IN THE MATTER OF APPSMITHS SUTERA SDN BHD

AND

In the matter of Section 99(1)(g) of the Insolvency Act, Cap 247.

BETWEEN

SUTERA ENERGY SDN BHD **... Petitioner**

AND

APPSMITHS SUTERA SDN BHD **... 1st Respondent**
APPSMITHS SDN BHD **... 2nd Respondent**

(High Court Of Brunei Darussalam)
(Companies Winding Up No. 4 of 2025)

Muhammed Faisal Bin PDJLD Kol(B) DSP Hj Kefli, J.C
Date of Ruling: 30th September, 2025.

Headnote: Arbitration – Stay of proceedings – International Arbitration Act, s 6 – Prima facie standard – Tomolugen three-stage test – Valid arbitration agreement – Dispute within scope – Agreement inoperative or incapable of being performed – Non-payment of deposit – Refund request – Resignation of arbitrator – Prolonged inactivity – Just and equitable winding-up – Public policy – Balance of prejudice – Stay refused.

Miss Too Shu Vun of Messrs LZ Hussain & Co for the Petitioner.
Mr Andrew Jonathan Nyi Tsun Wong of Messrs CCW & Partners for the Respondent.

Cases cited:
Tomolugen Holdings Ltd v Silica Investors Ltd [2015] SGCA 57
Family Mart China Holding Co v Ting Chuan (Cayman Islands, 2023) Holding Corp [2024] 1 All ER (Comm) 967
Paal Wilson & Co v Partenreederei Hannah Blumenthal; The Hannah Blumenthal [1983] 1 All ER 34
Kebabangan Petroleum Operating Co v Mikuni (S) Pte Ltd [2021] 1 MLJ 693
Zecon Engineering Sdn Bhd v Posco Daewoo Corp [2025] MLJU 391

Statutes:
Section 6 of the International Arbitration Act, Cap. 279
Section 99(1)(g) of the Insolvency Act, Cap. 247
Rule 19(3) of the Asian International Arbitration Centre

RULING

Muhammed Faisal, J.C:

I Introduction

1. This is the 2nd Respondent's application, by way of Notice of Motion dated 18 June 2025, for an order that these winding-up proceedings be stayed pursuant to Section 6 of the International Arbitration Act[1], Cap. 279, pending the resolution of disputes by arbitration in Malaysia.

2. The Petitioner, Sutera Energy Sdn Bhd, opposes the application, contending that the arbitration agreement is now inoperative or incapable of being performed, and that the matters raised in the winding-up petition are not arbitrable but engage the Court's statutory jurisdiction under Section 99(1)(g) of the Insolvency Act[2], Cap. 247.

II Background Facts

3. The 1st Respondent, Appsmiths Sutera Sdn Bhd ("the Company"), is a joint venture company incorporated in Brunei Darussalam on 25 February 2020 with an issued share capital of B$1,000,000. The Petitioner and the 2nd Respondent each hold one ordinary share, representing equal ownership.

4. The joint venture was established pursuant to a Joint Venture Agreement[3] ("JVA") dated 5 February 2020. Under Clause 3[4] of the JVA, the purpose of the joint venture was to undertake and perform Brunei Shell Petroleum Company Sdn Bhd ("BSP") Contract No. C181884 for CO_2 Well Tracer Services, and any other activities incidental or complementary thereto. Clause 7.2[5] provides that the joint venture shall subsist for the duration of the BSP Contract and one year thereafter, with any further renewal at the sole discretion of the 2nd Respondent.

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[1] "6.(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after entering an appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as they relate to that matter." - ***S.6(1) International Arbitration Act, CAP 279***

[2] "S. 99. (1) A company may be wound up by the Court if-
(g) the Court is of the opinion that it is just and equitable that the company be wound up." - ***S.99(1)(g) Insolvency Act, CAP 247***

[3] *See exhibit **"P5"** of Petition dated 13th February, 2025*

[4] **Clause 3.1, JVA** "*The purpose of the JV company will be to undertake the Business in Brunei and as agreed together with any other activity complementary to the purpose of the company.*"

[5] **Clause 7.2 JVA** "*The duration of this joint venture shall be for a period of the BSP contract C181884 duration and its options plus one year. Thereafter any further renewal shall be at the discretion of Appsmiths Sdn Bhd.*"

5. The BSP Contract came to an end on 9 January 2025 and was not renewed. The Petitioner contends that the Company has had no further business since the expiry of the BSP Contract and that its principal object has thus lapsed.

6. Relations between the shareholders have deteriorated. The Petitioner complains of a breakdown of trust and confidence, citing the repeated changes of directors nominated by the 2nd Respondent, refusal to attend board and general meetings, failure to approve business plans, failure to approve or finalise the Company's accounts, and the accrual of penalties for statutory non-compliance. There have been letters of demand from third-party vendors and suppliers, which the Petitioner asserts it had to deal with unilaterally in order to protect the Company's position.

7. On 6 January 2025, the Petitioner wrote to the 2nd Respondent proposing that the Company be voluntarily wound up in light of the expiry of its principal contract and its continuing liabilities. The 2nd Respondent rejected this proposal by letter dated 13 January 2025. The present winding-up petition was then filed under *Section 99(1)(g) of the Insolvency Act*, seeking that the Company be wound up on *the just and equitable ground*[6].

8. Separately, disputes had arisen between the parties in late 2023 concerning the management and control of the Company. On 3 November 2023, the 2nd Respondent issued a Notice of Arbitration under Clause 11.2(b)[7] of the JVA. The Petitioner acknowledged and filed a response and counterclaim. The AIAC confirmed the commencement of arbitration on 21 March 2024 and issued invoices for the provisional advance deposit ("PAD"). The 2nd Respondent paid its share in April 2024 but the Petitioner did not. Following reminders, the 2nd Respondent requested a refund of its deposit on 7 March 2025. The sole arbitrator subsequently resigned in April 2025. The proceedings are currently inactive but not formally withdrawn.

9. Against this background, the 2nd Respondent now seeks a stay of these winding-up proceedings pending the determination of the disputes by arbitration.

III Chronology of Arbitration Proceedings

10. Disputes between the Petitioner and the 2nd Respondent arose in or around August 2023 concerning the management and control of the Company. A Zoom meeting was held on 1 September 2023 in an attempt to resolve the differences, but the meeting ended without agreement.

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[6] *Supra, n.2*
[7] *Supra, n.3 at pp.48*

11. On 3 November 2023, the 2nd Respondent issued a Notice of Arbitration, alleging breaches of the JVA and seeking, inter alia, the dissolution of the joint venture company. The Petitioner acknowledged the notice on 10 November 2023 and, on 29 November 2023, filed a formal response and counterclaim under the AIAC Rules 2023.

12. By letter dated 21 March 2024, the *Asian International Arbitration* Centre "AIAC" confirmed that arbitration proceedings had been duly commenced and invoiced both parties for their respective shares of the provisional advance deposit ("PAD") under Rule 19 of the AIAC Rules[8]. The 2nd Respondent paid its share of the PAD on 12 April 2024. The Petitioner did not pay its share, resulting in repeated reminders from the AIAC on 18 September 2024, 29 October 2024, and 28 January 2025[9].

13. On 7 March 2025, the 2nd Respondent requested a refund of the sum it had paid towards the PAD, stating that the arbitral claim had not proceeded[10]. On 14 April 2025, the sole arbitrator appointed by the AIAC tendered his resignation. No steps have since been taken by either party to appoint a replacement arbitrator or to revive the arbitral process.

14. In August 2025, following direct queries by the 2nd Respondent's solicitors, the AIAC confirmed that the arbitration proceedings are "inactive" but have not been formally withdrawn or terminated[11]. The AIAC stated that the claims may be treated as withdrawn if the required deposit is not paid but that such withdrawal would be without prejudice to the claimant's right to recommence proceedings in future.

IV The Application and Affidavit Evidence

15. The 2nd Respondent's case is set out in the affidavit of Sailash Kumar a/l Thiagarajah (Sailash Kumar) affirmed on 18 June 2025. He avers that:

    - The disputes raised in the winding-up petition fall squarely within the scope of the arbitration clause in the JVA, in particular concerning the purpose of the joint venture, the duration of the JVA under Clause 7.2[12], and the management of the Company under Clause 9.1[13].

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[8] *See* exhibit "**AS-1**", Affidavit of Azlan bin Sharifudin
[9] *See* exhibit "**AS-2**", Affidavit of Azlan bin Sharifudin
[10] *See* exhibit "**AS-3**", Affidavit of Azlan bin Sharifudin
[11] *See* exhibit "**SK-6**", Affidavit of Sailash Kumar a/l Thiagarajah
[12] *Supra, n.5*
[13] **Clause 9.1, JVA** "Subject *to the terms of this agreement, Sutra agrees that Appsmiths shall supervise, direct and control all aspects of the operation of the Business in accordance with the directions and authorisation of the Exco Committee during the duration of this Agreement*."

- The arbitration agreement remains valid and operative, and the 2nd Respondent intends to pursue its claims to conclusion once the procedural issues are regularised.

- The Petitioner's unilateral conduct in managing the Company after the commencement of arbitration, including taking decisions without board approval, constitutes a breach of Clause 9.1 of the JVA[14].

- By virtue of Section 6 of the International Arbitration Act[15], the Court is obliged to stay the winding-up proceedings unless the arbitration agreement is shown to be null, void, inoperative, or incapable of being performed.

16. The Petitioner has filed three affidavits in opposition:

    - Sharifudin bin Haji Salahudin (Director of the Petitioner) affirmed that the arbitration has been effectively abandoned, that the petition raises matters of fact which are not arbitrable disputes, and that public policy requires that the Company not be kept in limbo.

    - Azlan bin Sharifudin provided detailed evidence of the AIAC correspondence reminding parties of the unpaid PAD, the 2nd Respondent's refund request of 7 March 2025, and the subsequent resignation of the arbitrator. He exhibits the refund letter and argues that the 2nd Respondent's conduct amounts to abandonment or waiver of its right to arbitrate, rendering the agreement inoperative.

    - Choong Shu Wan, a solicitor of the High Court of Malaya, exhibited a legal opinion[16] analysing Malaysian arbitration law. The opinion concludes that the arbitration agreement has become inoperative by reason of the withdrawal of the claims under Rule 19(3) of the AIAC Rules[17] and that a Malaysian court would likely refuse a stay of proceedings in similar circumstances.

17. Collectively, the Petitioner's affidavits contend that the petition is based on undisputed facts concerning the expiry of the BSP Contract, the paralysis of the Company's management, and statutory non-compliance, which are matters for this Court under Section 99(1)(g) of the Insolvency Act[18], not for a private arbitral tribunal.

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[14] *Id.*
[15] *Supra, n.1*
[16] *See* exhibit "**CSW-1**", Affidavit of Choo Shu Wan
[17] *Id.*
[18] *Supra, n.1*

18. A further affidavit by Sailash Kumar on 25 August 2025 exhibits evidence that the 2nd Respondent had paid its share of the PAD[19] and correspondence from the AIAC confirming that the arbitration remains inactive but extant[20]. He denies that the refund request amounted to abandonment or waiver and asserts that the 2nd Respondent remains ready to proceed with arbitration once the deposit issue is resolved. He maintains that the petition concerns disputes governed by the JVA and should be stayed pending arbitration.

V Submissions & Authorities

2nd Respondent

19. They submit that Section 6 of the International Arbitration Act[21] mandates a stay of proceedings where there is a valid arbitration agreement and the dispute falls within its scope, unless the agreement is shown to be null, void, inoperative, or incapable of being performed.

20. The JVA contains a clear and binding arbitration clause[22] (Clause 11.2). The grounds relied on in the petition — namely, whether the purpose of the joint venture has come to an end, whether its substratum has been lost, and whether there is deadlock — all involve disputes concerning the construction and operation of the JVA and the rights of the parties thereunder.

21. It is argued that argue that arbitration agreement remains valid and operative. The 2nd Respondent has paid its share of the provisional advance deposit and the arbitration was stalled by the Petitioner's refusal to pay its share. The request for a refund does not amount to abandonment, as confirmed by the AIAC which has stated that the proceedings are inactive but not withdrawn.

22. It is also submitted that the Court should give effect to the parties' agreement to arbitrate and allow the arbitral process to run its course. The remedy of winding-up remains available after the arbitral tribunal has determined the disputes.

23. In *Tomolugen Holdings Ltd v Silica Investors Ltd*[23], the Singapore Court of Appeal held that winding-up petitions can be stayed in favour of arbitration where the underlying disputes are arbitrable, and on *Family Mart China Holding Co v Ting Chuan (Cayman Islands, 2023)*[24] which similarly recognised that just and equitable winding-up

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[19] *See* exhibit "**SK-4**", Affidavit of Sailash Kumar a/l Thiagarajah
[20] *Supra, n.11*
[21] *Supra, n.1*
[22] *Supra, n.3 at pp.48*
[23] **Tomolugen Holdings Ltd v Silica Investors Ltd [2015] SGCA 57** at [63]
[24] **Family Mart China Holding Co v Ting Chuan (Cayman Islands, 2023) Holding Corp [2024] 1 All ER (Comm) 967** at [101] – [103]

petitions may be stayed to give effect to arbitration agreements. Reference is also made to *Paal Wilson & Co v Partenreederei Hannah Blumenthal*[25] for the proposition that arbitration agreements are not easily frustrated by delay or inactivity.

24. In *Paal Wilson,* it was it was held *inter alia,*

"Where delaying proceeding with an arbitration was caused by breaches by both claimant and respondent of the mutual obligations to one another to avoid delay it was not open to either party to rely on others conduct as amounting to repudiation."[26]

Petitioner

25. It is submitted that although the existence of the arbitration agreement is not disputed, the agreement has become *inoperative* within the meaning of Section 6 of the International Arbitration Act[27]. The 2nd Respondent itself requested a refund of the deposit, the sole arbitrator has resigned, and no steps have been taken to revive the arbitration.

26. The petition does not raise arbitrable disputes but invokes the Court's statutory jurisdiction under Section 99(1)(g) of the Insolvency Act[28] on the just and equitable ground, based on undisputed facts: the BSP Contract has expired, the Company has no business, and there is management deadlock.

27. Public policy and the interests of creditors and regulatory authorities require that the Company not be kept in a state of paralysis pending an arbitration which the 2nd Respondent has no genuine intention to pursue.

28. Even if a stay could be granted, the Court should limit it to a short period (three months) with liberty to proceed with the petition if the arbitration is not revived.

29. *Tomolugen Holdings*[29] approved a three-stage stay test but argues that the third limb — that the arbitration agreement must not be inoperative — is not satisfied. Also, insolvency proceedings engage public policy and cannot be ousted by private arbitration, Malaysian authorities including *Kebabangan Petroleum Operating Co v Mikuni (S) Pte Ltd*[30] and *Zecon Engineering Sdn Bhd v Posco Daewoo Corp*[31] which held that failure to pay deposits and prolonged inactivity can amount to abandonment or waiver of the right to arbitrate.

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[25] **Paal Wilson & Co v Partenreederei Hannah Blumenthal; The Hannah Blumenthal [1983] 1 All ER 34**
[26] *Id.*
[27] Supra, n.1
[28] Supra, n.2
[29] Supra, n.23
[30] **Kebabangan Petroleum Operating Co v Mikuni (S) Pte Ltd [2021] 1 MLJ 693**
[31] **Zecon Engineering Sdn Bhd v Posco Daewoo Corp [2025] MLJU 391**

VI Issues for Determination

30. The application raises the following issues for the Court's determination:

- **Validity and Scope of the Arbitration Agreement**
  - Whether there is a valid and binding arbitration agreement between the parties, and whether the matters raised in the petition fall within the scope of that agreement.
- **Operability of the Arbitration Agreement**
  - Whether the arbitration agreement has become inoperative or incapable of being performed within the meaning of Section 6 of the International Arbitration Act, having regard to the chronology of events including the non-payment of the deposit, the refund request, and the resignation of the arbitrator.
- **Arbitrability of the Petition Grounds**
  - Whether the matters raised in the petition, being an application for winding-up on the just and equitable ground, are capable of settlement by arbitration, or whether they fall within the exclusive statutory jurisdiction of the Court.
- **Public Policy Considerations**
  - Whether granting a stay would be contrary to public policy or would unduly prejudice creditors, employees, or the public interest in ensuring compliance with statutory obligations.
- **Balance of Prejudice**
  - The relative prejudice to each party if the stay is granted or refused, including whether the Company will suffer continuing detriment if the proceedings are stayed pending arbitration.

VII Discussions

24. The governing legal principles are settled. Section 6(2) of the International Arbitration Act provides that the Court "shall" stay proceedings which are the subject of an arbitration agreement unless satisfied that the agreement is "null and void, inoperative or incapable of being performed." [32]

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[32] *"S.6(2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such conditions as it may think fit, staying the proceedings so far as they relate to that matter, unless it is*

25. The Singapore Court of Appeal in *Tomolugen Holdings*[33] held that the Court should grant a stay if the applicant shows a *prima facie* case that:

(i) there is a valid arbitration agreement,

(ii) the dispute falls within its scope, and

(iii) the agreement is not null, void, inoperative or incapable of being performed.

The Court should only refuse a stay where it is clear on the evidence that one or more of these requirements have not been satisfied.[34]

26. *Existence of a Valid Arbitration Agreement*. There is no dispute that Clause 11.2[35] of the JVA constitutes a valid and binding arbitration agreement. The Notice of Arbitration issued by the 2nd Respondent on 3 November 2023 was acknowledged by the Petitioner, and a response and counterclaim were filed. I am satisfied that the first limb is made out.

27. *Whether the Disputes Fall Within the Scope of the Agreement*. The Petition seeks to wind up the Company on the just and equitable ground under s 99(1)(g) of the Insolvency Act, relying on:

(i) the expiry of the BSP contract,

(ii) the loss of the substratum of the joint venture, and

(iii) management deadlock.

Each of these grounds turns on the parties' rights and obligations under the JVA, including its duration[36], the purpose of the joint venture, and the management provisions.[37]

28. *Does the dispute fall within the scope of the agreement*? Although the remedy sought is a statutory winding-up order that only this Court can grant, the underlying disputes as to whether the joint venture purpose has been fulfilled, whether there has been breach of the JVA, and whether the Company can continue

satisfied that the arbitration agreement is void, inoperative or incapable of being performed." - ***S.6(2) International Arbitration Act, CAP 279***

[33] *Supra, n.23*

[34] *Supra, n.23 at [64]*

[35] *Supra, n.3 at pp.48*

[36] *Supra, n.5*

[37] *Supra, n.13*

to operate are arbitrable. Applying **Tomolugen**, I am satisfied that the second limb is satisfied.

29. *Whether the arbitration agreement is inoperative or incapable of being performed*. This is the crucial question.

Petitioner's Evidence

30. The Petitioner points to the following:

a) The 2nd Respondent requested a refund of the advance deposit from AIAC on 7 March 2025;

b) The sole arbitrator resigned on 14 April 2025 and no replacement was appointed;

c) The arbitration has remained inactive for over a year, with no steps taken to revive it; and

d) A legal opinion [38] concludes that under Rule 19(3) of the AIAC Rules[39], the claims may be treated as withdrawn and the agreement thereby rendered inoperative.

2nd Respondent's Evidence

31. The 2nd Respondent counters that:

a) It paid its share of the deposit;[40]

b) The refund request was merely to recover funds pending resolution of the deposit issue, not an abandonment of arbitration;

c) The AIAC confirmed in August 2025 that the arbitration is inactive but has not been withdrawn, and could still be revived;[41] and

d) It remains ready and willing to proceed with arbitration.

Refusing the Stay

32. The test whether court proceedings should be stayed in favour of arbitration is a prima facie test.[42] Conversely, the threshold for refusing a stay is thus a high one. Having considered all the issues and arguments put forward by both parties, I am

[38] *Supra, n.16*
[39] *Supra, n.8*
[40] *See* exhibit "**SK-4**", Affidavit of Sailash Kumar a/l Thiagarajah
[41] *Supra, n.11*
[42] *Supra, n.23*

satisfied on the evidence that the arbitration agreement has, for all practical purposes, become inoperative. The 2nd Respondent's own act of requesting a refund of its deposit, the resignation of the arbitrator, and the prolonged failure to take any steps to revive the process collectively amount to abandonment or waiver. For all intent and purpose, I am of the view that the claim is to be treated as withdrawn. The Court cannot permit the Company to remain in limbo indefinitely pending an arbitration which the 2nd Respondent has shown no real intention to pursue.

VIII Conclusion and Dispositive Order

33. Having considered the facts laid before me, I am satisfied that the first and second limbs of the test in *Tomolugen* are met: there is a valid and binding arbitration agreement, and the disputes underlying this petition fall within its scope.

34. The determinative issue lies in the third limb, that is, whether the arbitration agreement is inoperative or incapable of being performed. On the evidence, I find that the arbitration has been effectively abandoned. The 2nd Respondent's request for a refund of its advance deposit, the resignation of the arbitrator, and the absence of any steps to revive the proceedings over a prolonged period collectively establish that the agreement is, for all practical purposes, inoperative. The AIAC's characterisation of the proceedings as "inactive" reinforces this conclusion.

35. I am therefore satisfied that the threshold for refusing a stay has been crossed; it is clear on the evidence that the arbitration agreement cannot at present be performed. To grant a stay would be to leave the Company and its stakeholders in a state of paralysis, contrary to public policy and the statutory purpose of the just and equitable jurisdiction under s 99(1)(g) of the Insolvency Act.

IX Order

35. The 2nd Respondent's application for a stay of these proceedings pending arbitration is dismissed.

36. The winding-up petition shall proceed to be heard on its merits.

37. Costs of this application are awarded to the Petitioner, to be taxed if not agreed.

MUHAMMED FAISAL BIN PDJLD KOL(B) DSP HJ KEFLI
Judicial Commissioner