

Be Cautious When Applying for an Extension of Time in the Event There is an Arbitration Agreement

Section 10(1) of the **Arbitration Act 2005** gives the party against whom court proceedings are brought a right to stay court proceedings if the agreement from which the dispute arises contains an arbitration clause.

However, this right to refer the dispute is forfeited if the party against whom the court proceedings are brought takes any step in the court proceedings.

The question is whether seeking an extension of time amounts to a “step” in the proceedings.

This question was addressed by the Court of Appeal in the recent case of **Airbus Helicopters Malaysia Sdn Bhd v Aerial Power Lines Sdn Bhd** [2024] 4 CLJ 243.

Brief Facts

Airbus Helicopters Malaysia (“AHM”) entered into a Sales Contract to sell a helicopter manufactured by its headquarters in France to Aerial Power Lines (“APL”). Dissatisfied with the helicopter upon delivery, APL brought a court action against AHM and filed a Statement of Claim of over 100 paragraphs, alleging various technical defects in the helicopter.

Faced with a lengthy Statement of Claim, no proper instructions from their clients at AHM’s French headquarters, and no access to the contractual documents, AHM’s Malaysian solicitors requested a one-month extension to file a defence (“Request”) during the first case management.

Subsequently, it was discovered that the Sales Contract contained an arbitration agreement, and as such AHM filed a stay application under section 10(1) (“Stay Application”). This Stay Application was filed before the next case management date, as well as the original deadline for filing the defence.

APL resisted the Stay Application on the basis that by requesting a one-month extension, AHM had forfeited its right to refer the dispute to arbitration, in favour of proceeding with litigation in court.

Arbitration Update

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The High Court agreed with APL and dismissed the Stay Application. However, following an appeal by AHM, this decision was overturned by the Court of Appeal and the court proceedings were stayed in favour of arbitration.

Findings

In reaching this decision, the Court of Appeal held as follows:

- There is a policy to uphold the bargain of the agreement between parties who have chosen arbitration as the preferred dispute resolution mechanism. A party commencing litigation in court would be in breach of this agreement.
- The court generally grants a stay of the court proceedings unless the applicant has evinced a clear and unequivocal intention to proceed with the suit and not to be bound by the arbitration agreement.
- The intention of the applicant in seeking a stay is crucial, the determination of which requires a fact-centric approach. The applicant's intention should be assessed by its actions, particularly whether they are "*preparatory*" to taking a step, or are actually taking the "*step*" itself in court proceedings.
- It would be overly simplistic and strict to consider a mere request for an extension of time to file a defence as "*taking any other steps in the proceedings*".
- Considering the circumstances in this case, AHM's solicitors had made the reasonable Request out of caution. The Request did not prejudice APL.
- As soon as possible after learning of the arbitration agreement in the Sales Contract, AHM promptly filed the Stay Application.
- Therefore, AHM should not be prevented from wanting to honour the arbitration agreement.
- However, it would be prudent to reserve the right to apply for a stay of court proceedings when requesting an extension of time. This precaution is particularly important when dealing with foreign clients or industry standard-form contracts which typically include an arbitration agreement.

Conclusion

While it has almost become routine for solicitors to seek extensions of time to file defence during the first case management, before such a request is made, caution

should be exercised to prevent it from being considered as an abandonment of right to refer a dispute to arbitration.

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