

Stay Pending Arbitration : Request for Extension of Time to File Defence Tantamount to Taking Steps in Proceedings?

AIRBUS HELICOPTERS MALAYSIA SDN BHD (FORMERLY KNOWN AS EUROCOPTER MALAYSIA SDN BHD) V AERIAL POWER LINES SDN BHD [W-02(IM)(NCvC)-1888-10/2022]

21st February 2024

ISSUES

It is not uncommon for Defendants to request for extension of time to file their defence, especially when the nature of the Plaintiff's claim is technical and voluminous.

However, if the Defendant subsequently discovers that there is an arbitration agreement between parties, would the prior request for extension of time to file defence tantamount to "*taking any other steps in proceedings*" and thereby defeats an application for stay of proceedings under section 10 of the Arbitration Act 2005 ("AA 2005")?

Likewise, would such request indicate the Defendant's unequivocal intention to proceed with the suit and abandonment of its right to have the dispute resolved by way of arbitration?

These questions were answered in the recent Court of Appeal case of **Airbus Helicopters Malaysia Sdn Bhd (formerly known as Eurocopter Malaysia Sdn Bhd) v Aerial Power Lines Sdn Bhd [W-02(IM)(NCvC)-1888-10/2022]**.

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) The Plaintiff initiated a civil suit against the Defendant in the Kuala Lumpur High Court where the Writ, Amended Writ and Statement of Claim were served on the Defendant on 13.07.2022.
- (b) Defendant entered appearance on 15.07.2022.

- (c) During the Case Management by way of e-review on 18.07.2022, the Defendant's Solicitors requested for an extension of time of 1 month to file their client's Defence ("**Request for EOT**").
- (d) The Request for EOT was made as the Defendant was unable to have access to the contract ("**Sale Contract**") by the Case Management date considering that the Defendant is a wholly-owned subsidiary of its parent company in France and the Sale Contract for the helicopter (which is the subject matter of the dispute), was executed some 9 years ago.
- (e) Further, the Defendant's Solicitors also had difficulties getting instructions from the French Headquarters as the Headquarters were closed for the weekend and Public Holidays in France from the time the Writ was served on 13.07.2022 to the Case Management on 18.07.2022.
- (f) The Plaintiff's claim was in respect to alleged technical defects to the helicopters, which were manufactured by Airbus Helicopters in France. The subject matter of the Plaintiff's claim was technical and voluminous in nature (no less than 100 paragraphs in the Statement of Claim) containing allegations of technical defects of the helicopters supplied under the Sales Contract.
- (g) Crucially, the Defendant's Request was not considered by the High Court during the Case Management on 18.07.2022 as the suit was reassigned to another High Court because the Judicial Commissioner hearing the case was from the same firm as the Defendant's Solicitors.
- (h) Thereafter, the Defendant discovered that the Sale Contract contained an arbitration clause and promptly filed its Stay Application pursuant to section 10 of the AA 2005 on 01.08.2022, i.e. before the next Case Management date on 02.08.2022 and before the deadline to file Defence pursuant to Rules of Court 2012 ("**ROC 2012**").
- (i) The Plaintiff resisted the Stay Application on the basis that the Defendant, by its Request for EOT, had clearly and unequivocally elected to abandon arbitration in favour of litigation before the High Court.
- (j) The High Court agreed with the Plaintiff and dismissed the Stay Application. Consequently, the Defendant lodged an appeal to the Court of Appeal.

ISSUES BEFORE THE COURT OF APPEAL

The issues before the Court of Appeal are as follow:-

- (1) Whether the Defendant has shown a clear and unequivocal intention to abandon arbitration; and
- (2) Whether the Request for EOT to file Defence tantamount to “*taking any other steps in the proceedings*”.

Clear & Unequivocal Intention to Abandon Arbitration?

At the outset, the Court of Appeal reiterated the principle that the Courts will generally enforce the arbitration agreement and grant a stay unless the Defendant evinces a clear and unequivocal intention to proceed with litigation or has waived its rights to arbitration:-

[16] If there is a prima facie arbitration agreement the party commencing litigation would be in breach of such an agreement and when objected to by a defendant promptly, the Court would generally grant a stay of the Court proceedings unless the defendant had evinced a clear and unequivocal intention to proceed with the suit and not to be bound by the arbitration agreement. The Court in line with holding the parties to their bargain instead of allowing a party to breach it, would enforce the arbitration agreement by granting a stay of the court proceedings...

[18] Another way of looking at the situation is from the point of view of whether the defendant has waived its right to insist on going for arbitration or is otherwise estopped from so contending by its action or inaction in court...

[20] Consistent with the principle that the courts will lean in favour of arbitration if the parties have a clear arbitration clause in their underlying contract, there must then be an equally clear intention reflected in the action of the defendant in not wanting to proceed to arbitration but instead to litigation...

[Emphasis added]

The central question in such application is whether the Defendant has waived its rights to arbitrate by taking steps in the proceedings. It is a fact-centric and fact sensitive question. Where the Defendant’s intention to proceed with litigation is unclear but the existence of the arbitration agreement is clear, the Courts would lean in favour of arbitration.



[23] *If asking the right question is the key to finding the right answer, then **the right question to ask is whether the applicant in the Stay Application has waived its right to proceed to arbitration or is estopped from so doing by its action. Has the applicant participated in the Court proceedings by “taking any other steps” such that it could be said that the applicant had foregone arbitration and followed the plaintiff to litigate in Court?** Has the applicant also preferred to proceed to Court just like the plaintiff and indeed has pursued litigation by participating in the process in taking “such other steps in the proceedings” in Court?*

[24] *The consistent approach of the Court has always been to lean in favor of arbitration even when the arbitration agreement is less than clear. **Similarly, the Court should be inclined to uphold the parties’ declared intention to arbitrate in circumstances where the arbitration clause is clear, despite the defendant’s unclear intention as to whether it has agreed with the plaintiff’s intention to proceed with the Court proceedings in spite of the arbitration agreement,** especially when it has yet to take the plunge by filing the necessary documents within the timeline set by the Court or in the ROC 2012.*

[25] ***It becomes obvious then that the answers to the questions variously asked to decipher the defendant’s intention must be fact-centric and fact-sensitive.** The applicant’s intention must be assessed from how it has manifested in its actions and when in doubt to look at its actions as to whether the actions are preparatory to and not the actual “taking any other steps” in the Court proceedings.”*

[Emphasis added]

The Court of Appeal found that, when the Defendant made the Stay Application, the Defendant’s Request for EOT has yet to be determined by the Court and the Defence is also not due pursuant to the ROC 2012. As such, the Defendant cannot be said to have made known a clear and unequivocal intention to proceed with the court action.

[27] ***In a case like the present case where the Request had not been decided by the Court we do not think that the applicant/defendant could be said to have made known a clear and unequivocal intention to proceed to Court.** We have no good reason to disbelieve the defendant when it said through its director that it had not obtained the relevant documents then because the Writ of Summons was served only on 13.7.2022 and the first case management by way of e-review was on 18.7.2022 and it had only time to instruct its solicitors to act on its behalf and the said solicitors had only time to file and serve a Memorandum of Appearance...*



[32] To hold otherwise would be to penalise the defendant for his articulated thoughts, that of having thought of filing a Defence and so acting on an abundance of caution, asking for an extension of time and before any decision was made by the Deputy Registrar, to then file promptly the Stay Application. Generally, in civil matters, no one is prejudiced by the expression of a thought unless it is defamatory of the other or putting the other in fear of bodily harm or injury. Thus, no prejudice having resulted from the mere expression of an intention and neither had the plaintiff acted on it to its detriment, the defendant should not be prevented from wanting to honour what both parties had earlier agreed as reflected in the arbitration agreement.”

[Emphasis added]

Consequently, the Court of Appeal allowed stay of proceeding in favour of arbitration as the Defendant did not evince a clear, unequivocal and irrevocable intention to abandon arbitration.

“[34] Absent a clear, unequivocal and irrevocable intention to abandon arbitration though both parties had earlier agreed in the arbitration clause to arbitrate and to agree to and affirm the plaintiff’s action in proceeding in Court, this Court would allow a stay of the Court proceedings in favour of arbitration, which remains a terms of the underlying contract.”

[Emphasis added]

Request for EOT to file Defence – “taking any other steps in the proceedings”?

The Court of Appeal noted that there are 2 lines of High Court cases on what tantamount “taking any other steps in the proceedings”. Under the strict approach, a mere Request for EOT to file Defence would invoke the ROC 2012 and thus tantamount to taking steps. The other approach is to treat a Request for EOT as “a step preparatory to taking a step in the proceedings”.

“[38] A survey of the cases in the High Court shows that **some courts have taken a rather strict approach and concluding that a mere Request for an extension of time to file Defence cannot be done without invoking the ROC 2012 and by so doing, one has taken “any other steps in the proceedings”** with the result that it would be too late to file a Stay Application.

[39] **Cases falling on the other side of the line would be cases where the courts have held that it is at most “a step preparatory to taking a step in the proceedings” and so no punishment or penalty should be visited on the defendant who did not file its Defence but instead filed its Stay Application.**”

[Emphasis added]

Having reviewed the 2 lines of cases as well as foreign cases on this point, the Court of Appeal found that a workable guide is to determine whether the Defendant's action is merely a ***preparatory step to take steps in the proceedings*** or ***the step in proceedings itself***.

"[49] ***A workable guide*** to determining if a step is "before taking any other steps in the proceedings" is perhaps to ask ***if the step is merely preparatory to "taking any other steps" or is it "the step itself"*** and a request for extension of time to file Defence which Defence was never filed and which Stay Application was filed even before the time frame as stipulated in the ROC 2012 for the Defence to be filed before the extension of time operates, may well be within the meaning of "before taking any other steps in the proceedings"."

[Emphasis added]

By reference to the Federal Court's decision in **Sanwell Corporation v Trans Resources Corporation Sdn Bhd & Anor [2002] 3 CLJ 213**, the Court of Appeal identified the factors to be considered in determining whether "any other steps in the proceedings" have been taken:-

"[50] The Federal Court in **Sanwell Corporation v Trans Resources Corporation Sdn Bhd & Anor [2002] 3 CLJ 213** at pp 229-230 when considering if "any other steps in the proceedings" have been taken other than entering its appearance and serving its Defence, the court will have to consider ***the nature of the action*** and whether or not it indicates ***an unequivocal intention to proceed with the suit*** and to ***abandon the right to have the dispute disposed off by arbitration***. (emphasis added)"

The Court of Appeal concluded that a mere request for extension of time to file Defence would not ipso facto tantamount to "taking any steps in the proceedings" and the focus should be on upholding parties' initial bargain for arbitration instead of "technical non-compliance seeking to trip and trap the defendant into litigation".

"[53] With the greatest of respect, ***it would be too simplistic and indeed too strict an approach, steeped in technical traps, to say that a mere request for an extension of time to file Defence would ipso facto tantamount to "taking any steps in the proceedings."*** An approach consistent with the ***paradigm shift in encouraging parties to go for arbitration and to hold them to their bargain to so proceed in the arbitration agreement would resonate with the overall focus of s 8 of the AA 2005 which is that no court shall intervene in matters governed by this Act, except where so provided in this Act***. If we may be so bold as to say that when intervention is allowed as in s 10 of the AA it would be more predisposed to promoting the bargain earlier struck



by the parties in favour of arbitration considering that the plaintiff had coyly commenced litigation in breach of the arbitration agreement without candidly communicating to the defendant that in spite of the bargain struck it had now no intention of so arbitrating for whatever may be the reasons...

*[62] **The focus should be on upholding the bargain initially struck by the parties to elect arbitration in resolving their disputes and not litigation** and to avoid being unduly fastidious with or fixated on technical non-compliance seeking to trip and trap the defendant into litigation when the declared intention in the arbitration agreement is loud and clear...*

*[64] **It would take a massive dose of persuasion to convince the Court that a request for extension of time to file one's Defence is an answering the plaintiff's substantive claim.***

[Emphasis added]

COURT OF APPEAL'S DECISION

In the upshot, the Court of Appeal allowed the appeal and granted the stay of proceedings in favour of arbitration. The Court of Appeal held that the Defendant's Request for EOT, in the circumstances of the case, does not tantamount to "taking any other steps in the proceedings", notwithstanding that the Defendant did not reserve its rights to arbitrate when making the Request for EOT.

"[70] It would be prudent with the benefits of hindsight to, even in a case of requesting for extension of time to file Defence during a first case management by way of e-review, to reserve the right to apply for a stay of proceedings in the event that there is an arbitration agreement especially when the client is a foreign client or the contract is an industry standard-form contract with or without modifications. However, in the overall circumstances if this case the mere Request here could not be said to mean that the Defendant had evinced its unequivocal intention to proceed with the court proceedings as it cannot be said to have "taken any other steps in the proceedings" in the sense of a significant and definitive step in advancing or participating in the court's proceedings."

KEY TAKE AWAY

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

- (a) A mere request for extension of time to file defence does not ipso facto tantamount to "taking any other steps in proceedings";



- (b) The Courts will have to determine if the Defendant's action is merely a **preparatory step to take steps in the proceedings** or the **step in proceedings itself**, and
- (c) This is a fact-centric question and consideration will have to be given to ***“the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration.”***

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

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