Stay Pending Arbitration : When Parties have the Option to Arbitrate or to Litigate in Court

SETIA AWAN MANAGEMENT SDN BHD V SPNB ASPIRASI SDN BHD [2025] CLJU 982

27th June 2025

ISSUES

An arbitration agreement is defined as *"an agreement by the parties to submit to arbitration all or certain disputes which has arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not"* – **section 9 of Arbitration Act 2005** ("**AA 2005**").

Where the contract contains an arbitration clause / agreement and a party to the contract initiates a claim in the Court, the Court proceedings shall be stayed if the counterparty applies for a stay under section 10 of AA 2005 before taking any other steps in the proceedings, unless *"the arbitration agreement is null and void, inoperative or incapable of being performed*".

What if the dispute resolution clause under the contract gives the parties the option to either arbitrate or litigate in Court? Can such a clause still be considered as an arbitration agreement? If so, would it be *"null and void, inoperative or incapable of being performed"* due to lack of certainty?

These questions were answered in the recent Court of Appeal case of **Setia Awan Management Sdn Bhd v SPNB Aspirasi Sdn Bhd [2025] CLJU 982**.

BRIEF FACTS

The brief facts of the case are as follows:-

(a) On 17.05.2018, SPNB Aspirasi Sdn Bhd ("**Plaintiff**") entered into a Development and Contra Transaction ("**DACT**") Agreement with Setia Awan Management Sdn Bhd ("**Defendant**") for a development project in Sitiawan, Perak ("**Project**").

(b) Under the DACT Agreement, the Defendant was to develop the project and the Plaintiff was to purchase 20 plots of land and transfer 1,169 units valued at RM248,035,014.00 as part of the financing.

(c) Disputes arose between the parties where the Defendant alleged that the lands identified were not transferred to it and the Defendant terminated the DACT Agreement in July 2021. The Defendant also demanded compensation of RM311,897,723.00.

(d) In response, the Plaintiff initiated a suit for damages arising from the Defendant's breach of the DACT Agreement.

(e) Before taking any further steps in the proceedings, the Defendant applied for a stay of the court proceedings under section 10 of the AA 2005.

(f) Clause 18 of the DACT Agreement gives parties the option to either refer their disputes to the courts or to arbitration:-

> *"In the event that any dispute or difference whatsoever shall arise between parties touching or concerning this Agreement or its construction or effect or as to the rights, duties or liabilities of either party or of parties hereto under this Agreement in connection with the subject matter of this Agreement* ***the same maybe (sic) referred to any court in Malaysia or to arbitration in accordance with the provisions of the Arbitration Act 2005*** *or any statutory modification or re-enactment thereof." (emphasis added)"*

PROCEEDINGS BEFORE THE HIGH COURT

The High Court dismissed the Defendant's stay application, amongst others, on the basis that the key components of an arbitration have not been agreed upon, thus rendering the arbitration agreement null and void, inoperative and incapable of being performed:-

> *"[3] The High Court dismissed the stay application made under s. 10 of the Arbitration Act 2005 ("AA 2005") and held that as the key components of an arbitration agreement had not been agreed upon, such as the seat of arbitration, the number of arbitrators and the mode of their appointment, the arbitration clause was rendered null and void, inoperative and incapable of performance under s. 10(1) AA 2005."*

The High Court also held that an arbitration agreement that gives parties an option to proceed with litigation or arbitration is not a binding arbitration agreement *"that clearly and unequivocally requires the dispute to be resolved through arbitration*". On this note, the High Court held that *"such an arbitration agreement is null and void for failing to meet the requirements of the AA 2005 and is also unenforceable as in lacking certainty*".

Further, the High Court observed that the Plaintiff had elected to proceed with a suit in the High Court before the Defendant commenced arbitration whilst the Defendant had in their previous notice of demand threatened legal proceedings instead of arbitration, thus indicating that the Defendant had also opted to proceed with a suit in Court:-

> *"[5] The High Court further held that whilst the plaintiff had commenced a legal suit in the High Court and thus elected to proceed with court proceedings, the defendant had not served a notice of arbitration to trigger arbitration proceedings. The High Court was also influenced by the fact that the defendant in its notice of demand had threatened proceeding with a suit in court. The High Court also noted that the legal proceedings instead of arbitration indicating an opting for plaintiff having opted to initiate court proceedings, it had effectively exercised the option for litigation thereby excluding the possibility of arbitration for the dispute."*

Dissatisfied with the High Court's decision, the Defendant appealed to the Court of Appeal.

PROCEEDINGS BEFORE THE COURT OF APPEAL

The main issues before the Court of Appeal are as follows:

(1) Whether there is an arbitration agreement between the parties requiring the court to grant a stay of its proceedings in favour of arbitration?

(2) Whether the giving of an option to the parties to proceed to court or to arbitration renders the arbitration agreement null and void, inoperative or incapable of being performed?

- **Whether there is an arbitration agreement?**

By reference to the definition of an arbitration agreement under section 9 of AA 2005, the Court of Appeal held that there is no requirement for parties to agree on the seat of arbitration or the number of arbitrators or the mode of appointment. The Court of Appeal also held that matters such as the seat of arbitration, numbers of arbitrators or mode of appointment had already been provided for in the AA 2005.

> *"[15] **As can be seen there is no further requirement that parties to the arbitration agreement must agree on the seat of arbitration or the number of arbitrators or the mode of appointment**. Where "seat of arbitration" is concerned that is defined in s. 2(1) of the AA 2005 as meaning "the place where the arbitration is based as determined in accordance with section 22" …*
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> *[16] Where the AA 2005 provides for a mode of determining the seat of arbitration if the parties could not agree under s. 22(2), there is clearly no basis for finding an*

> *arbitration clause to fail to qualify as arbitration agreement merely because the seat had not been agreed…*
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> *[17] As for the so-called key component of the number of arbitrators, Parliament in its wisdom, had provided a default position, such that a failure to address this component would not cause the intention of the parties to go for arbitration to fail….*
>
> *[19] With respect to the mode of appointing an arbitrator, again we fall back on the AA 2005 and in s. 13(2) it is provided that the parties are free to agree on a procedure for appointing the arbitrator or the presiding arbitrator. Anticipating that a party to an arbitration agreement may drag its feet and thus delay the process of getting the arbitration off the ground, Parliament had provided a s. 13(5), (6) and (7) …"*

In the upshot, the Court of Appeal held that the default provisions of the AA 2005 would apply in the absence of these *"key components"* and the same would not prejudice the parties or the arbitration.

> *"[20] Here the arbitration agreement made reference to an arbitration "in accordance with the provisions of the Arbitration Act 2005" and thus any "key components" not expressly referred to in the arbitration clause or by a prior agreement would fall back and rely on the default provisions of the AA 2005.* ***Thus, the lack of an agreement on the seat of arbitration or the number of arbitrators constituting the arbitral tribunal or the mode of appointment of the arbitrator would not in any way prejudice the parties or the arbitration****. Other matters such as the law of the arbitration and that the arbitration agreement are non-issues seeing that the parties are all Malaysian domestic parties with the project in Malaysia. So too the rules governing the arbitration as that too would be decided by the court should the parties cannot come to an agreement."*

The Court of Appeal also held that the word *"may"* in the arbitration agreement would not alter the fact that there is a valid arbitration agreement. Once the option is exercised, arbitration would become the exclusive route of dispute resolution:-

> *"[26] It is true that the word "may" is used with respect to the parties' right to choose arbitration as the preferred mode to resolve any disputes or differences that may arise under the DATC Agreement between the parties as in "…the same maybe (sic) referred to any court in Malaysia or to arbitration in accordance with the provisions of the Arbitration Act 2005…" (emphasis added) However the word "may", though not the language of compulsion as in commanding but the language of common courtesy as in considering****, there is nothing ambiguous as to the parties' intention should the disputes or differences cannot be resolved through perhaps negotiations or mediations****…*

…

> *[34] **Whilst the word "may" is permissive, yet once the option is exercised to proceed further in a stand-alone arbitration agreement, it becomes exclusive in that the only route open in going forward is that of arbitration**. A word like "may" has the effect of qualifying a few subjects in a sentence as in it is not mandatory that one must proceed with arbitration the moment there is a dispute or differences but should one want to proceed further to resolve the dispute or differences then the only route open is via arbitration in a case of a stand-alone arbitration clause."*

Having reviewed the cases on enforcement of arbitration agreement, the Court of Appeal observed that every encouragement will be given towards saving and sustaining an arbitration clause. In the upshot, the Court of Appeal held that there is an arbitration agreement once either of the parties exercise the option to arbitrate and the court proceedings shall be stayed to enforce the arbitration agreement:-

> *"[42] There is a world-wide trend, especially with countries that subscribe to the UNCITRAL Model Law on International Arbitration, of giving every encouragement towards saving and sustaining an arbitration clause even though the words employed to evince an intention to arbitrate are less than elegant and or even embarrassingly inconsistent. Even an economical one word, reference to "arbitration" may suffice…*
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> *[50] It is our considered view that there is an arbitration agreement once **either one of the 2 parties exercised the option to arbitrate** and the court would hold the parties to the bargain struck and grant a stay of the court proceedings **so that the contractual rights of the party electing for arbitration may be enforced**."*

- **Whether option to proceed to court or to arbitration renders the arbitration agreement null and void, inoperative or incapable of being performed?**

The Court of Appeal held that the giving of an option to both parties to either arbitrate or litigate does not introduce any vagueness or ambiguity. Once **either** party exercise the option to arbitrate, an arbitration agreement would come into existence.

> *"[59] The giving of an option to arbitrate cannot introduce vagueness or ambiguity into the arbitration agreement. An option gives a party a choice. An option given to only one party gives a choice only to that party. An option given to both parties gives the choice to both the parties.*

> *[60] With the greatest of respect to the High Court, we are of the considered view that just because an option is available, it does not mean that the parties' intention to proceed with arbitration is less certain and not mandatory as in lacking contractual commitment to arbitrate their disputes or differences.* ***The arbitration clause is what it says it is — giving an option equally to both the parties to elect between going to court or arbitration. Before the option is exercised, either party could potentially opt for arbitration. Once either party opts for arbitration, an arbitration agreement would have come into existence****."*

The Court of Appeal also held that the option to go arbitration is not extinguished even if the other party had elected to proceed with court proceedings first:-

> *"[62]* ***There is no basis to say that once an option to go to court is exercised, the option for the other party is extinguished****….*
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> *…*
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> *[67] The court decides from the perspective of whether the right to arbitrate has been validly exercised and not on the basis of which right is exercised first. This is because the arbitration agreement is not drafted in the manner of giving the right that is exercised first, in this case going to court, as the prevailing right that would trounce the other party's right to arbitrate.*
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> *…*
>
> *[69]* ***There is no exhaustion of rights just because one party has opted for litigation first.*** *Neither does the right to go to court once exercised nullifies or extinguishes the right of the other party to opt to arbitrate.* ***Parties have contemplated that if one party opts for going to court the other party may well elect to go to arbitrate, in which instance the court would grant a stay should the other party apply before taking any further action in court, to stay the court action****."*

In the upshot, the Court of Appeal held that an arbitration agreement giving parties the option to proceed to court or arbitration is not null and void, inoperative or incapable of being performed:-

> *"[87] We find that the arbitration agreement in question giving the parties to proceed to court or to arbitration is a valid arbitration agreement once a party opted for arbitration as such an agreement is valid, clear and unambiguous and it is not null and void nor is it inoperative or incapable of being performed. Being satisfied that the requirements of s. 10 of the AA 2005 have been met we are left with one recourse, which is to uphold the arbitration agreement and to stay the court proceedings."*

KEY TAKEAWAY

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

(a) An arbitration agreement that does not stipulate the seat, number of arbitrators or mode of appointment is nevertheless a valid arbitration agreement. There are default provisions under the Arbitration Act 2005 to provide for these components in the event parties are unable to agree on the same.

(b) An arbitration agreement giving both parties the choice to arbitration or to litigate is a valid arbitration agreement. It is not null and void, inoperative or incapable of being performed. Once either party opts to arbitrate, an arbitration agreement would come into existence.

(c) The option to arbitrate can be exercised and enforced even if the counterparty had exercised the right to litigate first. As long as one of the parties opt to arbitrate before taking any steps in the proceedings, the Court will grant a stay of proceedings under section 10 of the Arbitration Act 2005.

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

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