

## The Race Against Time — When Does the Limitation Period Stop?

In issue April 2023 of our [Arbitration Update](#), we spoke of the High Court decision in **SH Builders & Marketing Sdn Bhd v Bongsor Bina Sdn Bhd** [2022] 1 LNS 2839 where it was held that the limitation period stops to run for arbitration proceedings when an action is filed in court, not upon the subsequent issuance of the notice of arbitration.

The Court of Appeal has considered this issue recently in **Bongsor Bina Sdn Bhd v SH Builders & Marketing Sdn Bhd** [2024] CLJU 965 (“Bongsor”) and affirmed the High Court decision.

### Brief Facts of the Case

A dispute arose from a construction contract where the plaintiff commenced civil proceedings in the Sessions Court against the defendant, for unpaid amounts in the sum of RM430,030.78 (“Sessions Court suit”).

The Sessions Court suit was filed before the expiration of the limitation period. Subsequently, the defendant filed an application pursuant to section 10 of the **Arbitration Act 2005** (“AA 2005”) to stay the civil proceedings (“Section 10 Stay Application”).

The Sessions Court Judge allowed the Section 10 Stay Application. However, by the time the plaintiff served its notice of arbitration, the limitation period had expired. Following this, the plaintiff made an application to the High Court pursuant to section 41 of the AA 2005.

The question of law that was posed for determination by the High Court was whether time stops to run when the plaintiff/applicant commenced the suit in the Sessions Court, or when the plaintiff/applicant served the notice of arbitration on the defendant/respondent.

In dismissing the plaintiff’s application, the High Court held the limitation period stops to run when proceedings are filed in court, even if the dispute is later referred to arbitration as a result of a successful stay application. Dissatisfied with the High Court’s decision, the defendant appealed to the Court of Appeal.

# Arbitration Update

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## Findings

The principles that can be distilled from the decision of the Court of Appeal are as follows:

- (i) The purpose of the limitation period is to discourage a litigant from sleeping on its right to pursue its claim. A litigant will be “*penalised*” for its delay to recover any outstanding debt within the time set under the **Limitation Act 1953** (“LA 1953”). Nevertheless, the Court of Appeal considered the applicable guiding principles in relation to the interpretation of law on limitation and concluded that the liberal approach should prevail over the strict approach.
- (ii) The courts have jurisdiction to hear any civil action, including matters that involve an arbitration agreement. Thus, the Sessions Court suit is a valid action even though it is subjected to the Section 10 Stay Application filed by the defendant.
- (iii) The issuance of the Notice of Arbitration arising out of an order for stay under section 10 of the AA 2005 cannot be viewed in isolation. It is a process which stems from the plaintiff’s action in the Sessions Court suit.
- (iv) Section 30 of the LA 1953 and section 23 of the AA 2005 are applicable in cases where the dispute is directly referred to arbitration, unlike the case at hand.
- (v) The application of section 30 of the LA 1953 in this instance will cause an absurdity for the following reasons: -
  - (a) The Plaintiff will be caught as it cannot pursue its claim in arbitration proceedings due to statutory limitation and on the other hand, the Sessions Court suit has been stayed pending arbitration proceedings.
  - (b) The Court would face a similar quandary — the Sessions Court suit remains pending even though arbitration cannot proceed. And yet, there is no basis for the Court to strike out the Sessions Court suit as the plaintiff filed the same before limitation set in.
- (vi) The Court of Appeal however cautioned that a plaintiff may have its claim barred on the grounds of laches. The Court of Appeal remarked that the gap of several months between the grant of the stay Order and the filing of the notice of arbitration would, in normal circumstances, open the plaintiff up to a challenge of laches. In the present case, the Court of Appeal held that the delay was reasonable by reason of the movement control order.

## Comments

The Court of Appeal findings are consistent with the current arbitral landscape of Malaysia, where the courts have taken a pro-arbitration stance with respect to stay applications. Notwithstanding the above, this case serves as a useful reminder to litigants to pursue their claims with reasonable diligence to avoid their claims being barred by limitation.

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