DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. J-04(IM)-122-03/2024

ANTARA

EXTRA EXCEL (M) SDN BHD
(NO. SYARIKAT: 223246-D) …PERAYU

DAN

QUEK PECK KEOW (P)
(NO. K/P: 510913-01-5494) …RESPONDEN

[Dalam Mahkamah Tinggi Malaya di Johor Bharu
Dalam Negeri Johor Darul Takzim, Malaysia
Rayuan Sivil No. JA-12A-19-06/2022

Antara

Extra Excel (M) Sdn Bhd
(No. Syarikat: 223246-D) …Perayu

Dan

Quek Peck Keow (P)
(No. K/P: 510913-01-5494) …Responden]

(DIDENGAR BERSAMA DENGAN)

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. J-04(IM)-125-04/2024

ANTARA

EXTRA EXCEL (M) SDN BHD
(NO. SYARIKAT: 223246-D) …PERAYU

DAN

QUEK PECK KEOW (P)
(NO. K/P: 510913-01-5494) …RESPONDEN

[Dalam Mahkamah Tinggi Malaya di Johor Bharu
Dalam Negeri Johor Darul Takzim, Malaysia
Rayuan Sivil No. JA-12A-18-06/2022

Antara

Extra Excel (M) Sdn Bhd
(No. Syarikat: 223246-D) …Perayu

Dan

Quek Peck Keow (P)
(No. K/P: 510913-01-5494) …Responden]

(DIDENGAR BERSAMA DENGAN)

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. J-02(NCC)(A)-2024-11/2024

ANTARA

EXTRA EXCEL (M) SDN BHD
(NO. SYARIKAT: 223246-D) …PERAYU

DAN

QUEK PECK KEOW
(NO. K/P: 510913-01-5494) …RESPONDEN

[Dalam Mahkamah Tinggi Malaya di Johor Bharu
Dalam Negeri Johor Darul Takzim
Saman Pemula No. JA-24NCC(ARB)-2-04/2022

Dalam perkara Timbangtara antara Extra Excel (Malaysia) Sdn Bhd dan Quek Peck Keow;

Dan

Dalam perkara Seskyen 11 Akta Timbang Tara 2005 (Akta 646);

Dan

Dalam perkara Aturan 15, 29, 69 Kaedah-Kaedah Mahkamah 2012;

Dan

Dalam perkara Akta Mahkamah Kehakiman 1964;

Dan

Dalam perkara Akta Relief Spesifik 1950;

Dalam perkara bidang sedia ada Mahkamah.

Antara

Quek Peck Keow
(No. K/P: 510913-01-5494) …Plaintif

Dan

Extra Excel (Malaysia) Sdn Bhd
(No. Syarikat: 223246-D) …Defendan]

<u>CORAM:</u>

AZHAHARI KAMAL BIN RAMLI, JCA.

ONG CHEE KWAN, JCA.

NADZARIN BIN WOK NORDIN, JCA.

JUDGMENT OF THE COURT

Introduction

[1] This appeal, and a companion appeal, arise out of one continuing dispute between a multi-level marketing company and one of its distributors. The company wrote the rules governing that relationship. It lost under those rules once, before the Sessions Court, won before the High Court, and lost before this Court on appeal. It rewrote the rules in the midst of the dispute. It now asks this Court to compel the distributor to abandon the courts entirely and to submit the same dispute, one that had already crystallised long before the rules were rewritten, to an arbitrator of the company's own unilateral appointment.

[2] Two questions of principle arise. The first is jurisdictional. Section 10(1) of the Arbitration Act 2005 ("**the AA 2005**") requires a court, before which proceedings touching an arbitration agreement are brought, to stay those proceedings unless it finds the agreement null and void, inoperative or incapable of being performed. Section 18 of the same Act empowers an arbitral tribunal to rule on its own jurisdiction. The question is when, if at all, the second provision displaces the first, so that a court must defer to the tribunal rather than make its own finding. The second question is substantive. It asks

whether a party may unilaterally amend its own standard form arbitration clause, after a dispute has already crystallised and has already been placed before a court, and then rely on the amended clause to compel arbitration of that same dispute retrospectively.

[3] We answer the first question by holding that section 18 does not oust a court's jurisdiction under section 10(1) in the circumstances before us. We develop our reasons for that conclusion at some length below, because the point recurs often in practice and deserves to be addressed from first principles. We answer the second question by holding that a dispute resolution clause, once a dispute has crystallised and proceedings have been commenced, cannot be unilaterally rewritten to capture that dispute after the fact. Those two conclusions dispose of this appeal, which we shall call "**Appeal 125**", and of its companion, Civil Appeal No. J-02(NCC)(A)-2024-11/2024, which we shall call "**Appeal 2024**". The parties are agreed, and we accept, that Appeal 2024 raises no question distinct from those determined in Appeal 125, both appeals turning on the same clause and the same chronology. We deal with Appeal 125 in full below, and dispose of Appeal 2024 in summary fashion at the end of these grounds.

[4] For the reasons that follow, we dismiss Appeal 125. It follows, for the same reasons, that Appeal 2024 is also dismissed.

Background Facts

[5] The Respondent was appointed a distributor of the Appellant's health products in August 2011. Her conduct as a distributor, and the resolution of any dispute between her and the Appellant, was governed by a standard form rulebook. The Appellant drafted that rulebook, called the E. Excel Policies and Procedures ("**the EEPP**"), and reserved to itself the right to amend it from time to time. Clause 1.3 of the EEPP contains the arbitration agreement. An earlier version of Clause 10.2 contained a time bar of 150 days within which a dispute concerning a suspension had to be referred to arbitration.

[6] The Appellant suspended the Respondent's distributorship by letter dated 11.3.2020. The EEPP November 2019 version was in force on that date, a fact the Appellant has never disputed and indeed relied upon expressly in its first attempt to compel arbitration, described below. The Respondent disputed her suspension and, on 16.12.2020, filed an Originating Summons in the Sessions Court at Johor Bahru ("**the OS**"), seeking declarations that the suspension was null and void, an order for reinstatement, and damages.

[7] The Appellant responded by invoking Clause 1.3. On 24.12.2020, relying expressly on the EEPP November 2019 version, it applied under section 10(1) of the AA 2005 to stay the OS pending arbitration. We shall call this "**the 1st Stay Application**". The Sessions Court dismissed the 1st Stay

Application on 24.3.2021. It held Clause 1.3, in its 2019 form, null and void and unenforceable, in breach of sections 24 and 29 of the Contracts Act 1950, because it excluded the Respondent’s right to damages and imposed an unlawful 150-day time bar. The High Court reversed that decision on 14.9.2021. On 20.4.2022, this Court restored the order of the Sessions Court and held the arbitration clause inoperative on account of the unlawful time bar. We shall call this decision “**the April 2022 Decision**”. It was not appealed further, and it is final.

[8] While the Respondent’s appeal against the order of 14.9.2021 was still pending before this Court, and relying on that order, the Appellant on 25.11.2021 unilaterally appointed a sole arbitrator and issued a Notice of Arbitration. By that date, the Appellant had already amended Clause 1.3. The EEPP was amended in June 2021 in two material respects. First, it added “E. Excel Malaysia” as an entity entitled to bring a claim to arbitration. The clause had previously captured only disputes “brought by a Distributor, or one other than E. Excel Malaysia”. Second, it deleted the 150-day time bar entirely. The Respondent participated in the ensuing arbitration only under protest. She disputed both the jurisdiction of the Arbitrator and the existence of any arbitration agreement entitling the Appellant to commence a reference at all.

[9] Following the April 2022 Decision, the Sessions Court resumed case management of the OS and fixed a decision date of 21.6.2022. On 6.5. 2022, sixteen days after the April 2022

Decision, the Appellant filed a second application under section 10(1), this time relying expressly on the June 2021 version of Clause 1.3. We shall call this "**the 2nd Stay Application**". In the alternative, the Appellant sought a stay pending disposal of a fresh originating summons the Respondent had by then filed at the High Court. That originating summons, numbered JA-24NCC(ARB)-2-04/2022 and which we shall call "**OS 2**", sought a declaration that no valid arbitration agreement existed and an injunction restraining the arbitration.

[10] On 21.6.2022, the Sessions Court dismissed the 2nd Stay Application on the ground of *res judicata* and issue estoppel. On the same day, the High Court allowed OS 2 and restrained the arbitration. The Sessions Court separately allowed the Respondent's original OS, with damages to be assessed. The Appellant appealed against each of these outcomes.

[11] On 20.3.2024, the High Court, per Shamsulbahri J, dismissed the Appellant's appeal against the dismissal of the 2nd Stay Application, and in materially identical reasoning separately affirmed the order allowing OS 2 and restraining the arbitration. His Lordship held that section 10(1) requires a court to scrutinise an impugned arbitration agreement and the surrounding factual matrix, and that a court ought not grant a stay simply because a document bears the label "arbitration agreement". His Lordship further held that the June 2021 version of Clause 1.3, which he termed the "Improvised Arbitration Agreement", could not apply to the Respondent's

dispute. That dispute, namely her suspension, had already occurred in March 2020, when the November 2019 version of the EEPP was in force, and it would be gravely unfair to give the 2021 amendment retrospective effect. His Lordship went further, and found that the 2021 amendment had been made "unilaterally by the Appellant without good faith … to allow the Appellant a second bite".

[12] Two appeals to this Court followed. This appeal, J-04(IM)-125-04/2024, is against the dismissal of the 2nd Stay Application. Appeal 2024, J-02(NCC)(A)-2024-11/2024, is against the affirmance of OS 2. Both were argued together before us. As already noted, the parties accept, and we accept, that our decision in this appeal governs the outcome of Appeal 2024. Both appeals turn on a single question: whether the June 2021 version of Clause 1.3 may be invoked by the Appellant against the Respondent, in respect of a dispute that crystallised in March 2020, more than a year before that version of the clause existed.

The Issues

[13] The following issues were canvassed in the record and in the parties' written submissions:

(1) whether section 10(1) of the AA 2005 required the courts below to determine for themselves the existence and operability of the arbitration agreement, or whether that

question ought to have been left to the arbitral tribunal under section 18 and the doctrine of *kompetenz-kompetenz*;

(2) whether the 2nd Stay Application and OS 2 are barred by *res judicata* or issue estoppel arising from the April 2022 Decision;

(3) the proper construction of Clause 1.3 in its November 2019 form, and in particular whether it ever entitled the Appellant to commence arbitration against its own distributor;

(4) whether the June 2021 amendment to Clause 1.3 could, consistently with ordinary contractual principles, be applied retrospectively to a dispute that had already crystallised and was already the subject of litigation;

(5) whether the Appellant had, in any event, taken a step in the proceedings within the meaning of section 10(1), disentitling it to a stay;

(6) whether Clause 1.3 is void, in whole or in part, under sections 24 and 29 of the Contracts Act 1950, because it caps the Respondent's recoverable damages;

(7) whether the Appellant's unilateral right to appoint the sole arbitrator renders the arbitration agreement void, or offends natural justice; and

(8) whether the finding that the Appellant acted in bad faith was properly made without a trial.

[14] At the hearing before us, counsel for both parties confined their submissions to Issues (1) to (4), and (8). Neither party pursued Issues (5) and (7) although Issue (6) was touched upon, it need not be determined by this Court. Thus, we express no view, one way or the other, on Issues (5), (6) and (7), and nothing in these grounds should be read as deciding them. We turn to the issues that were argued, taking Issue 1 first because it is logically anterior to the rest.

Issue 1: Section 10(1) and *Kompetenz-Kompetenz*

[15] The Appellant's primary submission is that neither the Sessions Court, nor the High Court, nor this Court, should have gone beyond asking whether a document exists that describes itself as an arbitration agreement. Counsel for the Appellant relied on *Cockett Marine Oil (Asia) Pte Ltd v MISC Bhd and another appeal* [2022] 6 MLJ 786 for the proposition that section 18 of the AA 2005 gives the arbitral tribunal the first and exclusive right to rule on its own jurisdiction, including any challenge to the existence of the arbitration agreement itself, and that a court

seised of a section 10(1) application must confine itself to a light-touch, *prima facie* enquiry.

[16] We begin with first principles, because the Appellant's submission, if correct, would leave a court with almost nothing to do under section 10(1) beyond checking that a document uses the word "arbitration".

[17] The starting point is that the jurisdiction of the civil courts of Malaysia to hear and determine a dispute between two parties is general, and is conferred by the Federal Constitution and by statute. It exists independently of the parties' wishes. An arbitration agreement is, in substance, a private contract by which the parties agree to withdraw a defined category of disputes from that general jurisdiction and to submit them instead to a tribunal of their own choosing. Section 29 of the Contracts Act 1950 records this. It treats an agreement in restraint of legal proceedings as void, and then carves out, by its first exception, an agreement to refer present or future disputes to arbitration. An arbitration agreement is therefore an exception to the general rule, not an assertion of it. The foundation of any court's obligation to decline its own jurisdiction under section 10(1) is accordingly the existence of a genuine, binding agreement to arbitrate. Without that foundation, there is nothing for the exception to operate upon, and the general jurisdiction of the court continues to apply.

[18] It is against that background that section 18 of the AA 2005 must be read. Section 18(1) provides that an arbitral tribunal may rule on its own jurisdiction, including any objection to the existence or validity of the arbitration agreement. This is the principle of *kompetenz-kompetenz*. It exists for a sound practical reason. It prevents a party who does not wish to arbitrate from stalling a genuine reference indefinitely by raising jurisdictional objections in court before the tribunal has even been constituted. A rule that tells a tribunal it may decide a question is not, without more, a rule that only the tribunal may ever decide it. Section 18(8) itself contemplates a party appealing a tribunal's preliminary ruling on jurisdiction to the High Court, which then decides the very question the tribunal has just decided. The doctrine, properly understood, allocates the sequence in which a jurisdictional question is addressed. It does not, of itself, remove the question from the court's competence altogether.

[19] Section 10(1) confirms this reading. It provides that a court before which proceedings are brought "shall … 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." Parliament did not write that a court shall stay the proceedings once a document purporting to be an arbitration agreement is produced. It required the court to make a finding, and it specified what that finding must address. A court applying section 10(1) cannot discharge that statutory duty by treating the mere production of a document as sufficient, and outsourcing the finding Parliament required it to make. This is

the effect of the Federal Court's decisions in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417 and *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd and another appeal* [2020] 3 MLJ 545, and of this Court's own decision in *Asia Pacific Higher Learning Sdn Bhd v Stamford College (Malacca) Sdn Bhd* [2025] 1 MLRA 740, which we set out and apply at [23] to [27] below.

[20] We reject, as a matter of first principle, any suggestion that a court seised of a section 10(1) application must *always* defer to the tribunal on every question touching the existence or validity of an arbitration agreement. The true position, in our judgment, is that the court retains its own jurisdiction to determine those questions, and that section 18 allocates the sequence of decision-making only for so long as, and only to the extent that, a *genuine* question remains for the tribunal usefully to decide.

[21] It follows that the more useful question is not whether section 18 applies in the abstract, but when a court will exercise its retained jurisdiction to make a *final* determination, rather than defer the question to the tribunal in the first instance. On the authorities cited to us, and as a matter of principle, we consider that the following circumstances will generally justify a court in making its own final determination of the existence or validity of an arbitration agreement under section 10(1). This list is not exhaustive, and the circumstances are cumulative rather than alternative.

(a) First, where the application before the court is not truly an application to stay pending arbitration, but an application for final relief, such as a permanent injunction restraining an arbitration, or a final declaration that no arbitration agreement exists. A stay merely pauses the court proceedings and leaves the tribunal free to give the parties a full hearing on the jurisdictional question in due course, subject only to an appeal under section 18(8). There is no equivalent pause available where the relief sought is itself final. The courts of Malaysia have long recognised an inherent jurisdiction, separate from section 10(1), to restrain an arbitration that lacks any legal foundation. See *Innotec Asia Pacific Sdn Bhd v Inotec GMBH* [2007] 8 CLJ 304 and *Pilecon Industrial Engineering Sdn Bhd v Maxson Resources Ltd* [2002] 1 MLJ 217. That jurisdiction is not constrained by the light-touch approach appropriate to a stay application, because there is no parallel proceeding left to defer.

(b) Second, where the question is one of the construction of a written instrument, and nothing beyond the document itself and an undisputed chronology is required to answer it. *Kompetenz-kompetenz* exists to preserve a tribunal's opportunity to receive evidence and submissions and to reach its own conclusion on a genuinely live question. It does not require a court to manufacture doubt where none exists, merely because the document under examination happens to contain an arbitration clause. We adopt, in this respect, the approach of Waller LJ in *Al-Naimi (trading as Buildmaster Construction Services) v Islamic Press Services Inc* [2000] 1 Lloyd's Rep 522, who held that a court need not refer a jurisdictional question to arbitration where it considers it virtually certain, one way or the other, whether a binding arbitration agreement covering the dispute exists.

(c) Third, where the same clause, or a materially identical clause, has already been the subject of a final and conclusive determination between the same parties by a court of competent jurisdiction. To defer such a question to a tribunal a second time would invite the tribunal to relitigate a settled question, at real cost and delay to the parties, only for the same question to return to the court in due course by way of a section 18(8) appeal or a challenge to any award under section 37. Nothing is gained, and something is lost, by the interposition of a fresh reference in those circumstances.

(d) Fourth, where the party invoking arbitration is not a party resisting the court's jurisdiction on a genuine and previously untested basis, but is instead attempting to relitigate, by a different route, a jurisdictional question it has already lost.

[22] These considerations are cumulative rather than exhaustive, and a court should exercise real caution before departing from

the ordinarily preferred, light-touch approach appropriate to a stay application. That approach remains the norm where a party makes a timely and untested application under section 10(1), and where the existence of a binding arbitration agreement covering the dispute is genuinely in doubt on the material before the court. We do not depart from *Cockett Marine Oil*, which correctly describes that norm. We hold only that the norm is not absolute. *Press Metal Sarawak* and *Tindak Murni*, properly read, confirm as much. A court exercising its jurisdiction under section 10(1) must ask, and answer, not only whether an arbitration agreement exists, but also whether it is null and void, inoperative or incapable of being performed. It is that second enquiry, mandated by the plain words of section 10(1) itself, that the Appellant's argument would strip away.

[23] The Federal Court's decision in *Press Metal Sarawak* makes this plain. At [33] and [38] of that decision, the Federal Court held that a court applying section 10(1) must restrict its enquiry to two questions: whether a binding arbitration agreement exists between the parties, and whether that agreement is null and void, inoperative or incapable of being performed. Both questions must be answered before the mandatory stay in section 10(1) can apply.

[24] The Federal Court repeated this formulation in *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd and another appeal* [2020] 3 MLJ 545. At [49] of that decision, the Federal Court described the court's task as a "prescribed statutory duty", to be

discharged by ascertaining both limbs before the consequences set out in section 10 can follow. This Court applied the same approach in *Asia Pacific Higher Learning Sdn Bhd v Stamford College (Malacca) Sdn Bhd* [2025] 1 MLRA 740. At [33] and [34] of that decision, where this Court upheld a High Court's own construction of an arbitration clause, undertaken for the purpose of determining its validity, and held that section 18 typically applies only where a dispute has been referred directly to arbitration by the parties, without any prior action instituted in court. That is not this case.

[25] We apply these principles to the facts before us. This case satisfies, on our assessment, at least three of the circumstances identified at [21] above, any one of which would independently justify the courts below in making their own final determination.

[26] First, OS 2, and the injunction restraining the arbitration that it sought and obtained, was never a section 10(1) stay application. It was an application for final declaratory and injunctive relief, of the kind described at [21(a)] above. The 2nd Stay Application, though brought under section 10(1) in form, sought in substance to compel a distributor to abandon an action she had already commenced, in favour of an arbitration she had, from the outset, refused to accept as validly constituted. Neither application admits of the light touch appropriate to a straightforward, first-instance stay application.

[27] Second, the clause the Appellant originally and consistently relied upon to compel this very dispute to arbitration, namely Clause 1.3 in its 2019 form, has already been finally and conclusively declared void and inoperative by this Court in the April 2022 Decision. There is no live question on that clause left for any tribunal to decide. What remains is whether a differently worded, later clause can retrospectively resurrect a right that this Court has already told the Appellant it does not have. That is a question of ordinary contractual construction, resolved by reference to an undisputed chronology and the text of two documents. It falls within the circumstance described at [21(b)] above. Applying *Al-Naimi*, we are satisfied that it is virtually certain, on the material before us, that Clause 1.3 of its November 2019 form is inoperative and further that the June 2021 clause cannot be read as reaching back to capture this dispute, for the reasons given at Issues 3 and 4 below.

[28] Third, this case falls within the circumstances described at [21(c)] and [21(d)] above. The Appellant, having lost on the clause it originally relied upon, now advances a fresh clause for the same dispute, having already been told by this Court, in the April 2022 Decision, that its earlier attempt to compel arbitration of this dispute failed. To defer the question a second time to a tribunal appointed unilaterally by the Appellant itself would achieve nothing but delay, and would invite exactly the re-litigation that the doctrine of *kompetenz-kompetenz* is meant to guard against, not encourage.

[29] For these reasons, we reject Issue 1. The courts below were entitled, and in our judgment were correct, to determine for themselves whether Clause 1.3, in whichever version relied upon, was a valid and applicable arbitration agreement covering this dispute.

Issue 2: *Res Judicata* and Issue Estoppel

[30] The Respondent submits that the April 2022 Decision operates as *res judicata* or issue estoppel, and precludes the Appellant from relitigating the existence of an arbitration agreement at all. Both the Sessions Court, and implicitly the High Court, accepted this submission in refusing the 2nd Stay Application. We do not accept it in that broad form.

[31] Issue estoppel requires identity between the issue previously and finally decided and the issue now raised. The April 2022 Decision concerned Clause 1.3 in its 2019 form, and turned principally on the unlawfulness of the 150-day time bar contained in that version. The 2nd Stay Application relies on a textually different clause, the June 2021 version, which removes precisely that time bar and, for the first time, purports to entitle the Appellant itself to invoke arbitration. That clause, in that form, did not exist when the April 2022 Decision was rendered. We are not persuaded, therefore, that *res judicata*, in its strict sense, is made out as a stand-alone bar to either the 2nd Stay Application or OS 2.

[32] That said, the April 2022 Decision remains highly relevant. It explains why the Appellant, having already lost on the clause it originally and consistently relied upon as applicable to this dispute, turned only after that loss to a differently worded, later clause for the very same dispute. We return to that context at Issue 4 below. We prefer, however, to resolve this appeal principally on ordinary principles of contractual construction, to which we now turn.

Issue 3: Construction of Clause 1.3 (November 2019 Version)

[33] This issue supplies one of two independently sufficient bases for our decision. We address it first, because if we are correct on it, the appeal may be disposed of on this ground alone. Clause 1.3, in its November 2019 form, identical in this respect to the November 2015 version, provided as follows:

> *"Any and all disputes, claims, and causes of action arising out of or in connection with the Agreement or the Malaysia Distributorship (including any questions regarding its existence, validity, or termination) brought by a Distributor, or one other than E. Excel Malaysia, shall be referred to and resolved through final and binding arbitration and not by court or jury …"*

[34] The Appellant submits that the qualifying words, "brought by a Distributor, or one other than E. Excel Malaysia", attach only to

"the Malaysia Distributorship", and leave disputes arising out of "the Agreement" open to either party, including the Appellant itself. We do not accept that reading. The clause identifies a single composite subject matter, namely disputes arising out of the Agreement or the Distributorship. It qualifies the whole of that subject matter with a single relative clause, which governs who may bring such disputes to arbitration. Nothing in the syntax of the sentence suggests that the qualification reaches back only to the second alternative. The natural reading applies the qualification to both.

[35] That reading is reinforced by the *contra proferentem* principle. The EEPP is the Appellant's own standard form document. The Appellant imposed it on distributors without negotiation, and reserved to itself alone the power to amend it. Any genuine ambiguity in a clause restricting who may invoke arbitration under such a document falls to be resolved against the party who drafted it.

[36] It follows that, on the wording of Clause 1.3 in force when this dispute crystallised, the Appellant never possessed any contractual right to commence arbitration against the Respondent. The clause operated in one direction only. A distributor could compel the Appellant to arbitrate a dispute. The reverse was never true. This conclusion does not depend on the April 2022 Decision. It does not depend on any question of retrospective effect. It does not depend on the Appellant's

motives in later amending the clause. It is simply what Clause 1.3, on its true construction, has always said.

[37] For this reason alone, the 2nd Stay Application was correctly dismissed, and OS 2 was correctly allowed. We go on to Issue 4, both because it was fully argued before us, and because it provides an independent and, in our view, equally decisive answer to this appeal.

Issue 4: Could the June 2021 Amendment Apply Retrospectively?

[38] Given our conclusion on Issue 3, the June 2021 amendment to Clause 1.3 becomes critical to the Appellant's case. That amendment, for the first time, expressly adds "E. Excel Malaysia" as an entity entitled to bring disputes to arbitration, and simultaneously deletes the 150-day time bar this Court had already condemned. It is the only version of Clause 1.3 that arguably confers on the Appellant any right to arbitrate at all.

[39] We accept, as the Appellant submits, and as Clause 1.1 of the EEPP expressly provides, that E. Excel Malaysia reserves the right to modify the EEPP from time to time without prior notice, and that distributors are bound by such amendments. We also accept the broader principle underlying the Appellant's submission. Parties are always free to agree, by consent, to submit a dispute that has already arisen to arbitration, even where court proceedings on that dispute are already on foot.

This liberty is recognised by section 9(1) of the AA 2005, which defines an “arbitration agreement” to include an agreement to submit to arbitration disputes which “have arisen” between the parties, and not merely disputes that may arise in future. It is also recognised by section 29 of the Contracts Act 1950, whose first exception permits parties to agree to refer to arbitration any dispute that may already have arisen. Neither provision is in doubt, and neither is disputed by the Respondent.

[40] The difficulty for the Appellant is that this liberty belongs to the parties jointly. It describes what the parties may achieve by agreement, at or after the point a dispute arises. It does not describe what one party may achieve alone, by invoking a standing contractual mechanism that permits it, unilaterally, to vary the terms on which disputes generally are to be resolved. A clause of that kind operates *prospectively* upon the parties’ ongoing relationship. It cannot, without more, operate retrospectively upon a dispute that has already crystallised and has already been placed before a court. To permit it to do so would allow one party alone to achieve, by unilateral amendment, what section 9(1) of the AA 2005 and section 29 of the Contracts Act 1950 contemplate only the parties may achieve together. It effectively permits one party to compel the other to repudiate his earlier agreement to arbitrate.

[41] There is in fact a more fundamental principle**.** Once a court is properly seised of a dispute, its jurisdiction to hear and determine that dispute is not liable to be divested except by the

true agreement of both parties, directed at that specific dispute. The Respondent invoked the jurisdiction of the Sessions Court on 16.12.2020. From that date, she held a vested right to have her dispute adjudicated by that court, subject only to a pre-existing and applicable arbitration agreement, or to a subsequent agreement she herself joined in making. A rulebook provision permitting the Appellant unilaterally to amend Clause 1.3 at any future date, for any reason, and without prior notice, is not an agreement by the Respondent, made at or after the dispute arose, to remove that specific dispute from the jurisdiction she had already invoked. It is, at most, evidence of a standing arrangement by which the Respondent agreed, in advance and for the future, to be bound by changes the Appellant might unilaterally make to the rules governing her *distributorship* generally. Those are two different things, and the second cannot be read as achieving the first, particularly where the party relying on the amendment is the very party who unilaterally made it, after losing the point under the earlier version of the same clause.

[42] We draw support for this distinction from an established principle of statutory construction, which we consider applicable here by analogy. A statute is not ordinarily construed to interfere with a vested right retrospectively unless the legislature has used language that admits of no other conclusion. The same caution applies with at least equal force to a standard form contractual clause. A general power to amend a rulebook governing a continuing relationship is not naturally read, absent

clear words, as conferring on one party the power to redirect, after the fact, the forum in which a dispute that has already crystallised, and that the other party has already brought before a court, is to be resolved. If the Appellant wished to reserve such a power to itself, it was open to it to say so in clear terms. It did not.

[43] A dispute resolution clause is different in kind from an operational policy governing matters such as bonuses, sales targets or disciplinary procedure. It is not a rule for future conduct. It fixes, at the point the parties' relationship began and as reasonably relied upon by both sides, the forum in which their disputes are to be resolved. Once a dispute has crystallised, here, on the Appellant's own repeatedly pleaded case, in March 2020, the parties' procedural rights in relation to that specific dispute are, absent clear and express agreement to the contrary, fixed as at that date.

[44] The chronology in this case illustrates precisely the mischief the principle set out above exists to guard against. The June 2021 amendment came after the suspension. It came after the OS was filed. It came after the 1st Stay Application had already failed in the Sessions Court, on the ground that the clause then relied upon was unlawful. It came shortly before the Appellant's fresh Notice of Arbitration. We do not need to characterise the Appellant's motive in amending the clause when it did, a matter we return to with some caution at Issue 8 below, in order to reach this conclusion. The conclusion follows from the ordinary

construction of what a dispute resolution clause is for, and from the principle that a court's jurisdiction, once properly invoked, is not liable to unilateral divestment.

[45] There is a further, corroborative difficulty with the Appellant's position, arising from the conduct of the Appellant's own earlier litigation. In the appeal that produced the April 2022 Decision, the Appellant defended the validity and applicability of Clause 1.3 in its 2019 form. It did so notwithstanding that, by the date of that appeal, the EEPP had already been amended in June 2021. The very version the Appellant now says governs, and now says applies retrospectively to this dispute, already existed at that time. Had the Appellant genuinely understood the 2021 amendment to reach back and capture a dispute that crystallised in March 2020, it might have been expected to advance that case in April 2022, when the amended clause was already available to it. It did not. It defended instead the validity of the earlier clause on its own terms, without any reference to the amendment it had itself made some ten months before.

[46] We accept the Appellant's explanation that the record of appeal in the earlier proceedings, being an appeal from the Sessions Court, ordinarily reflected the position as it stood before that court, and that the amended EEPP, made after the Sessions Court's decision, would not automatically form part of that record. That explains, at most, why the amendment was not formally exhibited. It does not explain the Appellant's silence on the amendment altogether, whether in submissions or by way

of an application to adduce it as further material relevant to an issue squarely live on that appeal. The June 2021 amendment was not evidence the Appellant discovered after the fact. It was the Appellant’s own document, made by the Appellant in the ordinary course of amending its own rulebook, and it was therefore always within the Appellant’s own knowledge, independently of what the formal appeal record happened to contain.

[47] A litigant is not permitted to approbate and reprobate: to take one position to secure an advantage in one proceeding, and an inconsistent position for a similar advantage in the next, where both concern the very same dispute between the very same parties. The principle is of long standing. See the statement of Scrutton LJ in *Verschures Creameries Ltd v Hull and Netherlands Steamship Co Ltd* [1921] 2 KB 608, that a party cannot elect to approbate and reprobate, and must choose one consistent course. We don't need to characterise the Appellant’s conduct as deliberate bad faith, a state of mind we decline to find on affidavit evidence alone for the reasons given at Issue 8 below, for the inconsistency to count against the Appellant. It is enough that the Appellant’s own conduct of the April 2022 proceedings is objectively inconsistent with the case it now advances, and that this inconsistency further undermines any suggestion that the 2021 amendment was always understood, even by the Appellant itself, to reach back and capture this dispute. We treat this as an additional and corroborative reason for rejecting retrospective effect, not as a

free-standing one. Our conclusion rests principally on the analysis at [39] to [44] above.

[48] For these reasons, even if we are wrong on Issue 3, the June 2021 amendment could not, in any event, confer on the Appellant a right to compel arbitration of a dispute that had already crystallised, and had already been brought before the Sessions Court, before that amendment was made. Section 10(1) accordingly had nothing on which to operate, so as to stay the Respondent's proceedings. The courts below were correct, on this ground too, to refuse the stay and to hold Clause 1.3, in its 2021 form, inoperative against this dispute.

Issue 8: Was the Finding of Bad Faith Properly Made?

[49] We turn last to Issue 8, the only remaining issue the parties asked us to determine. The High Court, at paragraph 21 of its grounds, found that the June 2021 amendment was made "unilaterally by the Appellant without good faith … to allow the Appellant a second bite". The Appellant submits that this finding of subjective bad faith could not properly be made on affidavit evidence alone, without cross-examination. It relies on *Tan Wei Lian & Ors v Mansor bin Masikon & Ors* [2019] 1 LNS 1615, and on the caution against drawing inferences of bad faith from affidavit evidence alone that is well known from *Re Smith & Fawcett*. It further submits that the parties' conflicting positions on motive raise a triable issue, relying on *Husli @ Husly bin Mok v Jundar Realty Development Sdn Bhd & Anor* [2014] 3 MLJ

496 and *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217.

[50] We have some sympathy with this submission. An inference drawn from an undisputed documentary chronology does not invariably require cross-examination, and the chronology here, namely when the amendment was made and what it changed, is not seriously in dispute. But characterising that chronology in terms of the Appellant's subjective bad faith went further than was necessary, and further than the material properly supported without the Appellant having had a fair opportunity to explain itself through oral evidence.

[51] We do not need to resolve this question. Issue 4 above yields the same result through the ordinary, objective construction of Clause 1.3, and through the application of settled principles governing the divestment of a court's jurisdiction once properly invoked, without any finding as to the Appellant's state of mind. To the extent the High Court's judgment can be read as making a finding of subjective bad faith, we do not endorse it. We rest our decision instead on the objective analysis at Issues 3 and 4 above.

Conclusion — Appeal 125

[52] For the reasons given above, we find as follows.

(a) Section 10(1) of the AA 2005 required, and the courts below were correct to undertake, a genuine determination of whether a valid and operative arbitration agreement existed. *Kompetenz-kompetenz* under section 18 does not oust that statutory duty, particularly in circumstances such as these, where the clause originally relied upon has already been finally declared void by this Court, where the relief sought is final rather than interlocutory, and where the question is one of ordinary construction resolved on undisputed documents.

(b) *Res judicata* is not, in the strict sense, made out against the differently worded June 2021 clause, though the April 2022 Decision remains important context.

(c) On its true construction, Clause 1.3 in its November 2019 form never conferred on the Appellant any right to commence arbitration against a distributor. This is the primary and independently sufficient basis for our decision.

(d) In any event, the June 2021 amendment could not be applied retrospectively to alter the dispute resolution mechanism for a dispute that had already crystallised and was already the subject of litigation. The liberty of parties to submit an existing dispute to arbitration belongs to the parties jointly, and cannot be exercised unilaterally by one party through a standing variation clause. A court's jurisdiction, once properly invoked, is not liable to divestment save by the true agreement of both parties directed at the specific dispute in question.

(e) We do not endorse the High Court's finding of subjective bad faith, and rest our decision instead on the objective construction of Clause 1.3.

(f) Issues 5, 6 and 7 were not seriously pursued before us, and we express no view on them.

[53] By reason of the aforesaid, Appeal 125 is dismissed. The order of the High Court dated 20.3.2024, dismissing the Appellant's appeal against the refusal of the 2nd Stay Application, is affirmed. We fixed costs of RM30,000.00 to the Respondent, subject to allocator.

Appeal 2024

[54] Appeal 2024 is the Appellant's appeal against the High Court's affirmance, on the same date and on materially the same reasoning, of the order allowing OS 2, that is, the Respondent's separate originating summons for a declaration that no valid arbitration agreement exists between the parties, and for a permanent injunction restraining the arbitration the Appellant commenced on 25.11.2021. As already noted, the parties accept, and we agree, that Appeal 2024 raises no question

distinct from those we have already determined. We deal with it in summary fashion.

[55] The difference between the two appeals is procedural rather than substantive. Appeal 125 concerns an application under section 10(1) to stay court proceedings. Appeal 2024 concerns a final originating summons for declaratory and injunctive relief restraining an arbitration outright. That distinction affects only the procedural gateway by which the same underlying question reaches this Court. If anything, it strengthens the Respondent's position, for the reasons given at [21(a)] and [26] above. The inherent jurisdiction of the courts to restrain an arbitration lacking legal foundation is not constrained even by the ordinarily preferred, light-touch approach appropriate to a first-instance stay application.

[56] On the merits, Appeal 2024 turns on precisely the same question as Appeal 125: whether Clause 1.3, in any version capable of application to this dispute, ever entitled the Appellant to compel the Respondent to arbitrate. For the reasons given at Issues 3 and 4 above, it did not, and it could not. The November 2019 version of Clause 1.3 never conferred such a right in the first place. The June 2021 amendment could not retrospectively manufacture one for a dispute that had already crystallised and was already before the Sessions Court. Those conclusions are as dispositive of OS 2 and Appeal 2024 as they are of the 2nd Stay Application and Appeal 125. Our reasoning on *res judicata*

at Issue 2, and on the propriety of the High Court's finding of bad faith at Issue 8, applies equally, and we do not repeat it.

[57] Accordingly, Appeal 2024 is dismissed. The order of the High Court dated 20.3.2024, affirming the order allowing OS 2 and restraining the arbitration commenced on 25.11.2021, is affirmed. We fixed costs of RM10,000.00 to the Respondent, subject to allocatur.

Dated the 1st day of September 2026

-sgd-

ONG CHEE KWAN
JUDGE
COURT OF APPEAL

CIVIL APPEAL NO. J-04(IM)-122-03/2024

Counsel for the Appellant	:	1. Mohanadass Kanagasabai; and 2. Thomas Shaun Mathews (Messrs. Mohanadass Partnership)
Counsel for the Respondent	:	1. Jayabalan a/l Raman Kutty; and 2. Siva Nantha a/l Saravanan. (Messrs. R. Jayabalan)

CIVIL APPEAL NO. J-04(IM)-125-04/2024

Counsel for the Appellant	:	1. Mohanadass Kanagasabai; and 2. Thomas Shaun Mathews (Messrs. Mohanadass Partnership)
Counsel for the Respondent	:	1. Jayabalan a/l Raman Kutty; and 2. Siva Nantha a/l Saravanan. (Messrs. R. Jayabalan)

CIVIL APPEAL NO. J-02(NCC)(A)-2024-11/2024

Counsel for the Appellant	:	1. Mohanadass Kanagasabai; and 2. Thomas Shaun Mathews (Messrs. Mohanadass Partnership)
Counsel for the Respondent	:	1. Fadhil Ihsan bin Mohamad Hassan; and 2. Mohammad Syahmi bin Nawawi. (Messrs. Azwad Ihsan & Co.)