

No Payment, No Arbitration

Can a defendant who refused to pay its portion of further deposit of the arbitrator's fees and the AIAC's administrative costs later object to the matter being brought before the High Court? The Court of Appeal in **JSB v ACSB**¹ was presented with this important question.

Facts

Once an arbitration is commenced, pursuant to rule 14 of the AIAC Arbitration Rules 2018 ("AIAC 2018 Rules"), parties to the arbitration would be required to pay deposits to the Asian International Arbitration Centre (AIAC). Such deposits are meant to cover the cost of the arbitration i.e., the arbitrator's fees and the AIAC's administrative costs ("AIAC Deposit") and is typically split between the parties. Should one party fail to make payment, the other party will be given an opportunity to make the required payment.

The dispute between the plaintiff and defendant was initially referred to the AIAC. However, the arbitrator decided to terminate the arbitration pursuant to rule 6 of the AIAC 2018 Rules when the defendant (who had a counterclaim) refused to pay its portion of the further AIAC Deposit ("Further AIAC Deposit").

Following the termination, the plaintiff proceeded to file its claim in the High Court. The defendant objected to the claim on the premise that the arbitration agreement was subsisting and was not abrogated due to the defendant's non-payment of the Further AIAC Deposit. The defendant filed an application to strike out the plaintiff's writ and statement of claim under Order 18 rule 19(1)(a) to (d) of the Rules of Court 2012 ("ROC 2012") or alternatively, a stay of the court proceedings under Section 10 of the Arbitration Act 2005 ("AA 2005").

Before the High Court

The High Court (HC) ordered a stay of the HC proceedings under Section 10 of the AA 2005. In this regard, the HC found that the non-payment of the Further AIAC Deposit did not render the arbitration agreement inoperative or incapable of being performed. Further, the plaintiff could pay the defendant's portion of the Further AIAC Deposit and seek to recover it via the arbitration.

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Before the Court of Appeal

Did the defendant's application to strike out invoke the court's jurisdiction and taken fresh steps in the proceeding?

It is well-known that pursuant to Section 10 of the AA 2005, the courts have no discretion but to make an order to stay the court proceedings to allow the matter to proceed to arbitration as per the arbitration agreement unless the applicant has taken other steps in the proceedings.

Therefore, the Court of Appeal (CA) held that an application under Section 10 of the AA 2005 cannot be a hybrid application where it is combined with other provisions under the ROC 2012. By the defendant's application of seeking to strike out the court proceedings, the defendant had invoked the court's jurisdiction and therefore, can no longer apply for a stay of the proceedings. This is particularly so when the court would need to look into the merits of the case in deciding a striking out application. It mattered not on whether the court is agreeable with or dismisses the striking out application.

Whether the defendant's non-payment of the further AIAC Deposit rendered the arbitration agreement inoperative?

Notwithstanding the above, the CA proceeded to consider if the defendant's non-payment of the Further AIAC Deposit rendered the arbitration agreement inoperative.

The CA found that the defendant's refusal tantamount to a breach of the arbitration rules which in this case, was the AIAC 2018 Rules. The adoption of these rules was provided for in the arbitration agreement between the plaintiff and defendant. Thus, compliance with the arbitration agreement includes compliance with the applicable AIAC arbitration rules.

In coming to its decision, the CA took cognizance that it would be disturbing if a party refuses to pay simply because it has a choice not to and that there would be no adverse consequences on so doing. The CA further appreciated that such acts is an effective way to tax the financial resources of the party if the other party is keen to have the arbitration continue. In the words of the CA – *"We can think of no more belligerent action on the part of the refusing party to inflict suffering and punishment on the paying party and to expose it to greater risk of inability to recover the fees paid on its behalf in the award of cost."*

As such, the CA concluded that there was no clearer means of rendering an arbitration agreement as inoperative when a party refuses to pay its share of the deposits – especially when it simply does not want to. Such acts stultify the arbitration and is a waiver of its right to arbitration. The CA went further to hold that a refusal to abide by the agreed arbitration rules (which required the deposit) is a repudiation of the arbitration agreement.

Whether a stay would be an exercise in futility due to the defendant's resolve not to pay the AIAC Deposit?

The CA noted that the defendant sees itself as having an inalienable and basic right not to pay the Further AIAC Deposit. Thus, the CA was of the view that the defendant's actions if stay were granted is predictable i.e., the defendant would refuse to pay the required deposit and the arbitration is terminated. The plaintiff may then have to apply to court to reinstate the court proceedings while the defendant objects.

Thus, the CA held that it would be acting in vain should a stay of the court proceedings be granted as the plaintiff would be forced to pay for the defendant's Further AIAC Deposit so that the arbitration may proceed. The doctrine of estoppel applies as the defendant cannot insist on the continuation of the arbitration while refusal to comply with the AIAC 2018 Rules. It would also be unconscionable to allow the defendant to refuse compliance with the AIAC 2018 Rules when it had agreed to such rules.

Comment

The CA's decision is a welcomed decision as it serves to aid parties in arbitration who have had to foot the bill to pursue justice. As the CA had pointed out in its judgment, the non-paying party's act is *"a subtle but sly strategy to scuttle the arbitration"* – especially if the non-paying party has nothing else to lose.

Among the drawing factors of arbitration is the finality of its awards and the confidentiality of the proceedings. A non-paying party will risk such benefits should the arbitration be terminated and the matter proceeds to court. The proceedings of the dispute would be aired in public for all to see and read.

Non-paying parties will henceforth be more cautious about refusing to pay for their share of the required deposits in an arbitration.

*Any enquiries on construction disputes, please contact **Tasha Lim Yi Chien** (tasha@ganlaw.my).*