

Court rules that stay of proceedings is mandatory

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Introduction

This update examines the Federal Court's decision in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd*.⁽¹⁾ This case restates the Malaysian courts' position in respect of their intervention in arbitration.

The Federal Court decision provides a useful reminder that the principle of party autonomy in arbitration, unless there is cogent basis not to adhere to it, will be upheld by giving effect to the arbitration agreement as long as it is not null and void, inoperative or incapable of being performed. In addition, if a binding arbitration agreement exists between the parties, the court must grant an order to stay the court proceedings pending reference to arbitration on application by any party to the agreement for a stay order.

Overview

In its first-instance decision, the high court allowed the stay application pending arbitration pursuant to Section 10(1) of the Arbitration Act 2005 as the parties had clear arbitration clauses which formed part of the contract between them and were not null and void or incapable of being performed. However, the high court's judgment was appealed.

The Court of Appeal agreed with the high court and ruled that the court had no discretion but to grant a stay of the proceeding, save for the exception set out in Section 10(1) of the Arbitration Act 2005; hence, the appeal was dismissed unanimously. Dissatisfied with the Court of Appeal's decision, an appeal was made to the Federal Court.

The Federal Court has now found that the clear effect of Section 10(1) of the Arbitration Act 2005 is to render a stay mandatory if the court finds that all the relevant requirements have been fulfilled. This has helpfully given parties to arbitration comfort that the courts will give effect to the clear intention of Parliament, as enunciated in the statute, to uphold the party autonomy principle by ensuring that no party is allowed to depart from what they have agreed to voluntarily in an agreement without valid justification.

Facts

In *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* the appellant company owned and operated an aluminium smelting plant, whereas the respondent company provided insurance and *takaful* products. By way of an insurance contract, the respondent agreed with the appellant to insure all critical plants and machineries against sudden and

unforeseen damage from any cause not excluded. The sum insured for machinery breakdown was RM200 million and the sum for lost profits was RM100 million.

Subsequently, the appellant suffered substantial losses and damage as a result of a disruption to its smelting operation caused by an extensive power outage, which forced the plant to be shut down temporarily. The appellant commenced legal proceedings before the high court against the respondent for, among other things, an indemnity by the respondent under the policy in respect of all losses and damage suffered by the appellant arising out of the incident and various declaratory orders and damages for breach of the policy and fraud committed by the respondent in the issuance of the policy.

Based on the arbitration clauses, the respondent applied to the court for a stay of the proceedings pending reference to arbitration.

The two arbitration clauses provided as follows:

- In respect of machinery breakdown, "if any difference arises as to the amount paid under this certificate (liability being otherwise admitted), such difference shall be referred to the decision of an arbitrator".
- In respect of loss of profits, "if any difference arises as to the amount to be paid under this certificate (liability being otherwise admitted), such difference shall be referred to the decision of an arbitrator".

However, the appellant submitted that the arbitration clauses were not part of the insurance contract between the appellant and the respondent and therefore there was no arbitration agreement in place and Section 10 of the act had no applicability.

Federal Court's decision

The Federal Court affirmed the Court of Appeal's decision and made the following findings.

Stay is mandatory

According to the Federal Court, in order to grant a stay:

- there must be a binding arbitration agreement or clause between the parties; and
- this agreement cannot be null and void, inoperative or incapable of being performed.

The court is no longer required to consider whether a dispute exists when granting a stay. In relation to this, the Federal Court was satisfied that the requirements were fulfilled. Accordingly, Section 10(1) of the Arbitration Act applied and the respondent was entitled to a grant of stay.

The Federal Court's decision operates as a guideline, or more so as a precedent, for similar cases in the future. It proves clarity to lawyers and the inferior courts regarding where the law stands in relation to the courts' power to stay proceedings pending arbitration.

Valid arbitration agreement

It was the appellant's contention that the payment slip issued by the respondent to the appellant contained no arbitration clause and that it was not bound by the terms of the previous policy which had already expired. In respect of this, the Federal Court agreed with the judge's finding that:

"even though the placement slip does not expressly contain an arbitration clause, it is not a disputed fact that the placement slip makes reference to the expired policy number which contained an arbitration clause, and as such the said arbitration clause was effectively incorporated in the new policy by the reference made in the placement slip."

The court's decision was based on the fact that even if the terms of an arbitration agreement are only referred to in the overall agreement, they are still binding – as if they were written in the latter agreement.

The Federal Court's decision provides a useful reminder to parties that they are bound by what they have agreed to in the arbitration agreement, including reference to another document where those terms can be found, regardless of whether they go to the trouble of reading them.

Scope of arbitration clause

Given that the respondent had admitted its liability, the Federal Court was satisfied that the only dispute left was the issue of the amount or quantum to be paid. The court had to decide whether the appellant's claim in the court proceedings fell within the ambit or scope of the arbitration clauses. On this matter, the appellant claimed for indemnity under the policy, while the respondent sought to offer a lesser sum than the appellant's claim after an analysis of the claim and the terms of the policy. The clear difference between the parties regarding the amount to be paid as indemnity under the policy was sufficient to bring the dispute within the scope of the arbitration clause.

The Federal Court's decision shows the court's reluctance to interfere with the principle of party autonomy. The Federal Court remarked that even in cases where the court doubts the validity of the arbitration clause or where it is arguable whether the subject matter of the claim falls within the scope of the arbitration clause, the court should nevertheless lean more towards granting a stay pending arbitration, pursuant to Section 10 of the act. The court ought to give a wide interpretation to the arbitration clause to serve, as far as the language used by the parties in the arbitration clause will permit, the commercial purpose of the arbitration clause.

Insufficient grounds to deny a stay

In considering the appellant's arguments and submission, the Federal Court ruled that the following grounds were an insufficient basis on which to deny a stay of proceedings pending arbitration:

- claims for declaratory orders and ancillary matters, such as fraud, damages, an account of monies received and inquiries into the monies remaining in the respondent's possession;
- where areas of law are in dispute;
- suggestions that avoiding arbitration will save time, costs or expenses of the parties; and
- reliance on Order 69, Rule 10(3) of the Rules of Court 2012 to suggest that the court should decide whether the subject matter falls within the terms of the arbitration clause and Section 10(1) of the act.

The Federal Court's decision provides a useful reminder of the difficulty in opposing an application to stay proceedings pending arbitration, as the court is mindful of the mandatory effect of Section 10(1) of the act as well as the critical importance of upholding the principle of party autonomy.

Comment

The decision in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* has clarified that once the parties agree to submit to arbitration in the event of disputes and put that agreement into writing, the courts will be less willing to allow one party to subsequently seek to depart from the arbitration agreement without sufficient justification. It is noteworthy that the courts are not only concerned about upholding Parliament's intention that a stay of proceedings pending reference to arbitration is mandatory unless otherwise exempted, but also to respect the core principle of party autonomy entrenched in Malaysian law.

For further information on this topic please contact Gan Khong Aik at Gan Partnership by telephone (+603 2201 1130) or email (khongaik@ganlaw.my). The Gan Partnership website can be accessed at www.ganlaw.my.

Endnotes

(1) [2016] 5 MLJ 417.

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