

Stay Pending Arbitration : Applications for Extension of Time, Issuance of Notice to Produce Documents and Filing of Defence constitute to “Steps in Proceedings”?

ESA JURUTERA PERUNDING SDN BHD v UNIVERSITI MALAYA [W-01(IM)(C)-105-03/2023]

26th February 2025

ISSUES

As long as there is a valid arbitration agreement that is capable of performance, a stay of proceedings pending reference to arbitration shall be granted pursuant to **Section 10 of the Arbitration Act 2005 (“AA 2005”)**, provided the applicant makes the “*application before taking any other steps in the proceedings*”.

In the case of **Airbus Helicopters Malaysia Sdn Bhd v Aerial Power Lines Sdn Bhd [2024] 4 CLJ 243** (read our update on this case [HERE](#)), the Court of Appeal held that a mere request for extension of time would not ipso facto tantamount to taking steps in proceedings for the purposes of Section 10 of AA 2005.

What if the Defendant applied for extension more than once and thereafter issued to the Plaintiff a Notice to Produce Documents referred in Pleadings? What if the Defendant also filed a Defence upon the dismissal of its stay application? Would these actions, cumulatively or otherwise, tantamount to steps in the proceedings, thus defeating the application for stay pending arbitration?

These questions were answered in the recent Court of Appeal case of **Esa Jurutera Perunding Sdn Bhd v Universiti Malaya [W-01(IM)(C)-105-03/2023]**.

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) The Plaintiff appointed the Defendant as the civil and structural consultant for a project known as “*CADANGAN PEMBINAAN BANGUNAN TAMBAHAN DEWAN*”

PEPERIKSAAN / DEWAN KULIAH, UNIVERSITI MALAYA”.

- (b) The contract between the parties were encapsulated in the Memorandum of Agreement dated 03.06.2008 (MOA), Conditions of Engagement and the Schedule to the Condition of Engagement (“**Agreement**”). The Conditions of Engagement contained an arbitration clause.
- (c) On 06.10.2022, the Plaintiff filed a Writ and Statement of Claim against the Defendant in the Kuala Lumpur High Court, alleging that the Defendant had failed, refused and/or neglected to fulfil its obligations under the Agreement.
- (d) The Defendant entered appearance on 17.10.2022 and the Court directed the Defendant to file its defence by 03.11.2022.
- (e) Via letter dated 17.10.2022, the Defendant applied for an extension of time until 17.11.2022 to file its defence. The Plaintiff agreed to the extension.
- (f) On 14.11.2022, the Defendant applied for a further extension until 01.12.2022 and the Plaintiff agreed to the Plaintiff’s request.
- (g) On 30.11.2022, the Defendant issued a Notice to Produce Documents Referred to in Pleadings dated 24.11.2022 and informed the Plaintiff that more time was required to finalise and file the defence. The Defendant indicate that they will be filing their defence by 05.12.2022.
- (h) The Plaintiff responded with a Notice Where Documents May Be Inspected dated 30.11.2022 and provided all documents requested by the Defendant via a Notice to Produce Document.
- (i) On 01.12.2022, the Defendant served a Notice of Arbitration on the Plaintiff and its solicitors and thereafter, on 02.12.2022, the Defendant filed an application for Stay pending Arbitration (“**Stay Pending Arbitration**”). The High Court had on 14.12.2022 directed that the Defendant need not file its defence pending disposal of its application for Stay Pending Arbitration.
- (j) The High Court dismissed the Stay Pending Arbitration application and following the same, the Defendant applied for interim stay of the decision but this was also dismissed by the High Court and the Defendant was ordered to file its defence by 07.03.2023.
- (k) On 02.03.2023, the Defendant lodged an appeal against the dismissal of the Stay Pending Arbitration application and filed another application for stay of all proceedings in the High Court pending disposal of the Appeal (“**Stay Pending Appeal**”). On 06.03.2023, the

Defendant applied for an ad interim stay pending the disposal of the Stay Pending Appeal application.

- (l) In the meantime, the Defendant filed its Defence and Counterclaim on 07.03.2023 as per the High Court's earlier directions.
- (m) On 18.04.2023, the High Court dismissed the Stay Pending Appeal application.

ISSUES BEFORE THE HIGH COURT

The main issue before the Court of Appeal is whether by seeking extensions of time from the Plaintiff to file the Defence and by issuing the Notice to Produce Documents Referred to in the Pleadings constitute "*steps in the proceedings*" for the purpose of Section 10 of AA 2005.

It is important to note that in this case, the Defendant also filed its Defence as per the High Court's direction pending the appeal, albeit with an express reservation of rights to refer the dispute to arbitration.

- **Steps in the Proceedings**

In considering this issue, the Court of Appeal referred to the Singapore's Court of Appeal case of **Carona Holdings Pte Ltd & Ors v Go Go Delicacy Pte Ltd [2008] 4 SLR 460** and held that, to constitute a step in proceeding for the purposes of stay pending arbitration, the action in question must demonstrate the applicant's desire to proceed with the Court action and that the applicant has no desire for the matter to be referred to arbitration.

"[29] Guided by the decision in Carona's case (supra), the pertinent question to ask is whether the request for the extension of time and the filing of the notice to produce 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.**" Put in another perspective, the action taken by the defendant must show its intention that he **desires that the writ action should proceed and has no desire that the matter should be referred to arbitration** (see *Austin & Whiteley Limited v S. Bowley and Sons [1912] 108 LT 921*). The defendant's action must not be seen as its intention to take steps to answer the plaintiff's claim."

[Emphasis added]

- **Reservation of Rights**

The Court of Appeal held that the Defendant's actions must be considered in view of the Defendant's solicitors' reservation of rights in the service letter for the Notice to Produce

Documents Referred to in Pleadings. The Court of Appeal view that the general reservation of rights would be wide enough to include the Defendant's rights to invoke the arbitration clause:-

*"[30] In answering the question whether the defendant has taken other steps in the proceedings, two actions referred to in paragraph [26] above, must be considered in the light of the defendant's solicitor's covering letter dated 7.3.2022 when serving the Notice to Produce Documents Referred to in the Pleadings on the plaintiff. In the said letter, the Defendant requested the plaintiff to furnish the documents referred to in the said notice for the defendant **"to prepare a Statement of Defence and for the pre-trial Case Management to run smoothly"**. In the same letter, the defendant had reserved all its rights in the following manner:*

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

[31] We take the view that by this paragraph, even though it was put in a general term, the defendant had expressed its intention of preserving its right to refer the dispute to arbitration. The words "all of our client's rights" should be read to include the defendant's right to invoke the arbitration's clause. Unfortunately, this letter was not referred to by the learned HCJ in her judgment. Be that as it may, taking into consideration the background facts of this case as referred to in paragraphs [5] to [11] above, it can be safely concluded that the application for extension of time (which was consented to by the plaintiff) and the filing of the notice to produce are not evidence of the defendant's unequivocal intention to proceed with the writ action. The extension of time sought does not prove that the defendant will eventually file its defence."

[Emphasis added]

- **Application for Extension of Time & Notice to Produce Documents**

Whilst the Defendant applied for extensions of time and issued the Notice to Produce Documents referred to in Pleadings, the Court of Appeal found that these actions does not tantamount to steps in the proceedings, in light of the factual matrix of the case.

Considering that the parties' contract was entered into in year 2008, the Court of Appeal found that it is not unreasonable to infer that the notice to produce and extension of time was to enable the Defendant to ascertain the nature of the agreement between the parties, which would include the agreement to arbitrate:-

"[32] In this respect, in its letter to the Deputy Registrar of the High Court dated 31.10.2022, the defendant did confirm that during the case management



conducted via e-review, **the defendant had notified the High Court that they would be filing the defence on or before 3.11.2022.** However, the extension of time sought is to “prepare and finalise (menyediakan dan memuktamadkan)” the defence. **It does not suggest that subsequent to the case management, the defendant would be filing its defence.** 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.** In addition, the general reservation of right as highlighted in the letter dated 24.11.2022 shows that at best, the defendant is preparing to take other steps in the proceeding including the filing of the application for stay. This is further fortified by the fact that the defendant had filed the notice of application for stay on 2.12.2022 barely 2 days from the date of service of the Notice Where Documents May Be Inspected dated 30.11.2022 by the plaintiff’s solicitors together with all documents requested by the defendant by way of a Notice to Produce Documents. Further, a Notice of Arbitration was also served on the plaintiff on 1.12.2022. **In our view, from the facts of this case, there is no clear intention reflected in the action of the defendant in not wanting to proceed to arbitration but instead to litigation.**”

[Emphasis added]

- **Filing of Defence**

Although the Defendant filed its Defence in this case, the Court of Appeal noted that the Defence was filed pursuant to the Court’s direction, following the dismissal of its interim stay application. The Court of Appeal also took note that the Defendant had expressly reserved their rights to refer the dispute to arbitration in the Defence and its service letter.

“[33] In addition, it is also pertinent to note that the statement of defence was filed by the defendant after being directed by the court at the case management stage. This was done after the application for interim stay of the High Court order was dismissed. However, in its covering letter when filing the defence, the defendant had expressly reserved its right to refer the dispute to arbitration. The relevant part of the said letter which was dated 7.3.2023 reads:

“Sepertimana arahan Mahkamah ini dan tanpa prejudis kepada hak Defendan untuk merujuk pertikaian antara Plaintiff dan Defendan di sini kepada prosiding timbang tara, dilampirkan di

sini sesalinan Pembelaan dan Tuntutan Balas Defendan bertarikh 7.3.2023 untuk tujuan penfailan”

[34] *Likewise, the defendant had also reserved its right in the statement of defence and counterclaim. It was pleaded that:*

1. Pada awalnya, Defendan menyatakan bahawa Pembelaan dan Tuntutan Balas ini (P&TB) difailkan tanpa menjejaskan hak Defendan untuk merujuk pertikaian pihak-pihak di sini kepada prosiding timbang tara (sepertimana dipersetujui secara kontrak antara pihak-pihak – klausa 4, Memorndum Perjanjian) ...

2. Defendan berhasrat untuk merujuk pertikaian pihak-pihak di sini kepada prosiding timbang tara dan tidak meneruskan (not to proceed) dengan tindakan Mahkamah di sini...”

By reference to its earlier decision of **Airbus Helicopters**, the Court of Appeal held that the Plaintiff’s rights to litigate in Court and the Defendant’s rights under Section 10 of AA 2005 should be balanced objectively.

Examining the facts of the case holistically, the Court of Appeal found that the Defendant did not evince intention not to be bound by the arbitration agreement or to submit to the Court’s jurisdiction. The Court of Appeal also held that Section 10 of AA 2005 should be construed so that there would be minimum intervention from the Courts on the parties’ agreement to arbitration:-

“[36] *The guideline as suggested in Airbus Helicopters Malaysia Sdn Bhd (supra) is an **objective approach in balancing** the right of the plaintiff to litigate its claim in court and the defendant’s right under section 10 of the Act. This is especially so when the phrase “taking any other steps in the proceedings” would invariably requires the court to evaluate the contradictory evidence and submission adduced by the parties.*

[37] *Hence, from the facts, we are of the view that the defendant has not irreversibly evinced its intention not to be bound by the arbitration agreement. The fact, taken holistically, did not show, that the defendant is submitting to the court’s jurisdiction. **It is also appropriate to remind ourselves that section 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]

KEY TAKEAWAY

Following the decision, it is important to note that:-

- (a) To constitute to a step in proceedings, the Defendant’s action “*must show its intention that he **desires that the writ action should proceed and has no desire that the matter should be referred to arbitration***”;
- (b) Applications for extension of time, issuing of Notice to Produce Documents referred to in Pleadings and filing of Defence as per the Court’s directions, especially if accompanied with a reservation of rights to arbitrate, would not per se tantamount to steps in proceedings; and
- (c) Whether a Defendant’s action tantamount to a step in proceedings is a fact sensitive question.

If you have any questions or comments on this article, please contact:-

CONTACT



ANDREW HENG YENG HOE
Senior Partner

+603 6207 9331

+6016 222 8412

andrew@zainmegatmurad.com

[The content of this article is not meant to and does not constitute a legal advice. It is meant to provide general information and specific advice should be sought about your specific circumstances. Copyright in this publication belongs to Zain Megat & Murad / ZMM]

ZAIN MEGAT & MURAD

D2-5-1 to D2-5-3A, Block D
Solaris Dutamas No.1, Jalan Dutamas 1,
50480 Kuala Lumpur, Malaysia

+6 03 6207 9331

+6 03 6207 9332

zmm@zainmegatmurad.com

