

Stay Pending Arbitration : Hybrid Striking Out & Stay Application and Failure to Pay Deposit for Arbitrator's / Administrative Fees

JSB v ACSB [2023] MLJU 2406

29th December 2023

ISSUES

Under Section 10 of the Arbitration Act 2005 (“AA 2005”), a stay of proceedings is mandatory where the matter before the Court is the subject of an arbitration agreement unless the party applying for stay has taken “*any other steps in the proceedings*” or where the arbitration agreement is “*null and void, inoperative or incapable of being performed*”.

What happens if a Defendant files a hybrid application to strike out the claim or in the alternative, to have it stayed and referred to arbitration pursuant to section 10 of AA 2005? Would such a hybrid application tantamount to taking “*any other steps in the proceedings*”?

It is also commonplace for the applicable arbitration rules to provide for payment of deposit for the arbitrator's fees as well as the arbitration institution's administrative fees. Would the failure of a party to make payment of its shares for the deposit render the arbitration agreement to be “*inoperative*” within the meaning of section 10 AA 2005?

These questions were answered in the recent Court of Appeal case of **JSB v ACSB [2023] MLJU 2406**.

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) The Appellant and the Respondent were parties to an arbitration where the parties agreed to adopt the Asian International Arbitration Centre (“AIAC”) Arbitration Rules 2018.
- (b) During the preliminary stage of settling of pleadings, AIAC gave notice to the parties to make payment of further deposit of the arbitrator's fees and the administrative costs of AIAC (“AIAC's Deposit”).

- (c) The Respondent, who had a counterclaim in the arbitration, refused to pay its portion of the fees.
- (d) The arbitrator, after consultation with the Director of AIAC, proceeded to terminate the arbitration, pursuant to the AIAC Arbitration Rules 2018.
- (e) Thereafter, the Appellant, who was the Claimant in the arbitration, proceeded to file its claim in the High Court.
- (f) The Respondent, who was the Defendant in the High Court, took the position that the arbitration agreement is still subsisting and not abrogated by its non-payment of the AIAC's Deposit.
- (g) The Respondent further posited that the recourse would be for the Appellant to pay for the Respondent's share of the AIAC's Deposit and continue with the arbitration and then ask the arbitrator to account for the payment on behalf in the final award.

BEFORE THE HIGH COURT

The Respondent filed an application to strike out the Writ and Statement of Claim under Order 12 rule 10(1)(a) and Order 18 rule 19(1)(a), (b), (c) or (d) of the Rules of Court 2012 ("**ROC 2012**") or alternatively, for the proceedings to be stayed and referred to arbitration under section 10 of AA 2005 [**"Hybrid Striking Out & Stay Application"**].

In response, the Appellant contended that it was entitled to commence the proceedings in Court as the Respondent breached the arbitration agreement by its non-payment of the AIAC Deposit, as required under the AIAC Arbitration Rules, resulting in the termination of the arbitration. The Appellant had in fact filed a suit in Court previously but had the same withdrawn upon the Respondent's insistence on arbitration.

The High Court found that the Defendant's non-payment of the AIAC's Deposit did not render the arbitration agreement inoperable or incapable of being performed as the Appellant could pay for the Respondent's share and recover the same via the final award.

Consequently, the High Court ordered a stay of the High Court proceedings under section 10 of AA 2005.

BEFORE THE COURT OF APPEAL

Dissatisfied with the High Court's decision, the Appellant appealed to the Court of Appeal. In the Court of Appeal, the Appellant was referred to as the Plaintiff and the Respondent was referred to as the Defendant.

There were 2 primary issues before the Court of Appeal, namely:-

- (1) Whether the Defendant has invoked the jurisdiction of the Court and taken steps in the proceedings by applying to strike out the High Court Suit via the Hybrid Striking Out & Stay Application;
- (2) Whether the arbitration agreement between the parties has become inoperative within the meaning of section 10 of AA 2005 resulting from the Defendant's non-payment of the AIAC Deposit.

Hybrid Striking Out & Stay Application

The Court of Appeal found that the filing of the Hybrid Striking Out & Stay Application tantamount to the Defendant invoking the jurisdiction of the Court by "taking any other steps in the proceedings" and thus, the Defendant can no longer apply to stay the proceedings and refer the same to arbitration:-

"[17] Such an application to strike out the plaintiff's action would be tantamount to "taking any other steps in the proceedings" and thus the applicant is disqualified from applying for a stay of the proceedings. It does not matter that the Court did not agree with its striking out application or that it dismisses the striking out application. Once the Court is invited to consider the application to strike out the suit before it, the applicant would have invoked the jurisdiction of the Court and submitted to its jurisdiction in "taking any other steps in the proceedings" and hence, can no longer apply for a stay of the proceedings on ground that the matter before the Court is the subject of an arbitration agreement."

[Emphasis added]

The Court of Appeal reasoned that by applying to strike out the Plaintiff's claim, which requires an examination of the merit of the claim, the Defendant is considered to have abandoned arbitration in favour of litigation in Court. To this end, a Hybrid Striking Out & Stay Application would not avail the Defendant's position:-

"[21] The applicant in the defendant cannot submit itself to the Court's jurisdiction and surrender to it in applying to strike out the plaintiff's claim and



yet at the same time apply for a stay of the proceedings should it not succeed in the striking out. Having entered the door of the Court and inviting it to decide on the matter on its merits, the applicant cannot now exit from it and merely pray for a stay of the proceedings.

[22] **The two are incompatible and having failed in striking out the plaintiff's claim, the applicant must be content to having to contest the proceedings for in applying to strike out, the applicant must be taken to have abandoned arbitration in favour of litigation in the Court.**

[23] *Consider for a moment that should the Court have allowed the striking out, the plaintiff could no longer commence arbitration to adjudicate on the matter for estoppel and res judicata would operate against the plaintiff."*

[Emphasis added]

In view of the above and in reliance of the earlier Court of Appeal case in **Kebabangan Petroleum Operating Company Sdn Bhd v Mikuni (M) Sdn Bhd & Ors [2021] 1 MLJ 693** as well as the Singaporean Court of Appeal case of **L Capital Jones Ltd and another v Maniach Pte Ltd [2017] SGCA 3; [2017] 1 SLR 312**, the Court of Appeal held that the Defendant had "*submitted and surrendered to the jurisdiction of the Court and waived its right to arbitration... and cannot now switch to arbitration to resolve the dispute between the parties.*"

Inoperative Arbitration Agreement due to non-payment of AIAC Deposit?

Notwithstanding the above and on the assumption that the Defendant did not take any steps in the proceedings, the Court of Appeal proceeded to consider whether non-payment of the AIAC Deposit would render the arbitration agreement to be inoperative within the meaning of section 10 of AA 2005.

In relation thereto, the Court of Appeal found that it is not necessary to determine whether the non-payment tantamount to a repudiatory breach of the arbitration agreement. Instead, the "*determinative factor is whether the parties insisting on arbitration because there is an arbitration agreement has nevertheless evinced an intention to waive arbitration in favour of litigation by taking a further step in the Court proceedings and by making the arbitration agreement inoperative by its action or inaction.*"

To this end, the Court of Appeal found that a party's refusal to pay its share of the arbitrator's fees, which in this case is mandatory as per the agreed applicable arbitration rules, evinces a clear and unequivocal intention not to abide by the arbitration process and tantamount to a waiver of that party's rights to arbitration.



*[55] **To refuse to pay its share of the arbitrator’s fees for no reason other than it does not want to would be evincing a clear and unequivocal intention not to abide by the arbitration process of resolving the disputes and indeed to abandon it altogether.** It is akin to stultifying the arbitration, if not to suffocate and even sabotage it. Its conduct, of a wilful and unexplained refusal to pay the additional deposit to the arbitrator’s fees, is found wanting and like the writing on the wall, **it is a waiver of its right to arbitration written in its body language of crossed arms, resisting every encouragement that it should pay its share of the arbitrator’s fees.**”*

[Emphasis added]

The Court of Appeal further found that the refusal to abide with the agreed applicable arbitration rules tantamount to a repudiation of the arbitration agreement:-

[56] If one has to decide the matter on whether there has been a repudiation of the arbitration agreement then we would say that we know of no clearer repudiation of an arbitration agreement than to refuse to abide by the Arbitration Rules with respect to paying its share of the arbitrator’s fees or the administrative body’s deposit...”

The Court of Appeal also noted that the Defendant’s failure to make payment of the AIAC Deposit resulted in the arbitrator terminating the arbitral proceedings, following consultation with the Director of AIAC, pursuant to Rule 14(7) of the AIAC Arbitration Rules 2018.

Apart from the above, the Court of Appeal took the opportunity to clarify that, whilst the Plaintiff may be given an opportunity to make payment on behalf of the Defendant for its portion of the AIAC Deposit under the arbitration rules, the Plaintiff is not obliged to take up that option and make payment on behalf. The Plaintiff may choose not to exercise the option and initiate a Court action instead.

*[62] **One cannot read an obligation to pay one’s share of the deposit as now being transposed onto the other party to pay once an opportunity is given to the other party to pay.** The opportunity given to the other party is an option given to the other party to pay the refusing party’s equal share of the deposit. **Such an opportunity to exercise an option does not convert the option into an obligation.***

*[63] **Here the other party in the plaintiff chose not to exercise the option for it does not make sense to incur further expenses in the AIAC’s Deposit with no certainty of being able to recover it...***

[67] The other party in the plaintiff, in the case before us, has no compunction in proceeding to Court with the claim as it had previously commenced a suit against the

defendant, only to have it withdrawn because of the defendant's insistence to proceed with arbitration as there was an arbitration agreement."

[Emphasis added]

Arising from the above, the Court of Appeal found that the arbitration agreement was rendered inoperative by virtue of the Defendant's refusal to comply with the arbitration rules in making payment for the AIAC Deposit. Consequently, the Plaintiff can continue with the Court action.

*"[68] **The arbitration agreement had been rendered inoperative by the refusal of the defendants to comply with the requirement of the AIAC Arbitration Rules that each party shall contribute equally towards the AIAC's deposit or further deposit to cover the Arbitrator's fees and the AIAC's administrative costs.** It is an inconsistent and untenable position for the defendant to take, that its refusal to pay its share of the AIAC's Deposit does not in any way affect the validity of the arbitration agreement...*

*[77] **The default position once the arbitration agreement has become inoperative through the belligerent action and breach of it is that the parties affected may continue with the court proceedings** if it has been stayed before under s 10 of the AA 2005 application or that a fresh action in Court may be commenced as in this case"*

[Emphasis added]

In closing, the Court of Appeal also found that a stay of proceeding in the circumstances would be an exercise in futility in view of the Defendant's refusal to make payment of its share of the AIAC Deposit:-

"[99] We were more than convinced that to stay the proceedings in Court would be an exercise in futility and tantamount to the Court having acted in vain and frustrating further the plaintiff's attempt to have the dispute heard and resolved with all due diligence and without further delay."

In the upshot, the Court of Appeal allowed the appeal and set aside the Order of the High Court in granting a stay of the High Court proceedings.

KEY TAKE AWAY

Following the decision, it is important to note that:-



- (a) Filing a hybrid application for both striking out and stay of proceedings under section 10 of AA 2005 would tantamount to *“taking any other steps in the proceedings”*, which would defeat the stay application under section 10 of AA 2005;
- (b) The refusal to pay its share of the arbitrator’s fees evinces a clear and unequivocal intention not to abide by the arbitration process and tantamount to a waiver of that party’s rights to arbitration. A party’s refusal to abide with the agreed applicable arbitration rules also tantamount to a repudiation of the arbitration agreement;
- (c) The arbitration agreement would be rendered inoperative if the counterparty refuses to comply with the arbitration rules in making payment for the AIAC Deposit. Consequently, the innocent party can initiate a Court action to resolve the disputes.

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

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