

# Stay Pending Arbitration: If the Liquidator Does Nothing, Does the Arbitration Clause Survive?

**HASHIM ABDUL RAZAK & ORS V PEMBINAAN PD JAYA SDN BHD (IN LIQUIDATION)  
[2026] 3 CLJ 22**

30<sup>th</sup> March 2026

## ISSUES

Section 10 of the Arbitration Act 2005 (“**AA 2005**”) mandates a stay of court proceedings in favour of arbitration, unless the arbitration agreement is shown to be null and void, inoperative or incapable of being performed. This raises an important question in the insolvency context: **does the winding up of a company or the bankruptcy of a person render the arbitration agreement inoperative, thereby defeating the mandatory stay or justifying the setting aside of an existing stay?**

The Court of Appeal had earlier addressed part of this question in **Peninsula Education (Setia Alam) Sdn Bhd v Biaxis (M) Sdn Bhd (In Liquidation) [2024] 6 MLRA 160**, (which we covered in a previous [update](#)), where it was held that liquidation does not, in itself, render an arbitration agreement inoperative.

However, further practical difficulties arise where the liquidator refuses to commence arbitration. **Can section 49 of the AA 2005 be invoked to resolve such a procedural impasse? If not, what recourse remains available to the counterparty? Where a stay has been granted, whose obligation is it to commence arbitration, the Plaintiff who commence the court action or the Defendant who succeeded in the stay?**

These questions were considered by the Court of Appeal in the recent case of **Hashim Abdul Razak & Ors v Pembinaan PD Jaya Sdn Bhd (In Liquidation) [2026] 3 CLJ 22**.

## BRIEF FACTS

The brief facts of the case are as follows:-

- (a) The dispute arose out of a Joint Venture Agreement (“**JVA**”) executed on 14 January 2002 between the Appellants and the Respondent. The JVA contained an arbitration clause.



- (b) Following a dispute between the parties, the Appellants commenced court proceedings against the Respondent in April 2021. On the Respondent's application, the High Court granted a stay of the proceedings pursuant to section 10 of the AA 2005 in favour of arbitration on 14 June 2022 ("**Stay Order**").
- (c) The Appellants did not appeal against the Stay Order nor refer the dispute to arbitration for over two years.
- (d) Subsequently, the Respondent was wound up and the Director General of Insolvency ("**DGI**") was appointed as liquidator. The liquidator did not commence arbitration.
- (e) On 7 December 2023, the Appellants applied to set aside the Stay Order, contending, amongst others, that the arbitration agreement had become inoperative or incapable of being performed in light of the Respondent's liquidation and that the liquidator's inaction.
- (f) The High Court dismissed the application. The Appellants appealed to the Court of Appeal.

### ISSUES BEFORE THE COURT OF APPEAL

The main issue before the Court of Appeal was whether the High Court erred in refusing to set aside the Stay Order, in light of the Appellants' contention that the arbitration agreement had become inoperative under section 10 of the AA 2005 following the Respondent's winding up.

A collateral issue arose as to whether section 49 of the AA 2005 could be invoked to resolve the procedural impasse caused by the liquidator's non-adoption of the arbitration agreement, notwithstanding that the Court proceedings had been stayed in favour of arbitration.

### S.49 OF AA 2005 APPLIES TO A COMPANY IN LIQUIDATION?

The Appellants contended that a procedural deadlock arose from the Respondent's liquidation. They argued that the DGI, as liquidator, was under a statutory duty under section 49 of the AA 2005, read together with sections 38 and 60(f) of the Insolvency Act 1967, to adopt the arbitration agreement. As such, they were unable to proceed with the court action due to the Stay Order, yet equally unable to commence arbitration without the DGI's participation.

The Respondent, on the other hand, argued that if the DGI declined to adopt the arbitration agreement, the proper course was to seek leave of Court under section 471 of the Companies Act 2016 to proceed against the Respondent. The Appellants' failure to do so meant that the alleged non-adoption could not be relied upon to set aside the Stay Order.

In considering whether section 49 of the AA 2005 applied, the Court of Appeal recognised that the provision is intended to address the procedural impasse arising where a liquidator does not adopt an arbitration agreement:

*[44] To recapitulate, section 49 of the AA 2005 establishes a specific legal framework to address the unique procedural situation that arises when a party to an arbitration agreement is declared bankrupt. Its purpose is to bridge the gap between the principle of party autonomy in arbitration and the collective, orderly process mandated by insolvency law.*

*[45] A plain reading reveals two potential pathways for a matter to proceed to arbitration post-winding up under section 49 of AA 2005:*

*(i) Subsection (1): Primarily, the liquidator (trustee in bankruptcy/DGI) has the discretion to “adopt” the arbitration agreement. Upon adoption, the agreement becomes enforceable by or against the liquidator.*

*(ii) Subsection (2): If the liquidator does not adopt the agreement, the High Court may, on the application by the other party, direct that the matter be referred to arbitration, provided it is satisfied that the dispute falls within the scope of the arbitration agreement and that the agreement was entered into before the commencement of bankruptcy.”*

[Emphasis added]

The Court further emphasised the broader insolvency framework governing proceedings involving a wound-up company, which has direct implications on how arbitration is to be pursued in such circumstances:

*[53] The distinction between proceedings against a wound-up company and proceedings by a wound-up company was authoritatively delineated by the Federal Court in *Lai King Lung & Anor v. Merais Sdn Bhd* [2020] 5 MLRA 1:*

*[20] Similarly, if a company is wound up by an order of court, the board of directors becomes *functus officio*. The management of the company is vested in the liquidator. Only the liquidator has the power under the 2016 Act to bring or defend any action or other legal proceedings in the name and on behalf of the company. A creditor or contributory cannot commence or continue with any action in the name of the wound up company. Accordingly, if a creditor or*



*contributory of the wound up company wishes to bring or proceed with an action, the creditor or contributory must apply to the liquidator for his sanction to do so. In order to ensure that the defendant is not prejudiced in the event that the wound up company's action is dismissed, the liquidators usually imposes conditions (such as indemnities and guarantees) which must be satisfied by the creditor or contributory, as the case may be, before the sanction is given.*

[21] *At the outset, it is important to appreciate that there are two different and distinct fact situations under which leave of the court or sanction of the liquidator is required. The first is in respect of action or proceeding against a wound up company. This situation is governed by s 226(3) of the 1965 Act/s 471(1) of the 2016 Act which provides that leave of court is necessary in order for any action or proceeding proceeded with or commenced against a wound up company. The second scenario is where action or proceeding is taken by a wound up company: s 236(2)(a) and (3) of the 1965 Act/s 486 of the 2016 Act read together with Part I of the Twelfth Schedule which requires the sanction of the liquidator to be obtained. The factual matrix in this appeal falls under the latter scenario."*

*[Emphasis added]"*

However, the Court held that section 49 of the AA 2005 does not apply to companies in liquidation, as it is expressly confined to bankrupt individuals:

"[54] *A plain textual analysis of Section 49 of the AA 2005, however, reveals a crucial limitation: its provisions are expressly and exclusively framed in terms of "a person who has been adjudged bankrupt". The statutory language provides no basis for its direct application to a corporate entity in liquidation under the Companies Act 2016. The Respondent is a wound-up company and not a bankrupt individual. Therefore, Section 49 of the AA 2005, on its own, does not govern the procedural impasse created by the liquidation of the Respondent company."*

*[Emphasis added]*

Accordingly, section 49 of the AA 2005 was inapplicable to the present case and could not be relied upon to resolve the procedural impasse arising from the Respondent's liquidation.

### DOES LIQUIDATION RENDER THE ARBITRATION AGREEMENT INOPERATIVE?

Having found that section 49 of the AA 2005 does not apply to companies in liquidation, the Court of Appeal proceeded to consider whether the Respondent's liquidation, or the liquidator's inaction, rendered the arbitration agreement inoperative or incapable of being performed, such as to displace the mandatory stay under section 10 of the AA 2005.

Applying the reasoning in **Peninsula Education (Setia Alam) Sdn Bhd v Biaxis (M) Sdn Bhd (In Liquidation)** (which we covered in an earlier [update](#)), the Court held that liquidation does not, in itself, render an arbitration agreement inoperative and further affirmed the doctrine of separability:

[64] *Applying the reasoning from Peninsula Education (Setia Alam) Sdn Bhd (supra), it is clear that at the outset, even a fundamental event such as the liquidation or bankruptcy of a party to the agreement does not render the arbitration agreement inoperative or incapable of being performed...*

[65] *Under the doctrine of separability, the arbitration agreement survives these challenges. The Appellants have not demonstrated that the arbitration agreement itself has been frustrated, discharged by breach, or rendered void by a court order. The alleged "incapability of performance" stems from the Respondent's financial status and the liquidator's inaction, which, as held in Peninsula Education (Setia Alam) Sdn Bhd (supra), are insufficient to override the mandatory stay under Section 10. The proper forum to resolve whether the main JVA was breached and what remedies flow from that, including the return of the IDT, is the arbitral tribunal, as the parties agreed.*

[Emphasis added]

Accordingly, the proper forum to determine the parties' substantive rights remained the arbitral tribunal.

### WOULD LIQUIDATION RENDER THE DISPUTE NON-ARBITRABLE?

The Court of Appeal recognised that while arbitration agreements are generally robust, the position becomes more nuanced where a company has been wound up, particularly in light of section 4 of the AA 2005, which permits refusal of arbitration on public policy grounds:



[66] *While the foregoing analysis establishes the robust independence and continued enforceability of arbitration agreements, the legal landscape becomes more nuanced when such agreements intersect with a wound-up corporate entity. This is especially so when Section 4 of the AA 2005 provides that an arbitration agreement may not be arbitrable should it be contrary to public policy. Section 4 of the AA reads as follows...*

To address this, the Court adopted the framework in the Singaporean case of **Larsen Oil and Gas Pte Ltd v Petropod Ltd (In Liquidation) And In Compulsory Liquidation In Singapore [2011] SGCA 21**, drawing a distinction based on the nature of the dispute, in reconciling the interface between party autonomy and the collective public interest underpinning insolvency law. This may be contrasted with the Federal Court's decision in **V Medical Services M Sdn Bhd v Swissray Healthcare Co Ltd [2025] 4 CLJ 282** (which we covered in an earlier [update](#)), which concerned a pre-winding-up dispute in the context of a fortuna injunction application.

[72] *To navigate this interface, the Singaporean Court in Larsen Oil And Gas Pte Ltd (supra) established a critical distinction based on the nature of the dispute. On one hand, disputes that arise directly from the operation of the insolvency regime itself, those that commence only upon the onset of formal insolvency proceedings, like avoidance actions taken by the liquidators, are deemed non-arbitrable as a matter of public policy.*

[73] *On the other hand, disputes concerning the company's pre-insolvency rights and obligations, such as disputes that occurred before insolvency, may be arbitrable. In essence, Larsen Oil and Gas Pte Ltd (supra) affirms that at the onset of insolvency, the court must carefully weigh the interests of the general body of creditors, which becomes a paramount public policy consideration."*

[Emphasis added]

Applying this distinction, the Court held that although the present case arose post-liquidation, it did not involve insolvency-specific remedies, but instead concerned a **purely contractual claim arising from pre-insolvency conduct**:



[80] *The nature of the dispute does not engage any of the statutory mechanisms or remedies that are unique to insolvency proceedings. It is not a claim brought by a liquidator to avoid transactions, challenge preferences, or recover assets for the benefit of creditors under insolvency legislation. Rather, **it is a private contractual claim for specific performance and return of a title document, which arose from the Respondent's pre liquidation conduct. As such, it falls within the category of disputes that "stem from the company's pre insolvency rights and obligations,"** as described in *Larsen Oil and Gas Pte Ltd v Petropod Ltd (supra)*."*

[Emphasis added]

Accordingly, the dispute remained arbitrable, and the arbitration agreement was not rendered inoperative.

The Court further held that the liquidator's non-adoption of the arbitration agreement does not alter the nature of the dispute. In any event, the arbitration clause continues to operate independently by virtue of the doctrine of separability:

[82] *We are of the view that the procedural deadlock caused by the DGI's non adoption of the arbitration agreement, as raised by the Appellants, does not alter the fundamental character of the underlying dispute as one arising from pre insolvency rights and obligations.*

[83] *The Appellants' argument that the underlying JVA termination or the Respondent's insolvency renders the arbitration agreement "inoperative" is unsustainable in light of Section 18 of the AA 2005. This section codifies the doctrine of separability, establishing that an arbitration clause is treated as an agreement independent of the other terms of the contract."*

[Emphasis added]

However, arbitration against a company in liquidation remains subject to procedural safeguards. In particular, leave of Court is required under section 471 of the Companies Act 2016, and the burden lies on the Plaintiff to take the necessary steps to commence arbitration:

[77] *Any proceeding against a company in liquidation requires the leave of the High Court under Section 471 of the Companies Act 2016. This requirement is a cornerstone of insolvency law, designed to protect the insolvent estate from a multitude of uncoordinated legal actions. An arbitration is an "action or proceeding" for the purposes of this section...*

[86] *In summary, this Court finds that:*

- (iv) *The Appellants were responsible for initiating arbitration once the stay was granted, and their failure to do so, or to seek the requisite leave under Section 471 of the Companies Act 2016 to proceed against a company in liquidation, does not invalidate the Stay Order...*

### DECISION OF THE COURT OF APPEAL

The Court of Appeal dismissed the appeal and upheld the stay in favour of arbitration under section 10 of the Arbitration Act 2005.

The Court held that neither the Respondent's liquidation nor the liquidator's inaction rendered the arbitration agreement inoperative or the dispute non-arbitrable. The proper forum for determination of the parties' rights remained the arbitral tribunal, subject to the applicable insolvency procedural requirements.

### KEY TAKEAWAYS

Following this decision, the following points should be noted:

- (a) **Liquidation does not, in itself, render an arbitration agreement inoperative.** The doctrine of separability continues to apply. Insolvency or the liquidator's inaction does not, without more, displace the mandatory stay under section 10 of the Arbitration Act 2005. Section 49 of the Arbitration Act 2005 does not provide a workaround in such circumstances, as it is directed at bankruptcy and does not extend to companies in liquidation.
- (b) **Arbitrability turns on the nature of the dispute, not the timing of insolvency.** Disputes arising from pre-insolvency rights and obligations remain arbitrable, even if pursued post-liquidation. In contrast, claims invoking insolvency-specific remedies may fall outside the scope of arbitration.
- (c) **Procedural safeguards under insolvency law must still be complied with.** Arbitration against a company in liquidation requires leave of Court under section 471 of the Companies Act 2016. Where a stay is granted, the claimant bears the responsibility to take the necessary steps to commence arbitration.

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



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