Stay Pending Arbitration : Limitation stops when action commences in Civil Courts

SH Builder & Marketing Sdn Bhd v Bongsor Bina Sdn Bhd [2022] 1 LNS 2839

ISSUES

When an action filed into court is stayed under Section 10 of the Arbitration Act 2005 for the disputes to be referred to arbitration, does the computation of limitation period stop at the time when the action is filed into court or does it only stop when the notice of arbitration is served thereafter?

What happens if the cause action is still within the limitation period when the action is filed into court but limitation has set in when the notice of arbitration is served after the court action has been stayed? Will the subsequent arbitration be barred by limitation?

Corollary to the above, is it necessary to attach a condition to the Section 10 stay order to preclude the respondent from raising the defence of limitation? Will the failure to seek such condition be fatal to the claimant's case?

These questions were answered in the recent Kuala Lumpur Construction High Court case of **BHS Builer & Marketing Sdn Bhd v Bongsor Bina Sdn Bhd** [2022] 1 LNS 2839.

BRIEF FACTS

The brief facts of the case, as reported, are as follows:-

(a) The Defendant is the main contractor in a development known as "*Cadangan Membina 12 Unit Baglo 1 Tingkat Yang Mengadungi Type A – 6 Unit dan Type B – 6 Unit Berserta 1 Unit Substation di Atas Lot 2512, Seksyen 36, Poskod 40470 Shah Alam*" ("**Project**");

(b) The Defendant appointed the Plaintiff as the sub-contractor for the Project via a Letter of Award dated 26.06.2012 ("**Contract**"). The Contract contained an arbitration agreement / clause;

(c) Disputes arose between the parties in relation to, amongst others, the Plaintiff's Progress Claim No.14 issued on 26.08.2013, for the sum of RM430,030.78;

(d) On 06.08.2019, the Plaintiff instituted KL Sessions Court Suit No. W-B52(NCVC)-250-08/2019 ("**Suit**") to claim for the said sum of RM430,030.78;

(e) The Defendant applied for the Suit to be stayed and for the disputes between parties be referred to arbitration. The Session Court allowed the stay application on 31.10.2019;

(f) The Plaintiff did not appeal against the stay order and instead served the Notice of Arbitration on 01.07.2020. Arbitration thereafter commenced upon the appointment of the Arbitrator.

APPLICATION BEFORE THE HIGH COURT

Upon the consent of the Arbitrator and the parties in arbitration, the Plaintiff filed an application pursuant to section 41 of the Arbitration Act 2005 for the following preliminary issues of law to be determined by the High Court:-

> *"(i) In the context of section 6 of the Limitation Act 1953, whether time already stops when the Plaintiff/Applicant filed the Writ Summons and Statement of Claim vis a vis Kuala Lumpur Sessions Court suit no. WA-B52(NCVC)- 350-08/2019 on 6.8.2019, which was subsequently stayed pending Arbitration pursuant to the Order dated 31.10.2019 or time only stops when the Plaintiff/Applicant served the Notice of Arbitration on the Defendant/Respondent on 1.7.2020?; In the alternative;*
>
> *(ii) Whether the Plaintiff's/Applicant's claim against the Defendant/Respondent was time-barred by section 6 of the Limitation Act 1953 when the Plaintiff/Applicant served the Notice of Arbitration on the Defendant/Respondent following the Order by the Kuala Lumpur Sessions Court suit no. WA-B52(NCVC)-350-08/2019 dated 31.10.2019 pending Arbitration, even though the Writ Summons and Statement of Claim was filed much earlier on 6.8.2019?"*

WHEN LIMITATION STOPS?

The Learned High Court Judge observed that a court action commenced in breach of an arbitration agreement is valid subject to the party applying for stay to have the disputes referred to arbitration. Hence, limitation stops in respect of the disputes when the court action is commenced:-

> *"[28] In the Federal Court case of Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat [1996] 1 CLJ 231, Gopal Sri Ram JCA (later FCJ) held as follows:*
>
> > *"[1] At common law, a prior agreement between contracting parties to refer their disputes to arbitration did not operate to bar either of them from instituting proceedings in the Courts. Neither did such a clause preclude the Court from entertaining a suit filed in breach of the contract to arbitrate. However, as evinced by s. 6 of the Arbitration Act 1952, the Court could, in the exercise of its discretion, stay an action and require a plaintiff to adhere to the obligation to go to arbitration that he had voluntarily undertaken ..."*

In other words, <u>any court action commenced in breach of an arbitration agreement is valid</u> subject to the party applying for a stay of the court action to have the dispute referred to arbitration instead.

*[29] Consequently, I hold that the **<u>limitation stops based on s. 6(2) of the LA in respect of the dispute when the court action is commenced</u>** even though the dispute is subsequently referred to arbitration as a result of a successful stay application."*

[Emphasis added]

Whilst **section 30 of the Limitation Act 1953** and **section 23 of the Arbitration Act 2005** provides that arbitration commences upon service / receipt of the notice of arbitration, the Learned Judge found that these provisions are only applicable to cases where the dispute is directly referred to arbitration in the absence of a prior court action that has been stayed:-

*"[30] I have however not overlooked the provisions in s. 30 of the LA and s. 23 of the AA but **<u>I find and hold them to be applicable only to cases where the dispute is directly referred to arbitration ab initio in the absence of a prior court action that has been stayed.</u>***

*[31] Juxtaposed on the undisputed facts here that the cause of action of the dispute accrued either on 25 September 2013 or 18 March 2014, **<u>I find and hold that the Suit that has been commenced by writ on 6 August 2019 is well within the limitation period of 6 years prescribed by s. 6(1) of the LA. Hence, limitation stopped on 6 August 2019. It follows that for purposes of limitation, the subsequent notice of arbitration served on 1 July 2022 is irrelevant and/or redundant."</u>***

[Emphasis added]

<u>CONDITIONS FOR STAY TO PRECLUDE DEFENCE OF LIMITATION?</u>

The Defendant also submitted that the Plaintiff ought to have sought for a conditional stay to preclude the Defendant from raising the defence of limitation. The Defendant submitted that the failure to do so would be fatal.

However, the Learned High Court Judge found that such conditional stay order is merely obtained in abundance of caution and it would not matter if there is no such condition attached to the stay order:-

*"[32] For completeness, I am mindful that the Defendant relied on the cases of Apex Marble Sdn Bhd & Anor v. Leong Tat Yan [2018] MLJU 39 and Interscope Versicherung Sdn Bhd v. Sime Axa Assurance Bhd (formerly known as United Malayan Insurance Co Bhd) [2007] 2 CLJ 370 to demonstrate that the Plaintiff ought to have sought for a condition in the stay order pursuant to s. 10(2) of the AA that the Defendant upon the commencement of the Arbitration via the service of the notice of arbitration be precluded from raising the defence of limitation in the arbitration proceeding. It is otherwise fatal to the Plaintiff if no such condition is imposed. **<u>In my opinion, the ordering of the condition is however merely</u>***

ex abundanti cautela to avoid the occurrence of the problem as arisen here. It did not matter at all if no condition is attached to the stay order."

MOVING FORWARD

Based on the decision, it is important to note that:-

(a) When an action filed into court is stayed under Section 10 of the Arbitration Act 2005 for the disputes to be referred to arbitration, limitation stops running when the court action is commenced and not when the notice of arbitration is served thereafter;

(b) Section 30 of the Limitation Act 1953 and section 23 of the Arbitration Act 2005 relating to commencement of arbitration upon service / receipt of the notice of arbitration are only applicable in cases where the disputes are referred to arbitration directly without a prior court action that has been stayed;

(c) A condition to preclude the defence of limitation when the stay is ordered is sought in abundance of caution (ex abundanti cautela) to avoid disputes such as in this case. However, it does not matter if the stay was given without such condition for the purposes of computing limitation.

If you have any questions or comments on this article, please contact:-

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