

Stay-ing within the Limits of the Arbitration Clock!

Time, for purposes of the **Limitation Act 1953**, stops to run upon commencement of a suit or other proceedings in a Court of law. However, what happens if the time bar sets in before the commencement of arbitral proceedings but after the commencement of the suit in Court that is subsequently stayed pending a reference to arbitration. The courts have looked at this issue in several cases.

The recent High Court judgment in **SH Builder & Marketing Sdn Bhd v Bongsor Bina Sdn Bhd**¹ provides guidance on whether time stops to run on the commencement of the Court proceedings or subsequently upon the initiation of arbitral proceedings.

On 6 August 2019, the plaintiff initiated a civil suit against the defendant in the Sessions Court, claiming for unpaid amounts in the sum of RM430,030.78. The dispute between the parties arose from a construction project, where the plaintiff was appointed as sub-contractor to carry out certain development works in respect of a housing project.

In response to the suit filed by the plaintiff, on 3 September 2019, the defendant filed an application to stay the Sessions Court proceedings pending reference of the dispute to arbitration. The Sessions Court allowed the defendant's stay application on 31 October 2019. The limitation period expired on 25 September 2019. The plaintiff then commenced arbitral proceedings against the defendant. The plaintiff's notice of arbitration was served upon the defendant on 1 July 2020.

The matter was referred to the High Court by the plaintiff for determination on a preliminary point of law, pursuant to **section 41 of the Arbitration Act 2005**. The question posed for the High Court's determination was whether time, for the purposes of the limitation period, stopped upon commencement of the civil suit in the Sessions Court or upon the commencement of the subsequent arbitral proceedings, after the stay had been granted.

Arbitration Update

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The plaintiff asserted that time stopped to run on 6 August 2019, when the Sessions Court action was filed by the plaintiff. This, the plaintiff argued, was well within the limitation period of six years from the due date of the plaintiff's final progress claim no. 14 on 25 September 2013 (in short, the limitation period only expired on 25 September 2019).

Lim Chong Fong J, at the High Court, agreed with the plaintiff's contentions and answered the question of law in favour of the plaintiff. The upshot of the High Court's decision was that where the Court proceedings were stayed upon the defendant's application, the limitation period must be calculated with reference to the date when the Court proceedings were commenced by the plaintiff.

In **Lineclear Motion Pictures Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd**², Liza Chan Sow Keng JC (now J) exercised Her Ladyship's discretion to impose a condition for the grant of the stay of Court proceedings, that the limitation defence is not to be raised in the arbitral proceedings. The High Court took the view that the stay would be rendered meaningless if the 1st defendant was allowed to raise limitation in the arbitration to the prejudice of the plaintiff. In short, limitation would not apply in the arbitration pursuant to the condition imposed by the Court. The matter was subsequently settled, and the Court of Appeal did not, therefore, pronounce on the matter.

A clear decision from the appellate courts is welcomed to provide clarity to the state of the law on this matter in view of the fine balance between the jurisdiction of the Court and the arbitral tribunal on matters relating to the limitation time bar.

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¹ (WA-24C(ARB)-8-03/2022).

² [2021] MLJU 1826.

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