (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.</p>

Table 4.0: Stay of Court Proceedings Across Commonwealth (Model Law) Jurisdictions

[47] In *Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd* [2009] 4 MLRA 488, T Selventhiranathan JCA articulated at p 500 as follows:

“The passing of the Act evinced Malaysia’s intention and determination to join the ranks of those countries where parties are wont to submit differences or disputes to arbitration and **the courts have to give effect to that postulation of the Legislature** by interpreting the Act in accordance with the intention of the Legislature.”

[Emphasis Added]

[48] Thus elucidated, we are of the considered view that the learned panel of the Court of Appeal was correct and that the following observation at paragraph [37] of their Lordships’ grounds of judgment accurately reflects the legal position which we have endeavoured to illustrate above:



“... It is also appropriate to remind ourselves that s 10 of the Act should be constructed so that there would be minimum intervention of the court pertaining to the parties’ agreement to the arbitration clause. The court should, as far as possible lean in favour of the arbitration agreement that the parties had, at the outset of the contract, agreed to. This is so when one of the parties had chosen to breach the arbitration agreement. Even if the intention may not be so clear but still falling short of taking the plunge in the proceedings as it were and still very much dealing with the preliminaries and things peripheral to the actual prosecution or defence of the proceedings, the court should give every encouragement to the parties to abide by the arbitration agreement entered into as the way of resolving the disputes.”

[Emphasis Added]

(ii) Substantive Conditions In *Tindak Murni Sdn Bhd* And Procedural Conditions In *Sanwell*

[49] Subsection 10(1) of Act 646 requires the Court to refer an action to arbitration upon the satisfaction of certain substantive and procedural conditions. It has not escaped our attention that the focus of analysis, and the reliance placed on *Sanwell* by our Courts, has largely been directed towards the procedural aspect within the ambit of the phrase “before taking any other steps in the proceedings” under subsection 10(1). In our considered view, of equal importance is the substantive condition that the subject matter of the dispute falls within cl 4 of the CoE, which is neither null and void, inoperative, nor incapable of being performed, a consideration to which we shall turn in the ensuing part of this judgment when addressing Question 1.

[50] This Court in *Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd & Another Appeal* [2020] 2 MLRA 264 highlighted these substantive conditions at p 274 in the following manner:

“[37] The starting point for an analysis of the issues in these appeals requires firstly a **consideration of the arbitration clause in the governing contract so as to ascertain whether it comprises a valid agreement to arbitrate.**

[38] The question arises why this should be an initial or primary consideration. The reason is s 10 of the Arbitration Act 2005, which sets out the role of the court when confronted with an application for a stay pending arbitration. It reads as follows:

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

[39] The emphasised portions make it clear that **the first step is to ascertain whether there is in fact an agreement to arbitrate in respect of the dispute in question ...**



[40] Section 9 of the Arbitration Act 2005 is relevant here. It is entitled 'Definition and form of arbitration agreement'. Subsection 9(1) defines an 'arbitration agreement' to mean 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not'

[41] The same section goes on to state in subs 9(2) that an arbitration agreement may be in the form of an arbitration clause in an agreement, or in the form of a separate agreement."

[Emphasis Added]

[51] In that appeal, this Court further stated at p 277 as follows:

"[49] In all these circumstances it therefore remained incumbent upon the court, notwithstanding the initiation of the civil suit ..., to carry out its function as set out in s 10, namely to refer the dispute to arbitration unless the arbitration agreement is null, void or inoperative. **The court carries out its prescribed statutory duty by ascertaining:**

- (a) whether there is an agreement to arbitrate the dispute;
- (b) whether the arbitration agreement is valid or null, void or inoperative.

Having done so, the following consequences ensue from s 10:

- (i) if there is a valid agreement to arbitrate then the court must refer the dispute to arbitration; and
- (ii) if the agreement to arbitrate is null, void or inoperative then the matter/suit need not be referred to arbitration."

[Emphasis Added]

[52] The second requirement, which is procedural in nature, requires that the referral to arbitration be sought "before taking any other steps in the proceedings". In *Sanwell*, this Court enumerated what constitutes "other steps in the proceedings" at p 167 as follows:

- (a) the entry of appearance is the mandatory procedural step to be taken by an applicant in proceedings in the High Court. It is a step in the proceedings as required by the RHC. However, it is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings within the meaning of the s 6 of the Act which would prejudice the applicant's right to apply for a stay of the proceedings;
- (b) if the applicant has served any pleadings, then he has clearly taken a step in the proceedings within the meaning of s 6 of the Act. He has thereby elected to proceed with the proceedings in the High Court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration;



- (c) if he has taken any other action in the proceedings (other than steps (a) or (b) above mentioned), the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed of by arbitration.”

[Emphasis Added]

[53] This Court, in *Sanwell*, put to rest the question whether an entry of unconditional appearance constitutes a step in the proceedings within the meaning of s 6 of the Arbitration Act 1952 [Act 93], by holding that the entry of appearance, whether conditional or otherwise, is a mandatory procedural step in High Court proceedings under the Rules of the High Court 1980 [P.U.(A) 50/1980] and a permitted, excluded or exempted step which does not amount to such a step. Since no different treatment was made to both modes of appearance, *Sanwell* remains a relevant authority after the enforcement of the Rules of Court 2012 [P.U.(A) 205/2012].

[54] The consideration of the nature of an action in the construction of “steps in the proceedings” under limb (c) in *Sanwell* affirms that different evaluative approaches are to be applied depending on the type of application, as illustrated in *Seloga Jaya Sdn Bhd*. In that case, the Supreme Court held that the Appellant’s actions, by filing several affidavits seeking discharge of the *ex parte* interlocutory injunction, applied by the Respondent, and by making a preliminary objection to challenge the jurisdiction of the Court to grant the injunction, were not steps in the proceeding when the Appellant had demonstrated to the Court, by *affidavit* evidence, its readiness and willingness to do all things necessary to the proper conduct of the arbitration. Further, based on the facts, there was nothing to suggest that the Appellant applying for the stay invoked the arbitration clause with a view to delaying or frustrating the resolution of the dispute when the various affidavits opposing the grant of the injunction and challenging the jurisdiction of the court were filed only after the filing of the stay application.

[55] In relation to the present appeal before us, the Defendant’s request for an extension of time to file a Defence and the service of Notice to Produce Documents Referred to in Pleadings fall squarely under limb (c) of *Sanwell*.

[56] The burden of showing that the Defendant had taken steps in the proceedings lies squarely on the Plaintiff. In *Seloga Jaya Sdn Bhd*, Edgar Joseph Jr SCJ observed at p 190 as follows:

“Now, it is clear by the law as it was laid down in *Heyman v. Darwins Ltd*, 12 that the onus is on a plaintiff to satisfy the court that it is proper to refuse the application for a stay. Indeed, the case of *The Eleftheria* shows that strong grounds for refusing a stay must be exhibited by a plaintiff.”

[Emphasis Added]



(iii) Extension Of Time: *Ford's Hotel Company*

[57] We consider it appropriate to revisit the English legal position on requests for extensions of time to file a Defence in the context of a stay of Court proceedings pending reference to arbitration and its influence on *Sanwell*.

[58] In *Chappell v. North* [1891] 2 QB 252, the Defendant delivered an amended counterclaim on 22 January 1891. Further, on various dates between 31 December 1890 and 20 March 1891, the Plaintiff obtained formal consents from the Defendant extending the time for the delivery of the Plaintiff's reply and defence to counterclaim. Subsequently, on 21 March 1891, the Plaintiff gave Notice of Discontinuance of the action and proposed that the entirety of the matters in dispute be referred to arbitration pursuant to the general submission clause contained in the contract. The Defendant, however, refused to submit the counterclaim to arbitration. In consequence, the Plaintiff took out a summons in chambers under s 4 of the Arbitration Act 1889 seeking an order that the proceedings on the counterclaim be stayed. The learned judge dismissed the summons on the ground that the Court had no jurisdiction to make the order, against which decision the Plaintiff appealed. Denman J, in hearing the appeal, observed at p 256 as follows:

“The first was that he had obtained a series of consents from the defendant for the extension of time for the delivery of reply. No doubt, if the consent had been refused the plaintiff would have had to take out a summons, and that summons would have been a step. **But I do not think that the obtaining a consent, which was asked for the very purpose of avoiding the necessity of taking a step, can itself be regarded as a step taken.**”

[Emphasis Added]

[59] In *Brighton Marine Palace and Pier Ltd v. Woodhouse* [1893] 2 Ch 486, the Defendant's solicitors wrote to the Plaintiffs' solicitors on 21 March 1893 seeking a fourteen (14) day extension of time to file the Statement of Defence, to which the Plaintiffs' solicitors consented in writing on the following day. Subsequently, on 29 March 1893, notice of motion was given on behalf of the Defendant for a stay of all proceedings pursuant to s 4 of the Arbitration Act 1889. Thereafter, on 5 April 1893, the Defendant's solicitors sought a further extension of ten (10) days to file the Statement of Defence, which was likewise consented to in writing by the Plaintiffs' solicitors on the following day. In holding that obtaining an extension of time by agreement for the filing of a Defence does not amount to taking a step in the writ action, North J observed at pp 488-489 as follows:

“The Defendant has not delivered any statement of defence; therefore, there is no question so far as pleading is concerned: he has not delivered any pleading; but he must apply before taking any other step in the action. The question is whether he has taken any other step in the action. What is relied on as steps taken by the Defendant is, that his solicitors wrote on two occasions asking for further time to put in a defence, which applications were acceded to. **In**



my opinion, asking for time by letter is not taking a step in the action; it is taking a step outside the action altogether. The application was under a rule which provides for enlargement of time without taking any step in the action, the very object of the rule being to enable the parties, without the expense of applying in the action, to enlarge the time. If the other side did not agree to enlarge the time, the party wishing further time would have to take a step in the action. I am of opinion that this is settled by decision, that obtaining time by agreement is not a step in the action. The case *Chappell v. North (1)* seems to be exactly in point, and I do not see why I should not follow it.”

[Emphasis Added]

Upon our perusal, *Chappell v. North* [1891] 2 QB 252 and *Brighton Marine Palace and Pier Ltd v. Woodhouse* [1893] 2 Ch 486 were cited by the Appellants in *Ford's Hotel Company Ltd v. Bartlett* [1896] AC 1 (HL).

[60] In *Ford's Hotel Company*, the Appellants obtained the Respondent's consent on three (3) occasions for extensions of time to deliver their Defence. Upon refusal of a fourth request, they applied by summons for a further extension in chambers which provides, “Let all parties concerned attend the master at chambers on the hearing of an application on the part of the defendants that they may have one month's further time to deliver defence herein”. The master granted fourteen (14) days. The Appellants subsequently applied for a stay of proceedings on the ground that the dispute ought to be referred to arbitration pursuant to the contract entered into between the parties. The master granted the stay which was affirmed by Collins J. with leave to appeal. The Court of Appeal set aside the stay on the basis that the Appellants had taken a “step in the proceedings” within the meaning of s 4 of the Arbitration Act 1889. The House of Lords dismissed the appeal and affirmed the order of the Court of Appeal.

[61] Lord Halsbury LC articulated that the law requires a party seeking arbitration to act promptly so as to avoid delay and wasted costs, observing at pp 4-5 as follows:

“The sole question upon which we have been engaged so long is whether this is a ‘step in the proceedings’. *It seems to me that it is*. I am not going to give any definition of what a ‘step in the proceedings’ may be; it is enough for this case to say that this is a ‘step in the proceedings’.

My Lords, there can be no doubt that what was in the mind of the Legislature was this **one of the great scandals which induced the Legislature to interfere by statutory provision was the delay, and another was the costs incurred, notwithstanding that the proceedings did not go on, so that there were a great number of proceedings for which the parties had to pay although they furnished no ultimate decision of their rights**. The intention of the Legislature in giving effect to the contract of the parties, and saying that one of them should be entitled to make an application to insist that the matter should be referred according to the original agreement, was that they should



at once, and before any further proceedings were taken, specify the terminus a quo, and that if an application to stay proceedings was made under those circumstances, then that the Court should enforce the contractual obligation to go to arbitration. **My Lords, that seems to me a very wise provision: that costs should not be thrown away in beginning to litigate.”**

[Emphasis Added]

[62] It is not the request for time *per se* that is determinative, but the fact that it was pursued judicially, thereby invoking the Court’s jurisdiction and process, and resulting in a formal order, which constitutes a step in the proceedings. Lord Watson pointed out at p 5 as follows:

“My Lords, I am of the same opinion. The only question raised by this appeal is an exceedingly small one, and in my opinion it has been rightly decided by the learned judges in the Appeal Court. I see no reason to doubt that **an order obtained upon a summons for extension of time** for delivery of defence is a ‘step in the proceedings’ by the defendant within the meaning of s 4 of the Arbitration Act.”

[Emphasis Added]

Similarly, Lord Shand enunciated at p 6:

“My Lords, I am also of opinion that the application by the appellants for an extension of time to deliver their defence, upon which an order giving fourteen days was obtained, was a step in the proceedings. **The proceeding in question was unlike that in the cases which have been mentioned, where agents without coming into court at all had given an extra judicial and voluntary consent, because the proceeding took place judicially in chambers, which was the same as if in Court. The proceeding of presenting such a summons and supporting it before the master was unquestionably judicial and implied a statement to the effect that the appellants were to defend the action. It was on that representation only that the Order of Court was obtained.** Having regard to the provisions of the arbitration statute this appears to me to have been in effect an abandonment of the proposal to have the subject of the cause disposed of by arbitration. **On these grounds I am of opinion with your Lordships that the appellants’ summons, with what followed on it, was a step in the proceedings, and that the judgment of the Court of Appeal ought to be affirmed.”**

[Emphasis Added]

[63] It becomes clearer to us that, in that case, the Appellants’ extension of time was not obtained informally or extra judicially by consent. Instead, as Lord Shand observed, they invoked the Court’s process by applying for an extension of time in chambers and obtaining an order. This is treated as a judicial step, equivalent to acting in open Court. By making and supporting the application, the Appellants represented to the Court that they intended to defend the action. The order granting time was made on that basis. The law treats this as committing to litigation which, according to Lord Halsbury LC,



the Arbitration Act 1889 seeks to prevent in order to avoid delay and wasted costs before arbitration is invoked. In our considered view, Lord Shand's remarks, namely, "unlike that in the cases which have been mentioned, where agents without coming into court at all had given an extra judicial and voluntary consent", demonstrate that the facts in *Ford's Hotel Company* ought to be distinguished from cases involving extensions of time obtained by consent outside Court proceedings. Accordingly, *Ford's Hotel Company* cannot be taken to have overruled such cases.

[64] In our perusal, the authority of the House of Lords in *Ford's Hotel Company*, now of over a century's vintage, endures. Earlier authorities decided by the English lower Courts, such as *Chappell v. North* [1891] 2 QB 252 and *Brighton Marine Palace And Pier Ltd v. Woodhouse* [1893] 2 Ch 486, in their proper context, must be read together with *Ford's Hotel Company*. Further, the Departmental Advisory Committee on Arbitration Law (DAC), chaired by the Rt. Hon. Lord Justice Saville, in its 1996 Report on the Arbitration Bill (published in *Arbitration International*, Vol 13 (3), pp 275-316) to which we have had the privilege of referring, made no indication of any intention to alter the position in *Ford's Hotel Company*.

[65] *Ford's Hotel Company* was cited in *Halsbury's Laws of England* (1991) (4th Edition) (Volume 2), para 627, pp 347-348, without further elaboration that there was a formal application to the Court by way of a summons and a Court order. We now reproduce the relevant portion of the paragraph, with certain modifications made to the footnote details appearing in square brackets for ease of reference:

"627. Acknowledgment of service and step in the proceedings ... Steps in the proceedings have been held to include: the filing of an *affidavit* in opposition to a summons for summary judgment [Unless an application for a stay is made before or at the same time: *Pitchers Ltd v. Plaza (Queensbury) Ltd* [1940] 1 All ER 151, CA; *Rumput (Panama) SA v. Islamic Republic of Iran Shipping Lines, The Leage* [1984] 2 Lloyd's Rep 259; *Turner and Goudy v. McConnell* [1985] 2 All ER 34, [1985] 1 WLR 898, CA], service of a defence [*West London Dairy Society Ltd v. Abbott* (1881) 44 LT 376], and an application to the court for leave to serve interrogatories [*Chappell v. North* [1891] 2 QB 252], or for a stay pending the giving of security for costs [*Adams v. Catley* (1892) 66 LT 687], or for an extension of time for serving a defence [*Ford's Hotel Co Ltd v. Bartlett* [1896] AC 1, HL; see also *Smith & Co v. British Marine Mutual Insurance*], or for an order for discovery [*Parker, Gaines & Co Ltd v. Turpin* [1918] 1 KB 358], or for an order for further and better particulars [*Chappell v. North* [1891] 2 QB 252]. The following have been held not to be steps: acts preliminary to the issue of proceedings, a request in correspondence for an extension of time for serving a defence [*Ives and Barker v. Willans* [1894] 2 Ch 478, CA; *Brighton Marine Palace and Pier Ltd v. Woodhouse* [1893] 2 Ch 486], the filing of affidavits in answer to an application by the plaintiff for the appointment of a receiver [*Zalinoff v. Hammond* [1898] 2 Ch 92; *Cie du Sngal et de la Cte Occidentale d'Afrique v. Smith & Co and Woods & Co* (1883) 53 LJ Ch 166 at 169], transferring a summons into counsel's list [*Lane v. Herman* [1939] 3 All ER 353. CA.], applying to strike out a defective statement of claim [*Eagle Star Insurance Co Ltd v. Yuval Insurance Co*



Ltd [1978] 1 Lloyd's Rep 357], resisting an application for an interlocutory injunction by putting in evidence and appearing in court [*Roussel-Uclaf v. G D Searle & Co Ltd* [1978] 1 Lloyd's Rep 225], and applying for a stay on grounds other than that the dispute was subject to an arbitration agreement [*R G E (Group Services) Ltd v. Cleveland Offshore Ltd* (1986) 11 Con LR 77].”

[Emphasis Added]

We also note that reference to *Ford's Hotel Company* was omitted in *Halsbury's Laws of England* (2008) (5th Edition) (Volume 2).

[66] Quite recently, in *Fairpark Estates Ltd And Others v. Heals Property Developments Ltd* [2023] 1 All ER (Comm) 250, Richard Williams J had applied *Ford's Hotel Company* and observed at pp 283-284 as follows:

“[73] As noted by the Judge, the reported cases are difficult to reconcile, and they give no clear guidance on the nature of a step in the proceedings. At one end of the spectrum, there is a case where a defendant applies for and obtains a court order extending the time for filing their defence, which is taken (subject to the question of election) to be a step in the proceedings *Ford's Hotel*. At the other end of the spectrum is an agreement made in correspondence between the parties for an extension of time for filing a defence, which is taken not to be a step in the proceedings, *Brighton Marine*. In my judgment, the Judge was not wrong to conclude that the present case more properly falls within the reasoning in *Ford's Hotel* rather than *Brighton Marine*:

- (i) This was not simply a private agreement made by the parties that did not involve the court such that the parties were taking a step altogether outside the action;”

[Emphasis Added]

[67] Suffice it to say that, based on the foregoing discussion, correspondence between solicitors and extra-judicial agreements between the parties to extend time for filing a Defence do not constitute a step in the proceedings. Had consent been refused and no agreement reached, a formal application to the Court culminating in an order would have been required and would have constituted a step in the proceedings. By contrast, the obtaining of consent, sought precisely to avoid such a step, cannot itself be regarded as a step in the proceedings. Therefore, not all requests for an extension of time amount to a step in the proceedings.

[68] For reasons that will become apparent, *Ford's Hotel Company* and *Halsbury's Laws of England* (1991) (4th Edition) were cited in *Sanwell*, whereas *Brighton Marine Palace & Pier Ltd v. Woodhouse* [1893] 2 Ch 486 was cited in *Usahabina v. Anuar Yahya* [1998] 1 MLRH 71. *Usahabina*, in turn, was referred to and distinguished in *Sanwell*.



(iv) Extension of Time: Judicial Engagement with *Ford's Hotel Company* in *Sanwell*

[69] We now turn to the Plaintiff's contention that this Court, in *Sanwell*, held that a request for an extension of time to file a Defence amounts to taking steps in the proceedings, where Mohtar Abdullah FCJ pointed out at pp 159-161 as follows:

"At this juncture, we note the existence of one salient fact in *Usahabina* which was mentioned in passing by the learned JC, but unfortunately not properly appreciated by him. It is this fact. In that case, the defendant who had entered an unconditional appearance failed to file his defence within the time limited for doing so. **He had requested for, and the plaintiff had agreed to, an extension of one week to file the defence. Pausing here for a moment, what the defendant did was clearly a step in the proceedings within the meaning of s 6 of the Act by requesting an extension of time to file the defence, clearly indicating an intention to deliver a statement of defence, thus abandoning the right to arbitration (see *Ford's Hotel Co v. Bartlett* [1896] AC 1)**

...

In this context, *Usahabina* was a case of the defendant taking more than one step in the proceedings, ie one step in filing the unconditional appearance and another step by applying for the extension of time, clearly indicating an intention to go on with the proceedings instead of asserting his right to arbitration. Even if the first step was not a step in the proceedings as envisaged by s 6 of the Act, **the second step certainly was.** The situation is worse if one takes into account the two alternative prayers in his summon in chambers. **On this fact, the learned JC could have properly concluded that the defendant had taken a step in the proceedings not because of the entry of unconditional appearance but because of his application for the extension of time.** The conclusion reached by the learned JC that the entry of an unconditional appearance was a step in the proceedings cannot be the basis for a similar finding in our present case. **The facts are clearly distinguishable.** On the facts of our present case, the appellant has not abandoned his right to resort to arbitration."

[Emphasis Added]

[70] In reply, the Defendant argues that the remarks made by this Court in *Sanwell*, quoted above, were *obiter dicta* as they were not relevant to the issue before the panel which concerned the entering of an unconditional appearance. The Defendant further contends that the very same *dicta* which addressed the issue of an extension of time (i) have given rise to the impression that a request for an extension of time *simpliciter* amounts to a step in the proceedings on the House of Lords' authority of *Ford's Hotel Company v. Bartlett* [1896] AC 1 and (ii) have unfortunately resulted in a domino effect whereby numerous subsequent cases post-*Sanwell* have gone on to incorrectly apply *Sanwell* as authority for the proposition that such a request amounts to a step in the proceedings.



[71] In our perusal, the issue before the learned panel in *Sanwell* concerned the entering of an unconditional appearance and there was no issue of extension of time. Mohtar Abdullah FCJ observed at p 156 as follows:

“In the present appeal, the question posed to this court is ‘whether the function to be served by an entry of appearance in one statute, ie the Rules of the High Court 1980 (‘the RHC’) is the same as the function to be served by the words ‘steps in the proceedings’ in s 6 of the Arbitration Act 1952’.”

[Emphasis Added]

[72] In distinguishing the facts in *Usahabina* from those in the appeal before it, the learned panel nevertheless canvassed the question of an extension of time. That is not all. Upon our review, the observations on extension of time were made with reference to *Ford’s Hotel Company*, but (i) without any substantive discussion of the facts of that case; (ii) without any analysis of whether an extension of time by consent, as opposed to one obtained by an application filed in Court, constitutes a step in the proceedings; and (iii) without analysing how the reasoning of the House of Lords was applicable to the facts in *Usahabina*.

[73] In *Usahabina v. Anuar Yahya* [1998] 1 MLRH 71, the context in which the extension of time was sought was one of agreement between the parties without the involvement of a Court order. Augustine Paul JC observed at p 72 as follows:

“On 13 June 1997 the writ of summons was served on the defendant who entered an unconditional appearance to it on 19 June 1997. The defendant did not file his defence within the time limited for doing so, that is to say, by 3 July 1997. The plaintiff allowed the defendant’s request for an extension of one week to file the defence. As he failed to file the defence within the extended period the plaintiff entered judgment in default on 15 July 1997 ... In the affidavit in support of the application it was affirmed that after the extension of time to file the defence was granted it was realized that the matter must be referred to arbitration.”

[Emphasis Added]

His Lordship further observed at p 78 as follows:

“On the other hand a defendant’s solicitors writing for further time to deliver defence (see *Brighton Marine Palace & Pier Ltd v. Woodhouse* [1893] 2 Ch 486); giving notice to the plaintiff, upon entering an appearance, requiring him to deliver his statement of claim (see *Ives and Barker v. Willans* [1894] 2 Ch 478) and filing affidavits and contesting an application for an interlocutory injunction (see *Roussel-Uclaf v. GD Searle & Co Ltd and GD Searle & Co* [1978] 1 Lloyd’s Rep 225) have been held not to be steps in the proceedings. Thus the defendant’s request for extension of time to file his defence does not amount to the taking of any steps in the proceedings.”

[Emphasis Added]



[74] At p 163, this Court in *Sanwell* referred to *Halsbury's Laws of England* (1991) (4th Edition) as follows:

“If the applicant has taken his first step in the proceedings by entering an appearance, that step is a permissible step that is not considered to be a step in the proceedings that would bar an application for stay. However, if the applicant has subsequently delivered any pleadings, or taken any other step in the proceedings which indicates his election to allow the action to proceed in the court, the applicant will be considered to have abandoned his right to seek recourse to arbitration and would be barred from applying for a stay of the proceedings. *Halsbury's Laws of England* (4th Ed, Reissue) para 627, at pp 347-348, explains the situation:

The applicant must have taken no step in the proceedings after acknowledgment of service. A step in the proceedings is an act which both invokes the jurisdiction of the court and which demonstrates the applicant's election to allow the action to proceed. An applicant may take what would otherwise be a step if he makes it clear that the act is done without prejudice to his right to apply for a stay. Steps in the proceedings have been held to include: the filing of an *affidavit* in opposition to a summons for summary judgment, service of defence, and an application to the courts for leave to serve interrogatories, or for a stay pending the giving of security for costs or for an extension of time for serving a defence, or for an order for discovery, or for an order for further and better particulars.”

[75] In our perusal, O 3 and O 18 of the Rules of Court 2012 [P.U.(A) 205/2012] were not covered in relation to the discussion on request for an extension of time to file a Defence in *Sanwell*. With all due respect, we are of the considered view that when this Court in *Sanwell* opined that an application for an extension of time “certainly” constitutes a step in the proceedings, the cumulative effect is that the words “intends to defend” under O 18 r 2(1) are effectively read into the requirement of an “unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed of by arbitration” under limb (c) of *Sanwell*, thereby elevating a mere intention to file a Defence into an actual step in the proceedings and rendering the avenue for extension of time by consent under O 3 r 5(3) illusory.

[76] Order 3 rule 5(3) provides an avenue by which extensions of time may be obtained by consent “without an order of the Court being made for that purpose”. This operates alongside O 18 r 2(1), which prescribes the time within which a Defendant must serve its Defence, unless the Court grants leave to the contrary.



Order	Rule
Order 3 Time	<p>Extension of time (O. 3, r. 5)</p> <p>5. (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these Rules or by any judgment, order or direction, to do any act in any proceedings.</p> <p>(2) The Court may extend any such period as referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.</p> <p>(3) The period within which a person is required by these Rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent in writing without an order of the Court being made for that purpose.</p>
Order 18 Pleadings	<p>Service of defence (O. 18, r. 2)</p> <p>2. (1) Subject to paragraph (2), a defendant who enters an appearance in, and intends to defend, an action shall, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of fourteen days after the time limited for appearing or after the statement of claim is served on him, whichever is the later.</p> <p>(2) If a notice of application under Order 14, rule 1 is served on a defendant before he serves his defence, paragraph (1) shall not have effect in relation to him unless by the order made on the notice of application, he is given leave to defend the action and, in that case, shall have effect as if it required him to serve his defence within fourteen days after the making of the order or within such other period as may be specified therein.</p>

Table 5.0: *Extension of time under Orders 3 and 18, the Rules of Court 2012*

[77] Falling short of the requisite judicial engagement with the authorities in their proper context, we are therefore of the considered view that the observations made in *Sanwell* in relation to a request for an extension of time to file a Defence were *obiter dicta*. With all due respect, the difficulties with a blanket proposition that a request for an extension of time constitutes a step in the proceedings is that it distracts attention from the true inquiry, which calls for a holistic assessment of the circumstances of the request, including the party from whom it is sought and the manner in which it is pursued. Therefore, given the cursory nature of the observations, with all due respect, we do not read the learned panel in *Sanwell* as having intended the remarks to be binding upon the lower courts.



(v) Extension Of Time: Post-*Sanwell* Cases

[78] Coming from the ultimate judicial authority of this land, *Sanwell* was applied by the Court of Appeal in *IFCI Limited v. Archipelago Insurance Limited* [2022] 2 MLRA 462, where the learned panel observed as follows:

“[25] Reverting to the present case, the 2nd defendant had requested twice for an extension of time to file its statement of defence. This request for an extension of time to file the defence, as was held by the Federal Court in *Sanwell Corp*, is a step in the proceedings indicating an intention to deliver a statement of defence, thus abandoning the right to arbitration.

...

[29] With regards to the 2nd defendant’s contention on the reservation of rights to refer the dispute to arbitration, **the facts show that when the 2nd defendant sought the extension of time to file the statement of defence, the 2nd defendant did not mention its intention to refer the dispute to arbitration pursuant to the arbitration clause in the AIL Policy.** The application for stay of proceedings was only made six days after the plaintiff has served its reply to the 2nd defendant’s statement of defence. This cannot be said a prompt action by the 2nd defendant or a clear indication to refer the matter to arbitration. Furthermore, the express reservation in the statement of defence does not discard or dilute the requirement under s 10(1) of the Act that the application for stay of proceedings must be made before taking any other steps in the proceedings.

[30] In *Yeo Eng Lam lwn. Infinity Vantage Sdn Bhd*, this court had decided that the defendant had taken steps in the proceedings when filing an application to disqualify the plaintiff’s solicitor and filing the statement of defence and its counterclaim, although the defendant has made an express reservation to refer the matter to arbitration in its statement of defence.

[31] In this regard, we agree with counsel for the plaintiff that the judicial commissioner fell into error in distinguishing *Yeo Eng Lam* case merely because two steps had been taken in the proceedings by the defendant in that case. Perusing the authorities alluded to earlier, the number of steps taken is immaterial as the pertinent consideration is whether there is any other steps taken in the proceedings as envisaged under s 10(1) of the Act. **In any event, in the present case, we find the first step in the proceedings taken by the 2nd defendant was the request for an extension of time to file the statement of defence and secondly, the filing and the serving of the same on the plaintiff.”**

[Emphasis Added]

[79] A line of High Court authorities applying *Sanwell* was cited by the Plaintiff to demonstrate a long-established position that a request for an extension of time to file a Defence constitutes a clear indication of an intention to defend the action (including *Winsin Enterprise Sdn Bhd v. Oxford Talent (M) Sdn Bhd* [2009] 3 MLRH 699; *Kem Krest LLC v. R P Trust Inc & Ors* [2021] MLRHU 1836, *Mun Seng Fook v. AIG Malaysia Insurance Berhad* [2018] 3 MLRH 203 which form



part of Leave Question No. 4). As will be seen below, we find it instructive to reproduce the relevant passages from those High Court judgments to illustrate the extent to which those decisions were influenced by *Sanwell*.

[80] In *Winsin Enterprise Sdn Bhd v. Oxford Talent (M) Sdn Bhd* [2009] 3 MLRH 699, the Defendant's solicitors requested an extension of time to file the Defence from the Plaintiff's solicitors by telephone on 8 July 2008, which was granted and confirmed by letter dated 9 July 2008 extending time to 21 July 2008. On that date, instead of filing the Defence, the Defendant applied by summons-in-chambers for a stay of proceedings under s 10(1), seeking to refer the dispute to arbitration pursuant to the contract. The application was opposed, the central issue being whether the request for and obtaining of the extension from the Plaintiff's solicitors constituted a step in the proceedings so as to bar the stay. The learned High Court Judge observed at p 701-703 as follows:

"[12] In relation to the next objection regarding the taking of any other step, the question concerns the request of an extension of time to file defence by the defendant. Does such an act constitute the taking of a step in the proceedings such that the defendant is considered to have waived his right to arbitration?

...

[14] In *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor the Federal Court made an important observation of the facts in *Usahabina v. Anuar Yahya* [1998] 1 MLRH 71 which is of much guidance in this case. At p 221 the Federal Court said ...*

[15] From the facts in this case it is clear that the defendant has abandoned its right to arbitration by requesting for time to file defence. **A defence is only filed where a party intends to defend an action such as is the case here. This can be seen from O 18 r 2(1) Rules of the High Court 1980 (RHC 1980). That order provides that where a defendant intends to defend the action instituted, the next step after an entry of a memorandum of appearance is to serve a defence on the plaintiff within the prescribed period unless granted leave to the contrary by the court ...**

...

[17] From the evidence it is clear that the defendant sought and was granted by the plaintiff an extension of time to 21 July 2008 to serve and file the defence. Having evinced such an intention to the plaintiff s 10(1) is no longer available to the defendant. This would be the position whether under the new or old law. In fact I am inclined to go further to say that because of the language deployed in s 10(1) where stay is now mandatory, subject to the reservations as earlier discussed, applicants who seek to rely on an arbitration agreement must make the application for stay promptly, even before the filing of an appearance.

...

[18] In conclusion the current proceedings are brought in respect of a matter which is the subject of an arbitration agreement. In such an instance the grant



of a stay will be mandatory. However, because the defendant applicant has taken other steps in the proceedings, namely by requesting and obtaining an extension of time to file defence, the defendant is deprived of the right to invoke s 10(1) Arbitration Act 2005 (Act 646). Enclosure 5 is therefore dismissed with costs.”

[Emphasis Added]

[81] In *Mun Seng Fook v. AIG Malaysia Insurance Berhad* [2018] 3 MLRH 203, the Appellant commenced his writ action dated 14 June 2017. The writ and statement of claim were served on the Respondent on 3 July 2017, who entered an appearance on 10 July 2017. At case management on 18 July 2017, upon the request of the Respondent’s solicitors, the Appellant’s solicitors sought, on the Respondent’s behalf, an extension of time to file the Defence until 1 August 2017, beyond the original deadline of 24 July 2017, which was granted by the learned Sessions Judge. At no time was any intention to apply for a stay of proceedings communicated to the Appellant’s solicitors or to the court. Subsequently, on 28 July 2017, the Respondent filed the application to stay the writ action. The learned High Court Judge articulated:

“[15] In *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor* [2002] 1 MLRA 156, the Federal Court had affirmed that the entry of appearance conditional or unconditional is permitted and does not amount to a step in the proceedings. But that is not the only position. The Federal Court summarised the legal position in Malaysia as follows ...

[16] In *Ford’s Hotel Company Ltd v. Bartlett* [1896] AC 1, the House of Lords held that a request for extension of time for serving of defence is considered a step taken in the proceedings. Lord Halsbury LC stated in the following fashion ...

...

[19] Returning to the present case, after the filing of appearance on 10 July 2017 followed by the respondent’s letter of 11 July 2017 requesting for an extension of time to file the statement of defence and the grant of such request by the learned Sessions Judge, there was no indication whatsoever from the respondent to the appellant or the court that an application for stay of the writ action will be filed and that it intends to take up the matter to arbitration. Nothing was stated in the respondent’s letter that the application for such extension is without prejudice to its right to apply for stay of proceedings.

[20] It is of the considered view that the respondent has submitted to the jurisdiction of the court on the first case management dated on 18 July 2017 when the respondent did not attend court but requested the appellant’s solicitors to mention on their behalf to request for an extension of time to file the statement of defence to 1 August 2017. The respondent’s solicitors did not attend personally to inform the court that the respondent is taking out an application for stay or that the request for extension of time to file the statement of defence was on a without prejudice basis. In *Sim Hiang Kiaw & Ors v. Lee Hoi Kim Construction Co* [1985] 2 MLRH 546 the defendants therein



had appeared and attended the hearing of the summons for directions without any objection or qualification. The High Court held that the defendants had already taken a step in the proceedings within the meaning of s 6 of the Arbitration Act 1952.”

[Emphasis Added]

[82] In *Kem Krest LLC v. R P Trust Inc & Ors* [2021] MLRHU 1836, the Plaintiff in that case contends that the 1st defendant had taken steps in the proceedings by seeking extensions of time to file its Defence. In support of this contention, the Plaintiff relies on three (3) such requests made by the 1st defendant first, on 12 May 2021 by email from its then solicitors; second, on 25 May 2021 during case management before the Deputy Registrar; and third, on 10 June 2021 by letter from its solicitors seeking a further extension of time. The learned Judicial Commissioner made the following observation:

“[13] I am of the view, whether any step taken by a litigant should be considered as a “step in the proceedings” for the purposes of an application under s 10 of the Arbitration is fact dependent. It would depend on the facts of each case. **I am guided by the judgment of Mohtar Abdullah FCJ in *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor* [2002] 1 MLRA 156 ...**

...

[15] Therefore, can it be said that the repeated requests for extension of time to file its Defence constitute an unequivocal intention to proceed with the suit and an abandonment of the 1st defendant’s right to refer the dispute to arbitration or otherwise.

[16] I am of the opinion, that based on the facts of this case, the said repeated requests for an extension of time do indicate an intention to proceed with the suit and therefore an abandonment of the right to arbitrate.

[17] When I consider the plethora of authorities in this area, I find that the Courts have held that when a party applies for an extension of time to file defence without any reservation of rights, the said action is deemed to be a step in the proceedings. This appears in the judgment of our eminent Judges appearing in the following cases ...

[18] This is to be contrasted to a situation where the steps taken by the litigant includes a clear reservation of right not to abandon the right to arbitrate or by a statement that despite the step taken the party intends to reserve its rights that have been accorded under the terms of the agreement

...

[19] I note that the 1st defendant’s counsel tried to persuade this Court to consider that the 3 requests for extension of time allegedly do not unequivocally show an intention to proceed with the suit and should not be seen as an abandonment of its right to arbitrate. Counsel for the 1st defendant valiantly argued that the delay and the repeated requests made were due to an internal arrangement that had to be sorted between the Defendants. Otherwise, the 2nd and 3rd Defendants may prejudice their insurance policy



coverage as the consent of the insurers was required before any steps were to be taken. Therefore, learned counsel for the 1st defendant contends that the right to arbitrate remains intact despite the continued requests for extension of time by the 1st defendant.

[20] I am not convinced by the said argument. I am of the view that the question of whether the Defendant had shown an intention to proceed with the suit and abandon the right to arbitrate must be looked at objectively from the steps taken by the said litigant. **It may have been different if the Defendant had reserved its right or indicated from the outset that the said request is made on a without prejudice basis and is subject to counsel's advice.** In this case, no such reservation of rights was clearly stated by the 1st defendant in any form whatsoever."

[Emphasis Added]

[83] In *Misc Berhad v. Cockett Marine Oil (Asia) Pte Ltd (Encls 16 & 22)* [2021] MLRHU 364, the learned Judicial Commissioner observed as follows:

"[63] The **Defendant's solicitors' request for an extension of time** to serve a Defence **amounts in law to a step in these proceedings** and a submission to the jurisdiction of this Court. **This position in law has been made clear in *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor* [2002] 1 MLRA 156, *Mun Seng Fook v. AIG Malaysia Insurance Berhad* [2018] 3 MLRH 203 and *Winsin Enterprise Sdn Bhd v. Oxford Talent (M) Sdn Bhd* [2009] 3 MLRH 699."**

[Emphasis Added]

[84] We are mindful of the practical difficulties arising from the conventions surrounding the formulation of written reasons in judicial decision making. The common law tradition does not require Courts to structure judgments into clearly delineated portions labelled as *ratio decidendi* and *obiter dicta*. As the final Court of Appeal, the institutional role of this Court extends beyond the resolution of disputes and the correction of errors to the provision of principled guidance and supervision in the development of judge made law. However, we are of the considered view that it remains for those Courts to ascertain the precedential effect of this Court's individual decisions, and any attempt by this Court to dictate the precise scope of that effect, thereby pre-empting that function, would risk conveying a lack of institutional trust with implications for the coherence of the Rule of Law.

[85] Against this backdrop, it was John Fletcher Moulton, Lord Justice of Appeal, who observed that "The real greatness of a nation, its true civilization, is measured by the extent, in this land, of obedience to the unenforceable" (published posthumously as "*Law and Manners*", *The Atlantic Monthly* (1924), 134, pp 1-5). Having regard to the observations made on extension of time in *Sanwell* as faithfully applied by the lower courts in a series of cases, there appears to be a discernible pattern whereby those Courts have treated themselves as obligated to conform to the *dicta* of this Court, an instance of obedience to



what is, strictly speaking, non-binding. This observation is reinforced by the fact that, notwithstanding O 3 r 5(3) of the repealed Rules of the High Court 1980 [P.U.(A) 50/1980], which is substantially reproduced in O 3 r 5(3) of the Rules of Court 2012 [P.U.(A) 205/2012] permitting extensions of time by consent, the *dicta* in *Sanwell* have been treated as a decisive consideration. Therefore, at the risk of reiterating what is otherwise regarded as a settled position in our jurisdiction, we consider it proper to address the precedential effect of this Court's *dicta*.

[86] Long before *Sanwell* was decided, those who are familiar with the history of the ideas of precedent would recognise that there exists a further category beyond the binary distinction between ratio and *dicta*. Courts have long drawn distinctions between different types of *dicta* to determine the weight to be accorded to them when seeking guidance from judicial authorities. Megarry J in *Richard West and Partners (Inverness) Ltd v. Dick* [1969] 2 Ch. 424 articulated at pp 431-432 as follows:

“I accept that what Lord Selborne and Lord Cottenham said must be ranked as *dicta*. But there are *dicta* and *dicta*. **Some authorities distinguish between *obiter dicta* and judicial *dicta*. The former are mere passing remarks of the judge, whereas the latter consist of considered enunciations of the judge's opinion of the law upon some point which does not arise for decision on the facts of the case before him, and so is not part of the *ratio decidendi*. But there is, I think, a third type of *dictum*, so far innominate. If instead of merely stating his own view of the point in question the judge supports it by stating what has been done in other cases, not reported, then his statement is one which rests not only on his own unsupported view of the law but also on the decisions of those other judges whose authority he has invoked. He is, as it were, a reporter pro tanto. Such a statement of the settled law or accustomed practice carries with it the authority not merely of the judge who makes it but also of an unseen cloud of his judicial brethren. A *dictum* of this type offers, as it seems to me, the highest authority that any *dictum* can bear; and I think that a judge would have to be very sure of himself before he refused to follow it.** What Lord Cottenham said in *Ex parte Pollard* (Mont. & Ch. 239, 251) plainly seems to fall within this category ...”

[Emphasis Added]

[87] Cairns J in *WB Anderson & Sons Ltd and Others v. Rhodes (Liverpool) Ltd and Others* [1967] 2 All ER 850 observed as follows at p 857:

“Under the law as it was understood to be before *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* was decided in the House of Lords, there could be no liability for negligent misrepresentation unless there was a contractual duty of care. The actual decision in the *Hedley Byrne* case was that the plaintiffs could not succeed because the representations made to them were expressly made without responsibility, but all the law lords agreed that in some circumstances there could be a liability in tort for negligent misrepresentation. **An academic lawyer might be prepared to contend that the opinions expressed by their lordships about liability for negligent misrepresentation were obiter, and that *Candler v. Crane, Christmas & Co* is still a binding decision.** In any



judgment that would be an unrealistic view to take. **When five members of the House of Lords have all said, after close examination of the authorities, that a certain type of tort exists, I think that a judge of first instance should proceed on the basis that it does exist without pausing to embark on an investigation of whether what was said was necessary to the ultimate decision.**"

[Emphasis Added]

[88] Putting Cairns J's observation in the context of *Sanwell*, we appreciate that this Court, by reason of the leave to appeal mechanism in place, decides a limited number of cases, and that those which come before it are, by their nature, of public importance. In such cases, observations made by way of *dicta* assume particular significance, and it is for this reason that the marks of this Court command profound respect and attention, and, as is evident from post-*Sanwell* cases, have been followed by the lower courts.

[89] In a manner not dissimilar to the experience of our lower courts post-*Sanwell*, it may be observed that lower courts in Australia have likewise regarded themselves as bound by *dicta* following the High Court of Australia's decision in *Farah Constructions Pty Ltd v. Say-Dee Pty Ltd* (2007) 236 ALR 209, in which the New South Wales Court of Appeal was criticised for recognising an unjust enrichment-based cause of action. In that context, the High Court, sitting as a five-member panel, made the following observation at p 259:

"[131] It was a grave error for the Court of Appeal to have taken this step. That is so for two reasons: it was very unjust and it has caused great confusion.

...

[134] ... **Leaving aside any technical question about whether the doctrine of *stare decisis* strictly applied**, abandonment of the rule that the plaintiff must prove notice on the part of the defendant is not an appropriate step for an intermediate Court of Appeal to take in relation to so long-established an equitable rule for other illustrations of it both before and after *Barnes* can be found, its existence had been acknowledged in the Court of Appeal itself the previous year and its correctness has been assumed in this court. If, on the other hand, the Court of Appeal is to be treated not as abandoning the notice test for the first limb of *Barnes*, but rather as recognising a new and additional avenue of relief, it is an avenue which tends to render the first limb otiose. **That too is not a step which an intermediate Court of Appeal should take in the face of long-established authority and seriously considered *dicta* of a majority of this court.**

...

[158] The changes by the Court of Appeal with respect to the first limb, then, were arrived at without notice to the parties, were unsupported by authority and **flew in the face of seriously considered *dicta* uttered by a majority of this court.** They must be rejected."

[Emphasis Added]



[90] The ambiguities surrounding this classification lie in the considerations relevant to characterising *dicta* as “seriously considered”. Certain *dicta* of the apex court may be “seriously considered”, yet not conform with long established authority (*Pape v. Federal Commissioner of Taxation* (2009) 238 CLR 1). Nor is it free from difficulty whether apex court *dicta* attract any binding force only where they are both “long established” and “seriously considered” (*CGU Workers Compensation (NSW) Ltd v. Garcia* (2007) 69 NSWLR 680). In *Zotti v. Australian Associated Motor Insurers Ltd* (2009) 54 MVR 111, Campbell JA articulated at p 130 as follows:

“[112] I have some *doubt about the proper way of reading Farah Constructions Pty Ltd v. Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22 at [134], [158] and [178] . **One reading is to treat it as saying that it is wrong for an intermediate Court of Appeal to depart from “seriously considered dicta” of a majority of the High Court (*simpliciter*). Another is to treat it as saying that it is wrong for an intermediate Court of Appeal to depart from seriously considered *dicta* of a majority of the High Court concerning a topic on which there is a long-established line of authority. Another is that the clear finding that this court had been wrong to depart from views about the first limb of *Barnes v. Addy* (1874) LR9 Ch App 244 that had been expressed in *Consul Development Pty Ltd v. DPC Estates Pty Ltd* (1975) 132 CLR 373 ; 5 ALR 231 is based on particular facts of the case.”**

[Emphasis Added]

[91] We are mindful that the use of the qualifiers “seriously considered” and “long-established authority” makes clear that any suggestion that lower courts should adhere to *dicta* is not intended to extend to every *dictum*. However, with all due respect, in light of the uncertainties, such roses are not in our garden. We are of the considered view that differing from the classification better serves the general interest of certainty and predictability in our arbitration law. Therefore, *obiter dicta*, by any other name and however compelling, do not bind lower courts in the same way as the *ratio decidendi*, by reason of its authoritative character, does.

(vi) Unequivocal Intention: Reservation And Waiver

[92] A Defendant who fails to assert its rights at the proper time, or takes action inconsistent with its assertion, may be held to have waived it. This underlies the practice of including an express reservation of rights in correspondence with the Court and the Plaintiff by a Defendant desirous of relying on the arbitration clause. We note that there are varying approaches used by the lower courts in the following authorities, including those cited by the Plaintiff.

[93] In *CLLS Power System Sdn Bhd v. Sara-Timur Sdn Bhd* [2015] MLRHU 25, it was observed that the unreserved or unqualified act of serving a Notice to Produce Documents Referred to in the Pleadings amounts to the Defendant having taken a step in the proceedings, thereby precluding the Defendant



from seeking a stay under s 10(1) of Act 646. The learned High Court Judge articulated at pp 31-33:

[27] ... Upon being served the writ and the statement of claim, the defendant, through its solicitors, wrote to the plaintiff a letter dated 4 December 2014 informing the plaintiff that it was 'entitled to the following documents referred to in your clients' said statement of claim'. Those documents were the various progress claims and other claims made by the plaintiff as well as a certification of a sum of RM16,336,972.15 as at 16 October 2012; and payment of RM550,000.00 made by the defendant. Together with that letter, a 'Notice to Produce Documents Referred to in Pleadings dated 4 December 2014' issued 'Pursuant to O 24 r 10 of the Rules of Court 2012' was enclosed 'by way of service on you as solicitors for the above named plaintiff'. **The request, made through legal counsel, was unqualified and unreserved.**

[28] It is the court's view that this **unreserved or unqualified step of serving a 'Notice to produce documents referred to in pleadings dated 4 December 2014' issued 'Pursuant to O 24 r 10 of the Rules of Court 2012 amounts to the defendant having taken a step in these Court proceedings.** Where that is the case, it is no longer open to the defendant to seek an order for stay under s 10 ...

[29] Although cl 29.1 would be wide enough to encompass the current claim of the plaintiff or the subject matter of the current proceedings in court if it were applicable in the first place, which the court has ruled that it does not for the reasons already set out; the mandatory stay nevertheless cannot be ordered. This is because the defendant had, by its own action or conduct, waived reliance on that arbitration clause and had agreed that the plaintiff's claim be resolved in court through the present proceedings. Save for that permitted under s 10, the defendant had itself utilised the process of court as found in the Rules of Court 2012. Where it has done so, it is regarded as having taken a step other than the step of filing for a stay. Under such circumstances, the order under s 10 is no longer available as of right.

...

[32] Now, s 10 requires an applicant such as the defendant to file for a stay of the proceedings in court 'before taking any other steps in the proceedings'. In fact, such an application may be made through the procedure provided under s 50. The object of such a requirement is clearly to preserve the defendant's position of non-submission to jurisdiction for the purpose of resolving the dispute or claim in question. Once the defendant has made that application, it may take any other step and that would not compromise or be taken as having compromised the defendant's position on the appropriate forum for resolution of the dispute or claim.

[33] In this case, the step taken by the defendant, that is the issue and service of a 'Notice to produce documents referred to in pleadings dated 4 December 2014 pursuant to O 24 r 10 of the Rules of Court 2012' even before the filing of this application on 12 December 2014, deprives the defendant of this order for a mandatory stay. Such a notice issued under O 24 r 10 serves as part of the discovery process available for claims filed in court. There are serious



ramifications and consequences upon the issue and service of such a notice. A party who is served with such a notice must respond within four days to the notice. Where a party fails to comply with such a notice, the other party may apply to court for an order of discovery.

[34] The party who is served with the notice, that is the plaintiff, must in response, issue a notice specifying in it a time within seven days for the defendant to inspect those documents that the plaintiff does not object to produce. If, however, the plaintiff objects to produce any of the documents, then the plaintiff must show cause why it should not produce. The burden is on the plaintiff to justify any refusal of production. These documents form part of the pleaded case.”

[Emphasis Added]

However, the Defendant before us submits that based on the following paragraph in the judgment, there was no arbitration clause in that case and therefore, any views expressed therein in relation to a Notice to Produce Documents Referred to in the Pleadings is purely *obiter*:

“[18] **Having carefully scrutinising the relevant clause pointed out by the defendant, the court agrees with the plaintiff that there is actually no arbitration agreement or clause in this case.** A careful reading of the relevant documents confirms the position taken by the plaintiff ...

...

[25] With respect, the court is not prepared to stretch the meaning and application of s 9(5) to include an instance where the mere reference to PAM conditions of sub-contract in cl 5 is sufficient to incorporate the PAM conditions of sub-contract and thereby the arbitration clause in cl 29.1 as part of the conditions of contract between these parties before the court. To do that will run counter to the clear intention of the parties and certainly, not in the face of the final term of the letter of award.”

[Emphasis Added]

[94] In *Life Plaza Sdn Bhd v. Pasukhas Construction Sdn Bhd* [2012] 5 MLRH 492, it was decided that the serving of Notice to Produce Documents Referred to in the Pleadings does not amount to the Defendant having taken positive steps in the proceedings. Additionally, the filing of Defence upon the instructions of the Court and with an express reservation stated in the said Defence to refer the matter to arbitration was not a step in the proceedings. The learned High Court Judge articulated at pp 499-501:

“[25] In this case the defendant had also served on the plaintiff a notice to produce documents mentioned in the pleadings as well as a letter asking for further and better particulars. The court notes the arguments of learned counsel for the defendant that these were steps taken to determine what the exact claim against the defendant was. The court is of the considered view that this step taken by the defendant would fall within the category of “other action” as stated by the Federal Court in *Sanwell Corporation*. And to



determine if the serving of the said notice and letter amounts to its having taken a positive step, the court would have to consider whether such action indicates an unequivocal intention to proceed with the suit and to abandon its right to refer to arbitration.

[26] In this regard, **the court is in agreement with learned counsel for the defendant that the serving of the notice and letter on the plaintiff does not amount to the defendant having taken positive steps. The court is unable to see how asking for particulars or for inspection of documents could be seen as amounting to an unequivocal intention to proceed with the suit. As such, on this score, the court finds that such action by the defendant does not amount to it having taken any positive steps in the proceedings.**

...

[29] It is thus in the face of these facts and circumstances that the Defence was filed on 30 January 2012. Paragraph 7 of the Defence reads as follows:

‘Defendan memfailkan Pembelaan ini tanpa prejudis kepada hak-haknya dan/atau kepentingannya dalam permohonannya untuk suatu penggantungan prosiding sementara menunggu remisi kepada Timbang Tara melalui Saman Dalam Kamar bertarikh 18 Januari 2012 dan Pembelaan ini adalah difailkan menurut arahan Mahkamah Yang Mulia ini yang diberikan pada 30 Januari 2012.’

[30] With the benefit of hindsight, the Court finds that since the defendant’s application for stay had been filed before it had taken any positive steps in the proceedings; the Court should have allowed encl 4 to be heard before directing the defendant to file its Defence which could be considered as taking a positive step in the proceedings. **In the circumstances of this case and the Court’s own role in directing that the Defence be filed, the Court is of the considered view that this act of filing the Defence should be viewed in the context of ‘other action’ as set out in *Sanwell Corporation*. In light of paragraph 7 of the Defence and the many protestations from learned counsel that there had been no abandonment of its rights to refer the dispute to arbitration, the Court finds that the filing of the Defence on the express instructions of the Court was not indicative of an unequivocal intention to proceed with the suit and to abandon its right to have the dispute disposed of by arbitration. As such, the Court finds that the filing of the Defence in the circumstances of this case does not amount to the defendant having taken a positive step in the proceedings.”**

[Emphasis Added]

[95] In *Comos Industry Solution GmbH v. Jacob And Toralf Consulting Letrikon Sdn Bhd & Ors* [2012] 4 MLRA 178, the Court of Appeal held that the Appellant, by applying to set aside the Respondent’s writ on the ground that local Courts had no jurisdiction to determine the dispute with an alternative prayer for leave to file a Statement of Defence (Enclosure 41), had not taken a step in the proceedings even when the reservation of rights to refer the dispute to arbitration is only stated in the *Affidavit* in Support of encl 41. The learned panel of the Court of Appeal observed at pp 183-184 as follows:



“[14] Our s 10 is differently worded. But the principles are the same. Whether an action amounts to a step in the proceedings is determined by the nature of the action and whether it indicates an unequivocal intention to proceed with the suit and to abandon the right to refer the dispute to arbitration. An application is not a step in the proceedings, if it does not express the willingness of the defendant to go along with the determination of the courts instead of arbitration. **A defendant who has specifically stated in the application or supporting affidavit that he intends to seek a stay is not estopped from asserting his right to invoke arbitration. An application, which is made in the event that the specific application for a stay is unsuccessful, is not a step in the proceedings.**”

[Emphasis Added]

[96] In *C&B Global Sdn Bhd v. Getthiss (M) Sdn Bhd* [2020] 2 MLRH 341, a request for an extension of time to file a Defence with the consent of the Plaintiff and the subsequent filing of the Defence pursuant to the directions of the Court were held not steps in the proceedings for the purposes of s 10(1) of Act 646. The learned High Court Judge pointed out as follows:

“[23] The main plank of the Plaintiff’s opposition is that the Defendant had taken steps in the proceedings prior to the filing of the Application and is therefore disqualified or is estopped from relying on s 10 of the AA. In this regard, **the Defendant had requested from the Plaintiff an extension of time to file the Defence as well as having filed the Defence before filing this Application; hence it is fatal according to the Plaintiff.**

...

[28] Likewise in this Suit, the Defendant was during the case management on 3 January 2019 which was the next working day after the filing of its appearance directed by the Deputy Registrar to file its defence within the prescribed time in the Rules of Court 2012. The Defendant was hence necessitated to seek an extension of time to file and thereafter file its defence in compliance with the aforesaid Court directive. However, the Defendant expressly reserved its right to refer the dispute to arbitration in para 25 of its Defence.

[29] ... **Upon my reading of para 25 of the Defence, it is nonetheless clear that the Defendant has reserved its right to have the dispute referred to arbitration.**

[30] In the unique circumstances of this case, I am convinced that the Defendant has the genuine intention to have its dispute with the Plaintiff arbitrated as agreed. There is also no reason why they should not be held to their bargain. **As to the Defendant’s request for an extension of time to file its Defence and the subsequent filing of the Defence, I am satisfied that it was not done by the Defendant voluntarily but out of necessity pursuant to the direction of the Court. The Defendant should not therefore be faulted for having taken steps in the Suit and hence deem to have waived or abandoned its rights to have the dispute arbitrated. I therefore find and hold that the Defendant had not taken steps in the Suit for purposes of s 10 of the AA.**”

[Emphasis Added]



[97] What is rather apparent to us is that a Defence is “pleadings” contemplated in limb (b) of *Sanwell*, which is not subject to the qualifications found in limb (c) governing “any other action”. Yet, as illustrated by the authorities cited, considerations of unequivocal intention, particularly in the form of a reservation of rights under limb (c), have been applied to limb (b), thereby blurring the distinction between “pleadings” and “any other action” in assessing whether there is an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed of by arbitration in the construction of “steps in the proceedings”. A common thread in the authorities is the emphasis on express reservation of rights, irrespective of whether the Applicant’s conduct for a stay is manifested in the pleadings or in any other action.

[98] With all due respect, we are of the considered view that an unequivocal intention “to proceed with the suit and to abandon the right to have the dispute disposed of by arbitration” cannot be established solely from the presence or absence of an express reservation of rights, all the more so where pleadings were filed not as a matter of choice, but pursuant to the directions of the Court. Given that a finding of unequivocal intention would suffice to displace the parties’ prior agreement to refer the matter to arbitration, entered into when relations were amicable, it must be a conclusion derived from a holistic assessment of the Applicant’s conduct, undistracted by what adversarial relations may bring to bear. In light of the pro-arbitration stance alluded to above, the burden of establishing such unequivocal intention cannot be met simply by pointing to the want of a mere line in the correspondence or pleadings. More definitive indication of waiver is required.

[99] To our minds, total reliance on an express reservation of rights clause risks shifting the focus of the inquiry on unequivocal intention to the wording of the clause, or its lack, and to its placement, instead of the Applicant’s conduct, viewed as a whole, in the factual matrix of the stay application. Further, to equate the generality of the wording of the clause, or its absence, with evidence of unequivocal intention, or to treat the absolute wording of the clause as negating such intention, is to reduce the inquiry to a jigsaw-like exercise of matching and fitting. Accordingly, we are of the view that an express reservation of rights, while a relevant indication, must not deflect the inquiry from the Applicant’s overall conduct in the circumstances of the case.

[100] In addition, looking at limbs (a) and (b) in *Sanwell*, one cannot help noticing at the outset that a step in the proceedings involves the act of filing a document in Court: limb (a) concerns the filing of a Memorandum of Appearance, which is a permitted step, whereas limb (b) concerns the filing of pleadings, which constitutes a definitive step in the proceedings. What remains an unexplored area is whether limb (c) also extends to an act of filing a document in court or to an oral application, which results in a corresponding formal order of the Court. On that footing, it would stand to reason that the Court is warranted in determining whether an action amounts to an unequivocal intention to proceed with the suit and to abandon the right to



have the dispute disposed of by arbitration. In the absence of a formal filing in Court resulting in a formal Court's order, can an action fall within limb (c) of *Sanwell* and be characterised as a step in the proceedings? As we have observed, the implication of *Ford's Hotel Company* is that costs are incurred, or in Lord Halsbury LC's words, "thrown away", only when the Court is called upon to determine an application upon hearing both parties and issues an order, which serves to illustrate the mischief of delay and wasted costs which the law seeks to obviate.

[101] Further, too often arguments have been advanced in support of the proposition that a request for an extension of time to file a Defence constitutes a step in the proceedings, premised on the assumption that the requesting party intends to file the Defence. In reality, no Defence has ever been filed. The intention to file a Defence is, thus, elevated into a step in the proceedings, rather than any actual step taken. In the absence of an actual step, is it tenable to equate a mere intention to file a Defence with a step in the proceedings, or is such an equation a fallacy in the underlying logic of limb (c) in *Sanwell*? We shall return to these issues in applying the principles laid down in *Yeo Eng Lam* to the facts of the present appeal.

(vii) The Ratio In *Yeo Eng Lam lwn. Infinity Vantage Sdn Bhd* (02(i)-20-03/2019(W))

[102] We pause to address another important aspect of the appeal. Concerns over the binding force of an appellate unwritten decision have been addressed by this Court on several occasions, including most recently, in *Tetuan Wan Shahrizal, Hari & Co v. PP* [2023] 4 MLRA 11. In that case, this Court by majority affirmed the Court of Appeal's decision, which had dismissed the High Court's decision. The High Court had relied on an unwritten decision of the Court of Appeal in allowing the Appellant's claim for legal fees to be paid out of monies seized under ss 50(1) and 51(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 [Act 613].

[103] Abdul Rahman Sebli CJSS observed at pp 14-16 as follows:

"[12] Without the benefit of the written grounds, there was no way that the learned judge could have known of the actual reason or reasons why the Court of Appeal decided the way it did in that case. In any case, it was wrong for him to have engaged in guesswork on the basis for the unwritten decision, which undoubtedly had weighed heavily in his mind in deciding whether or not to allow the appellant's claim.

[13] What binds the lower courts under the *stare decisis* doctrine is the *ratio decidendi* of the case and not mere similarity in the facts or in the law, or in the arguments of counsel, nor the obiter *dicta* of the case.

[14] **A lower court relying on an earlier unwritten decision of an appellate court must not assume that by affirming the decision of the lower court, the appellate court must have affirmed every finding of fact and law that the lower court had decided in favour of the winning party. Experience will**



tell that it is not uncommon for an appellate court to affirm or reverse the decisions of the lower courts on grounds other than those relied on by the lower courts.

[15] Nor must the court, in the absence of the written grounds, accept the argument that the appellate court in the earlier case decided the way it did because it accepted counsel's argument, even where the earlier case involved the same counsel. Such acceptance of counsel's argument must be reflected in the written grounds of judgment. The role of counsel is to assist and the court to decide.

...

[17] Obviously therefore, a decision that is delivered without the written grounds does not establish any principle or rule of law on which the decision is founded. The decision is therefore devoid of any *ratio decidendi* (rationale for the decision). It has no value as precedent. There may be instances where the court, either in its original or appellate jurisdiction, delivers a reasoned oral decision *ex tempore* but in that situation, the reasons must be reduced into writing in order for the decision to have any binding effect on the lower courts.

[18] We are not aware of any principle of law, nor have we been referred to any authority to say that the lower courts are bound by *stare decisis* even where the higher courts do not provide written grounds for their decisions

...

...

[19] Thus, where there are no grounds written, there is no point or principle of law that can officially be decided or settled by the ruling of a competent court. The correct position of the law is that an unwritten decision of a higher court, whether sitting in its original or appellate jurisdiction, binds the parties to the action but is not authority for any principle or rule of law and does not bind the lower courts. This is where the learned judge in the present case fell into error when he said that he was bound by *stare decisis* to follow the unwritten decision of the Court of Appeal in *Md Sukri*."

[Emphasis Added]

[104] Conversely, in *Firdaus Khan Parit Khan & Anor v. CIMB Bank Berhad* [2024] 5 MLRA 108, of direct relevance to the issue before us, an *ex tempore* broad grounds of judgment from which the *ratio decidendi* may be clearly discerned remains binding on the lower courts. The Court of Appeal, through the concurring judgment of Azizul Azmi Adnan JCA, which we find helpful, observed at pp 127-128 as follows:

"[10] Whether or not the broad grounds of judgment of a court may contain binding *ratio decidendi* must depend on a proper reading of the broad grounds issued in each case. The broad grounds of a case may contain a complete analysis of the issues at hand, but may omit a complete narration of the background facts. This should not relegate the grounds so issued into some lesser category of judgment. Thus, in my view, the *ratio decidendi*



of a case in respect of which only broad grounds were issued will still operate as binding precedent for the purposes of the principle of *stare decisis* as explained in *Young v. Bristol Aeroplane Co, Limited* [1944] KB 718, and as applied by the Federal Court in *Dalip Bhagwan Singh v. PP* [1997] 1 MLRA 653.

[11] Where, however, the Court of Appeal is presented with two conflicting prior decisions of the Court of Appeal, the court would be well entitled to prefer the decision containing the full grounds of judgment of the court, over the decision delivered only with broad grounds.”

[Emphasis Added]

[105] In the premises, we are of the considered view that the same principle equally applies to the present appeal and the ratio in this Court’s broad grounds of judgment in *Yeo Eng Lam* is binding on the Court of Appeal and the High Court. The Defendant’s written submissions (encls 17, 22 and 25) for encl 7 (application for a stay of the proceedings) before the High Court did not cite or draw to the attention of the learned High Court Judge the broad grounds, nor were they referred to in the High Court’s grounds of judgment. They were, however, cited in the Defendant’s written submissions (encls 38 and 54) and the Plaintiff’s written submissions (encl 35) for encl 1 (the appeal) before the Court of Appeal and referred to by the learned panel at paragraph [16] of its grounds of judgment:

“[16] Quite naturally, the defendant submitted that there is no clear intention on its part to waive its right to arbitration. **Citing the case of *Yeo Eng Lam lwn. Infinity Vantage Sdn Bhd (02(i)-20-03/2019(W))* it was impressed upon us that every case must be considered holistically with a view to ascertaining whether the party seeking a stay has in fact unequivocally waived its right to have the matter determined by way of arbitration as originally agreed between the parties. In that case, the Federal Court opined that the application to disqualify a solicitor of the respondent therein from continuing to act on its behalf without any reservation of rights was necessary but peripheral which did not touch on the merits of the substantive dispute.** The defendant takes the view that by applying for the extension of time and at the same time refraining from filing the statement of defence they were not submitting to the jurisdiction of the court. Likewise, the filing of the Notice to Produce Documents does not amount to unequivocal waiver by the defendant from referring the dispute to the arbitration. In the *affidavit* affirmed on 31 May 2024, the defendant averred that upon being served with the statement of claim, the defendant needed time to check with the facts and issues pleaded by the plaintiff as the matter relates to the documents for the said projects since year 2008.”

[Emphasis Added]

[106] We now turn our attention to the facts in *Yeo Eng Lam*. Shorn of tautology and concisely put, the case concerns a dispute between parties to a Joint Venture Agreement (“JVA”), which contains an arbitration clause under cl 29.3. The Respondent claimed a sum of RM7,000,000.00, together with interest, special



damages and other relief, from the Appellant for the latter's alleged breach. The JVA was prepared by the parties' common solicitors. On 9 October 2017, the Appellant filed encl 5 to disqualify the solicitors, who were then acting for the Respondent, following the directions of the learned Deputy Registrar on 25 September 2017 to file its Statement of Defence (encl 7) on or before 13 October 2017, and shortly after filing her Memorandum of Appearance on 3 October 2017. The Appellant's concern was that the solicitors were privy to confidential information pertaining to the Appellant, and that a serious conflict of interest would arise if they were to represent the Respondent in the suit. In addition, the solicitors will be called to testify as witnesses on material and disputed questions of fact.

[107] On 13 October 2017, the Appellant filed her Statement of Defence and Counterclaim. Thereafter, on 17 October 2017, the Appellant filed the Notice of Application under subsection 10(1) of Act 646 (encl 8), which was the subject matter of the appeal before the Court of Appeal, for the proceedings at the High Court to be stayed pending reference to arbitration. The Respondent, naturally, objected to encl 8 and argued that the Appellant had taken steps in the proceedings prior to its filing by filing encls 5 and 7. In reply, the Appellant contended that encl 5 was merely a defensive step to preclude any potential conflict of interest and to protect her position. Such a step did not, in any way, evince an intention on the part of the Appellant to abandon her right to refer the dispute to arbitration. Further, encl 7 was filed in compliance with the Court's directions and with an express reservation that the Appellant did not waive her right to arbitrate.

[108] The Appellant was granted leave to appeal to this Court on 26 February 2019 on the following questions of law:

- (a) Whether an express reservation of the right to refer a dispute to arbitration in their Pleadings, negatives the presumption in the 2nd limb of *Sanwell* that the serving of any Pleadings amounts to a step in the proceedings; and
- (b) Whether an application filed by a party only amounts to a step in the proceedings under the 3rd limb of *Sanwell*, if it relates to the substantive merits of the dispute between parties.

[109] In allowing the appeal, this Court on 24 February 2021 made the following pronouncement:

“The word ‘step in the proceedings’ must be construed in the context of s 10 AA which envisages that **the Court must refer to arbitration save and unless there is a step in the proceedings which has been identified as a clear and unequivocal intention not to arbitrate but to submit to the jurisdiction of the court. This must be a question of fact in each case** by way of application of the general principle articulated in this case balancing the application to disqualify the solicitors and the entry of a defence and counterclaim with an express reservation for the matter to be referred to arbitration, **it follows that**



the scales come down in favour of arbitration rather than the courts. The single application to disqualify cannot be said to amount to an unequivocal and clear assent to the jurisdiction of the courts and a clear rejection of the agreement to arbitrate. **It is not prudent to state that where there is an express reservation it automatically follows that it does not amount to a step in the proceedings. Such a reservation clause may simply be inserted subsequently to clear steps which indicate a submission to the courts' jurisdiction. Therefore, it is important that every case be considered holistically with a view to ascertaining whether the party seeking a stay has in point of fact unequivocally waived its right to have the matter determined by way of arbitration as originally agreed between the parties.**

In this context we would add that the application to disqualify was a necessary but peripheral application which did not touch on the merits of the substantive dispute. We are therefore of the unanimous view that the appeal should be allowed. As we have ruled that it must be a question of fact in each case based on the principles we have articulated in relation to s 10 and the case law, we do not think it necessary to answer the 2 questions posed.”

[Emphasis Added]

[110] In essence, the legal position distilled from the broad grounds of judgment is as follows:

- (a) “Step in the proceedings” must be construed in the context of subsection 10(1) which mandates that a dispute must be referred to arbitration unless there was a clear and unequivocal intention not to arbitrate and to submit to the jurisdiction of the Court;
- (b) Such unequivocal intention is a question of fact in each case. Accordingly, a finding by one Court in a particular case is not conclusive upon another Court faced with a similar act, given that the underlying facts may differ, even if the act is the same;
- (c) The Court is to adopt a holistic approach in determining whether a party has unequivocally waived its right to have the dispute resolved by arbitration;
- (d) A reservation of rights, *per se*, does not automatically preclude a finding that a step has been taken in the proceedings; and
- (e) An application before the Court that does not touch on the merits of the substantive dispute between the parties does not constitute a step in the proceedings. In our considered view, the decision of this Court in *Yeo Eng Lam* further clarifies the underlying reasoning in *Sanwell*.

[111] With the stage set, we now turn to the crux of the matter.



(viii) The Context Of The Appeal

[112] Despite our unfailing quill, having regard to the foregoing discussion, little remains that needs to be said. Before addressing the core issues, it is necessary to set out the context that informs our reasoning.

[113] As alluded to above, following *Tindak Murni Sdn Bhd* and having regard to the construction of cl 4 of the CoE, we are of the considered view that there is a *prima facie* arbitration agreement between the Plaintiff and the Defendant. Upon our perusal, there is no ambiguity in cl 4 of the CoE that would lead a reasonable businessperson to conclude that, in light of its clear wording and the factual context in which it came into existence, the parties never intended to refer their disputes to arbitration.

[114] Additionally, upon a proper construction of “any question, dispute, or difference of opinion ... upon or in relation to or in connection with this Agreement or any part thereof shall be referred to the arbitration”, we agree with learned counsel for the Defendant that the Plaintiff’s claim falls within the scope of cl 4 of the CoE and that, having perused the parties’ submissions here and below, the record of appeal and the grounds of judgment of the Courts below, no question arises as to the validity of cl 4 of the CoE. In the absence of any vitiating factors, such as fraud, duress or mistake, affecting cl 4 of the CoE, which has never been alleged by the Plaintiff, full effect must be given to the Clause. Guided by *Press Metal Sarawak Sdn Bhd*, we are of the view that the matter must be referred to arbitration even if there is some doubt as to the validity of cl 4 of the CoE, or where it is arguable whether the subject matter of the Plaintiff’s claim falls within the ambit of the Clause. Such is the effect of s 10(1), the intention of Parliament behind the legislative developments previously discussed, and the parties’ initial mutual intention.

[115] Further, as alluded to above, the specific references made by the Plaintiff in the Statement of Claim to the clauses in the MoA, Schedule and CoE demonstrate that the Plaintiff knew of the existence of an arbitration agreement under cl 4 of the CoE before commencing the writ action against the Defendant. It is upon the very terms of the MoA, Schedule and CoE that the Plaintiff now bases its claim.

[116] Turning to the next point, we recognise the practical difficulties faced by the parties and the learned High Court Judge arising from the unavailability of the full grounds of judgment in *Yeo Eng Lam*. Upon our perusal, the decision of the Court of Appeal in *IFCI Limited v. Archipelago Insurance Limited* [2022] 2 MLRA 462, cited by the Plaintiff, appears to have relied on the Court of Appeal decision in *Yeo Eng Lam* without the benefit of knowing that it had been overruled.



[117] The implication of our finding that this Court's observation in *Sanwell*, to the effect that a request for an extension of time to file a Defence constitutes a step in the proceedings, is *obiter dicta* is that it does not in any way affect the remainder of the judgment in *Sanwell*. *Sanwell* remains the authority for the position that an entry of appearance is a permitted step which does not amount to a step in the proceedings within the meaning of s 6 of Act 93, now subsection 10(1). This is especially important since the entry of appearance is not expressly excluded as a step in subsection 10(1), unlike in some other jurisdictions.

[118] Further, the three (3) limbs in *Sanwell* continue to provide useful guidance in determining whether a particular act may be regarded as a step in the proceedings. However, as alluded to above, given that *Sanwell* was decided prior to the legislative developments that solidified the pro-arbitration stance, such guidance should not be applied rigidly. As this Court held in *Yeo Eng Lam*, whether there is a clear and unequivocal intention not to arbitrate and to submit to the jurisdiction of the Court is a question of fact, and the Court is to adopt a holistic approach in determining whether a party has unequivocally waived its right to have the dispute resolved by arbitration.

[119] *Ford's Hotel Company* is an old English authority which reflects the policy of English law and, though persuasive, should be considered in light of the principles laid down in *Yeo Eng Lam*. In our considered view, in the absence of further consideration of the circumstances of a particular case, a blanket approach which treats a request for an extension of time to file a Defence secured through extra-judicial agreement as not constituting a step, while treating a formal application for the same to the Court culminating in a formal order as constituting a step, renders the inquiry a mechanical exercise which flies in the face of the holistic approach underscored in *Yeo Eng Lam*. In the context of the Rules of Court 2012 [P.U.(A) 205/2012], such a blanket approach limits further inquiry into the circumstances attending a formal application for an extension of time under, on the one hand, O 3 r 5(1) and, on the other, a request for the same under O 3 r 5(3), read together with O 18 r 2(1). The same applies to the background circumstances surrounding the issuance and service of Notice to Produce Documents under O 24 r 10 and a formal application under O 24 r 11.

[120] As alluded to above, a Defendant who fails to assert its rights at the proper time, or takes action inconsistent with its assertion, may be held to have waived it. This underlies the practice of including an express reservation of rights in correspondence with the Court and the Plaintiff by a Defendant desirous of relying on the arbitration clause. The filing of a Statement of Defence pursuant to the Court's directions, lest judgment in default of Defence be entered against the Defendant, illustrates that limb (b) of *Sanwell* should not be applied rigidly. While a reservation of rights clause is a relevant factor, it is not to be considered in isolation, but in the context of the overall factual circumstances. As this Court held in *Yeo Eng Lam*, a reservation of rights, *per*



se, does not automatically preclude a finding that a step has been taken in the proceedings.

[121] In an appropriate case, delay may constitute an aspect of waiver, to be assessed in light of the Defendant's conduct as a whole. The mere passage of time does not, in itself, result in a Defendant losing the right to a stay of Court proceedings in favour of arbitration. However, a Defendant seeking a stay should act promptly so as to avoid any impression of tactical manoeuvring by stringing the Plaintiff along. A pro-arbitration stance should not be taken to condone inordinate delay where there has been a significant lapse of time since the service of the Statement of Claim before an application for a stay in favour of arbitration is made.

[122] Following *Seloga Jaya Sdn Bhd*, the burden of showing that the Defendant had taken steps in the proceedings lies squarely on the Plaintiff.

[123] In our analysis, as the issue of the Defendant's Notice to Produce Documents Referred to in the Pleadings arises in the factual context of the Defendant's request for an extension of time to file a Defence, which is another issue to be determined, we shall deal with both issues together.

(ix) The Defendant's Conduct In Issue: Extension Of Time To File Defence And Notice To Produce Documents Referred To In The Pleadings

[124] Clause 4 of the CoE is evidence of the parties' mutual waiver of their right to judicial adjudication and, consequently, of their agreement to refer their disputes to arbitration and to be bound by the outcome. Accordingly, where it is alleged that the Defendant has, by requesting extensions of time from the Plaintiff and serving a Notice to Produce Documents, "taken any other steps in the proceedings" and consequently waived its right to refer the disputes to arbitration, we are of the considered view that the evidence of such waiver must be correspondingly cogent to displace that prior mutual waiver. Under limb (c), the guidance in *Sanwell* requires not a mere intention, but an "unequivocal intention".

[125] In *Malaysian European Production System Sdn Bhd v. Zurich Insurance (Malaysia) Bhd* [2003] 2 MLRH 68, Kamalanathan Ratnam J observed:

"In *Brighton Marine Palace & Pier Ltd v. Woodhouse* [1893] 2 Ch 486, North J held that asking for time by letter is not taking a step in the action; it is taking a step outside the action altogether. I agree with this proposition of the law. **The defendant can apply for extension of time pursuant to O 3 r 5 of the RHC ... Since r (3) provides for written consent by a letter without the need for an order of court, I hold that having given the written consent, the plaintiff cannot now seek to argue that the granting of the consent must be held against the defendant. Of course, the application by letter dated 16 February 2002 was made under r (3) which provides for enlargement of time without taking any step in the proceedings. It is clear that the very object of r (3) is to enable the parties to enlarge time by consent without the**



need to apply to court and thus taking a step in the proceedings. However, if the plaintiff had refused the application for extension of time then the defendant would have been compelled to apply to court and this would be tantamount to taking a step in the proceedings.”

[Emphasis Added]

[126] *Malaysian European Production System Sdn Bhd* was referred to in the judgment of the Singapore Court of Appeal in *Carona Holdings Pte Ltd and Others v. Go Go Delicacy Pte Ltd* [2008] 4 SLR 460 (CA). In *Carona*, the Singapore Court of Appeal took the view that an application for an extension of time to file a Defence did not constitute a “step in the proceedings” under s 6(1) of the Singapore Arbitration Act 2001. Commenting on the approach adopted in *Ford’s Hotel Company*, VK Rajah JA observed at pp 495-496 as follows:

“[94] In our view, **an application for an extension of time to file a defence plainly does not constitute a “step in the proceedings” under s 6(1) of the Arbitration Act.** First, as mentioned earlier, we agree with the views of Woo JC expressed in *Yeoh Poh San* ([21]; *supra*) that, where a plaintiff’s solicitor insists on the filing of the defence notwithstanding the pending application or an appeal therefrom, the defendant’s solicitors should then promptly apply for an extension of time to file the defence pending the outcome of the appeal. A pragmatic approach is warranted when assessing the procedural act in question. We are not impressed by some of the older English cases that appear to place an undue premium on procedural subtleties rather than on the substance of the issue at hand. In our view, it would be a mistake to place too much emphasis on the means adopted rather than on the ends of an application to stay which is to challenge the appropriateness of the court’s jurisdiction and to bring an immediate closure to the pending court proceedings. We should add that citing isolated decisions from other jurisdictions will usually not be helpful in resolving the competing tensions that are almost invariably present in assessing this issue. Each case should be approached and resolved on the basis of principle rather than merely precedent.

[95] This brings us to the case of *Ford’s Hotel* ([61]; *supra*) where both the English Court of Appeal and House of Lords decided that a request for an extension of time constituted a step in the proceedings. As alluded to earlier, the defendants in *Ford’s Hotel* thrice obtained the plaintiff’s consent for further time to deliver their defence, and upon their fourth request being refused, took out a summons and obtained an order for a further 14 days. The taking out of the summons was held to be a step in the proceedings by the House of Lords because “[t]he proceeding of presenting such a summons and supporting it before the master ... implied a statement to the effect that the appellants were to defend the action” (per Lord Shand at 6). **With respect, while that case is not directly relevant on the facts before us and can be distinguished, we are of the view, after mature reflection, that the approach postulated is archaic, inconsonant with common sense and ought not to be followed in Singapore. An application for an extension of time is not in itself tantamount to an unequivocal submission to jurisdiction. It is not so plainly “done with the intention of electing to litigate, rather than stand on the right to arbitrate”** (see the quote from *Blue Flame Mechanical* at [51]; above). **We hasten to add**



that, if it is indeed plain that the purpose of asking for an extension of time is not, in the final analysis, *bona fide* for the purposes of staying the proceedings pending arbitration, the court in the exercise of its discretion can either refuse the extension of time or dismiss the stay application.”

[Emphasis Added]

[127] Quite recently, in *Airbus Helicopters Malaysia Sdn Bhd v. Aerial Power Lines Sdn Bhd* [2024] 3 MLRA 152, Lee Swee Seng JCA articulated at pp 166 and 167 as follows:

“[53] With the greatest of respect, **it would be too simplistic and indeed too strict an approach, steeped in technical traps, to say that a mere request for an extension of time to file defence would *ipso facto* tantamount to “taking any other steps in the proceedings”**. An approach consistent with the paradigm shift in encouraging parties to go for arbitration and to hold them to their bargain to so proceed in the arbitration agreement would resonate with the overall focus of s 8 of the AA 2005 which is that no court shall intervene in matters governed by this Act, except where so provided in this Act. If we may be so bold as to say that when intervention is allowed as in s 10 of the AA it would be more predisposed to promoting the bargain earlier struck by the parties in favour of arbitration considering that the plaintiff had coyly commenced litigation in breach of the arbitration agreement without candidly communicating to the defendant that in spite of the bargain struck it had now no intention of so arbitrating for whatever may be the reasons.

...

[62] **The focus should be on upholding the bargain initially struck by the parties to elect arbitration in resolving their disputes and not litigation and to avoid being unduly fastidious with or fixated on technical non-compliance seeking to trip and trap the defendant into litigation when the declared intention in the arbitration agreement is loud and clear.”**

[Emphasis Added]

[128] Learned counsel for the Plaintiff submits that the Defendant’s repeated requests for extensions of time to file a Defence are indicative of an intention to defend the action in Court rather than to have the dispute resolved by arbitration, otherwise the Defendant ought not to have taken any steps in the proceedings but should instead have promptly filed a stay application. On the other hand, learned counsel for the Defendant submits that, by seeking and obtaining extensions of time yet refraining from filing a Defence, the Defendant demonstrated an intention not to commit to the suit and thereby avoided taking a step in the proceedings. Had it done so, it would clearly have fallen foul of limb (b) in *Sanwell*.

[129] We are of the considered view that unequivocal intention ought not to be determined by mere assumptions or implication, but must be arrived at objectively by reference to the evidence before us. As appears from its *Affidavit* in Reply affirmed on 4 January 2023 in response to the Plaintiff’s *Affidavit* in



Reply, the Defendant deposed that more time was required as the events and documents dated as far back as 2008 and that some documents were not in its possession. This averment was neither challenged nor contradicted by the Plaintiff. In our view, the reasons given by the Defendant for the extensions of time are reasonable, and the requests were necessary and made in good faith. In our view, the learned panel of the Court of Appeal was correct in observing at paragraph [32] as follows:

“Considering the fact that the contract between the parties were entered into **in year 2008, it is not unreasonable to infer that the defendant, *vide its notice to produce and the application for the extension of time***, was ascertaining the nature of the agreement between the parties, including the arbitration clause.”

[Emphasis Added]

Therefore, based on the foregoing discussion, we are of the considered view that requests for extensions of time to file a Defence, as well as a mere indication in the Defendant’s correspondence of an intention to file a Defence, do not evince an unequivocal intention to proceed with the suit and, consequently, do not amount to steps in the proceedings as contended by the Plaintiff. This is particularly so given that such indication was made before the Defendant had access to documents not in its possession.

[130] In addition, learned counsel for the Plaintiff argues that the Defendant took a step in the proceedings by issuing and serving on the Plaintiff’s solicitors a Notice to Produce Documents Referred to in the Pleadings under O 24 rule 10 of the Rules of Court 2012 [P.U.(A) 205/2012]. The Plaintiff’s solicitors subsequently served on the Defendant’s solicitors a Notice Where Documents May Be Inspected and provided the documents requested in the Notice to Produce Documents. By invoking the Court’s discovery procedures, the Defendant is said to have compelled the Plaintiff to produce documents that would assist it in responding to the Plaintiff’s claims. It is further submitted that, having utilised the Court’s processes under the Rules of Court 2012 [P.U.(A) 205/2012], the Defendant obtained the benefit of those procedures, and that it would be prejudicial and unjust to permit the Defendant to avoid the Court proceedings by invoking the arbitration clause. The Defendant cannot, on the one hand, be permitted to rely on the Court’s procedures for its own advantage, only to thereafter seek refuge in arbitration once those advantages have been obtained. Accordingly, the Plaintiff submits that the Defendant must be held to its election to proceed within the Court’s jurisdiction.

[131] With all due respect, we disagree. Guided by the principles laid down in *Yeo Eng Lam*, a necessary but peripheral application or action that does not touch on the merits of the substantive dispute does not constitute a step in the proceedings. The Notice to Produce Documents cannot be classified as pleadings within the ambit of limb (b) of *Sanwell*. Rather, it falls within limb (c) of *Sanwell*. Additionally, the nature of a Notice to Produce Documents is



to enable the inspection of documents referred to in the pleadings. It is, though not an application, purely peripheral to the substantive disputes between the parties and does not advance the merits of the case in any manner. As made clear by the Defendant in its letter dated 8 December 2022 and *Affidavit* in Reply affirmed on 4 January 2023 in response to the Plaintiff's *Affidavit* in Reply, some documents referred in the Statement of Claim were not in the Defendant's possession. In our view, the Defendant's Notice to Produce Documents is reasonable and necessary, and was issued and served in good faith. Therefore, we are of the considered view that the serving of Notice to Produce Documents by the Defendant's solicitors does not indicate an intention to waive arbitration rights.

[132] In *The Londonderry Port and Harbour Commissioners v. W S Atkins Consultants Ltd and Charles Brand Ltd* [2011] NIQB 74, it was held that a request for discovery of documents referred to in the Statement of Claim did not constitute a step in the proceedings. Weatherup J observed as follows:

“[25] Similarly in the present case I am satisfied that the 1st defendant was investigating the nature and terms of the contractual arrangement between the parties. The request for discovery related to matters referred to in the Statement of Claim and included the contractual documents relied on by the plaintiff. The discussion of a timetable for delivery of the 1st defendant's defence was in the course of the ongoing exchange about the contractual documents. There was no unequivocal representation that the matter would proceed in Court and no election to waive any right to proceed by way of arbitration. The 1st defendant's actions were consistent with the investigative measures being undertaken to ascertain the terms of engagement between the plaintiff and the 1st defendant. While it would have been desirable if the 1st defendant had stated expressly in correspondence that the right to apply for a stay was reserved while the contractual arrangements were being investigated, that was not essential in order to maintain the right to make the application for the dispute to be determined by arbitration.

[26] Accordingly I am satisfied that the arbitration clause was incorporated into the contractual arrangements between the plaintiff and the 1st defendant and that the actions taken by the 1st defendant did not constitute steps in the proceedings to answer the substantive claim. I am satisfied that the order should be made on behalf of the 1st defendant staying the proceedings and referring to arbitration.”

[Emphasis Added]

[133] Similarly, in the Singapore High Court decision in *Amoe Pte Ltd v. Otto Marine Ltd* [2014] 1 SLR 724 (HC), Lee Seiu Kin J observed at p 729 as follows:

“[14] In my view, if a party files and serves a notice to produce under O 24 r 10 of the ROC for inspection of documents referenced in pleadings, and had done so to ascertain the nature of the claim before it to see if arbitration was an option, this act by itself is not a step in the proceedings, even without an express reservation of the right to seek a stay.”



[Emphasis Added]

[134] The Plaintiff's next point of contention is that a general reservation of rights contained in the letter dated 24 November 2022 issued by the Defendant's solicitors is insufficient to negate the procedural steps taken in the proceedings. According to learned counsel for the Plaintiff, the Defendant had engaged substantively with the Court's processes by requesting multiple extensions of time, expressing an intention to file a Defence, and invoking the discovery mechanism. These acts were undertaken without any express and unequivocal reservation of the right to arbitrate. A vague and general reservation of "all rights", without specific reference to the arbitration clause or to an intention to apply for a stay, is inadequate to preserve the right to arbitrate. Accordingly, the Plaintiff submits, the Defendant cannot rely on such a general reservation of rights to avoid the consequences of its conduct in the proceedings.

[135] With all due respect, we disagree. The Defendant had expressly stated its reservation in its covering letters dated 24 November 2022 and 7 March 2023, its Notice of Arbitration dated 1 December 2022, and its Statement of Defence and Counterclaim dated 7 March 2023. In our view, the wording of the reservation is sufficiently clear and wide, and therefore, ample notice had been given to the Plaintiff of the Defendant's position and its reservation of right to arbitration.

[136] It is also pertinent to observe that, viewed against the chronology of events, the Defendant, having filed an Appearance on 17 October 2022, first issued and served on the Plaintiff a Notice to Produce Documents dated 24 November 2022, to which the Plaintiff's solicitors responded by serving a Notice Where Documents May Be Inspected dated 30 November 2022. Shortly thereafter, the Defendant issued a Notice of Arbitration on 1 December 2022 and, on the very next day, proceeded to file the stay application by way of a Notice of Application dated 2 December 2022. In the circumstances, we are of the considered view that the Defendant acted with reasonable expedition and did not acquiesce through any undue lapse of time.

[137] Therefore, taking them in their entirety and in the factual circumstances of the present appeal, we are of the considered view that the Defendant's requests for extension of time to file its Defence, as well as its issuance and service of the Notice to Produce Documents Referred to in the Pleadings on the Plaintiff's solicitors, cannot objectively be construed to amount to "any other steps in the proceedings" within the meaning of s 10(1) of Act 646, nor to constitute a waiver of the agreement to arbitrate. We answer Question 1 in the NEGATIVE.

F. Conclusion

[138] Thus elucidated, we take the view that the learned panel of the Court of Appeal committed no appealable error warranting our appellate intervention. After giving much consideration to the entire submissions and for the reasons



above stated, we affirm the decision of the Court of Appeal and dismiss the Plaintiff's appeal with costs.

[139] We thank both learned counsel for their well-articulated written and oral submissions, as well as for their replies to the questions we had laboured them with, in reaching this unanimous decision. We have been greatly assisted by their efforts and civility throughout the matter. Further, we appreciate their patience in awaiting this full judgment more than words allow us to convey.

[140] We also thank the learned Registrar on duty and her team for their work in ensuring the smooth running of the proceedings and that the machinery of the Court has the support it needs to function effectively.

