Kluwer Arbitration Blog

Failure to Proceed Diligently with Arbitration Relevant in Assessment of Damages

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The dilatory tactics of some claimant parties in conducting arbitration proceedings can often be frustrating and can result in unnecessary costs and expenses. In the judgment of *Jaks Island Circle Sdn Bhd ("**Jaks Island**") v. Star Media Group Bhd ("**Star Media**") and AmBank (M) Berhad ("**AmBank**")* **[Originating Summons No.: WA-24C(ARB)-11-02/2018]** issued in 2019, the Malaysian High Court considered a party's failure to proceed diligently with the arbitration to be relevant in assessing damages arising out of an undertaking given to the Court pursuant to an ad-interim injunction.

Case summary

The original dispute arose between Jaks Island and Star Media in relation to a breach of a sale and purchase agreement. Star Media issued notices to AmBank and UOB to call on the unconditional on-demand performance bond furnished by Jaks Island.

On 23 February 2018, Jaks Island filed two separate originating summonses, seeking an injunction to restrain Star Media from receiving the bank guarantees in the sum of RM25 million each from AmBank and UOB.

These originating summonses were filed pursuant to Section 11(1)(h) of the Malaysian Arbitration Act 2005 ("**Act**") which states that:

> *11. Arbitration Agreement and Interim Measures by High Court*
>
> *1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for: … h) an interim injunction or any other interim measure.*

In obtaining the ad-interim injunction pending the hearing proper of the injunction, Jaks Island gave an undertaking as to damages to preserve the status quo of the matter. However, the

Malaysian High Court dismissed the injunction.

Aggrieved by the High Court's decision, Jaks Island appealed but its appeals in the Court of Appeal and the Federal Court were dismissed with costs. Consequently, Star Media applied to the High Court for an inquiry of damages pursuant to the undertaking given by Jaks Island at the High Court.

In considering whether to enforce the undertaking, Justice Lee Swee Seng (as his lordship then was) relied on the principles enunciated from the Federal Court's decision of *GS Gill Sdn Bhd v Descente Ltd* [2010] 4 MLJ 609, that:

> i. If an interlocutory injunction is wrongly granted, the trial judge should make an order for inquiry of damages on the undertaking given by the plaintiff applying for the interlocutory injunction;
>
> ii. The plaintiff has to provide reasons as to why the undertaking given should not be enforced; and
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> iii. Special circumstances exist that justify such an order.

Based on the above principles, the High Court held that:

> i. Jaks Island failed to provide a cogent reason as to why the undertaking should not be enforced; and
>
> ii. it was not a special circumstance to refuse enforcement of an undertaking even if the arbitration award "*may very well be in favour of*" Jaks Island and Star Media has to refund the money it received under the bank guarantees. The Court considered that if this was otherwise, it will discourage businesses from using bank guarantees to allocate risk.

In the circumstances, the enforcement of undertaking should not be prolonged until the disposal of the arbitration.

What was noteworthy was that the High Court took into consideration the delay in the arbitration proceeding. The Notice of Arbitration was issued by Jaks Island to Star Media on 6 March 2018 and as at the date of the decision (*i.e*. 19 June 2019), an arbitration tribunal had not been constituted.

Jaks Island's counsel argued that the delay in progress was due to the lack of response from Star Media on its proposed arbitrators. However, the High Court rejected the argument. The court held that default provisions in most arbitration rules would have dealt with this situation and such lack of response was not a cogent reason for not proceeding with the arbitration, unless the arbitration agreement did not incorporate any arbitration rules.

Default provisions under the Arbitration Act 2005 should have applied

It was argued by Jaks Island that the arbitration could not proceed further because Star Media did not respond to its list of proposed arbitrators. However, we submit that if parties could not agree on the appointment of arbitrator, parties should rely on Section 13 of the Act as a recourse, namely,

when parties failed to agree on the procedure, application can be made to the Director of the Asian International Arbitration Centre **("AIAC")** to appoint an arbitrator[1)]

If the parties have agreed on the procedure for appointment of arbitrator, but a party failed to act as required under such procedure; or parties are unable to reach an agreement under such procedure; or a third party, including an institution failed to appoint an arbitrator, any party may request the Director of AIAC to take the necessary measures[2)]

In the event the Director of AIAC fails to act within 30 days from the request, any party may apply to the High Court to appoint an arbitrator[3)]

Therefore, Jaks Island could have proceeded diligently with the arbitration even if Star Media failed to respond to its proposals on the arbitrator.

Would Jaks Island have a better chance under the Arbitration (Amendment) Act 2018?

Jaks Island's originating summonses were filed before the coming into force of the Arbitration (Amendment) Act 2018 on 8 May 2018. Section 11(1)(h) has now been removed from the Act.

With the Arbitration (Amendment) Act 2018, a party can now apply to the arbitrator[4)] and/or the High Court[5)] for an interim measure to "*maintain or restore the status quo pending the determination of the dispute"*. Although there is an overlap between Section 11(a) and 19(2)(a) of Arbitration (Amendment) Act 2018, Section 11(2) in both the Act and Arbitration (Amendment) Act 2018 allows party to apply to the High Court for the same interim measure in the event that the arbitrator dismisses the application.

However, the High Court is bound by the finding of facts by the arbitrator and is not empowered to reconsider the finding of facts by the arbitrator. This is confirmed by the High Court in *IJM Construction Sdn Bhd v Lingkaran Luar Butterworth* [2018] 7 MLJ 341 that:

> "*…part of the arbitrator's ruling or decision on interim measure other than the findings of fact are open to reconsideration and fresh decision by the High Court under a s.11(1) application."*

In this regard, reference can be made to a recent Court of Appeal's decision in *Obnet Sdn Bhd v Telekom Malaysia Bhd* [2019] 6 MLJ 707 where the Court of Appeal set aside a High Court's order that allowed Telekom Malaysia Bhd's ("**TM**") application for discovery of a settlement agreement ("**Discovery Application**").

The High Court allowed the Discovery Application notwithstanding that the arbitrator had dismissed TM's discovery application and that it is bound by the finding of facts by the arbitrator. The Court of Appeal held that the High Court has no jurisdiction to interfere with the arbitrator's

finding of facts.

The Court of Appeal further found that the relief sought under Section 11 of the Act must be interim in nature. Where the relief sought under the Discovery Application is permanent in nature, this would have exceeded the court's jurisdiction under Section 11 of the Act. In these circumstances, the learned judge in the High Court ought to have dismissed the Discovery Application.

The Court of Appeal also held that Section 11 of the Act 2005 is "*designed to support and facilitate the arbitral process and not to displace it. The approach, in the context of s.11, must be not to encroach on the procedural powers of the arbitrators but to reinforce them.*"

Hence if an application was instead made to the tribunal pursuant to Section 19(2)(a) of the Arbitration (Amendment) Act 2018, assuming an undertaking as to damages had been given, Jaks Island may have a better chance of delaying the inquiry of damages to the conclusion of the arbitration. Jaks Island's exposure to damages, if any, would also have been delayed accordingly.

For further information on arbitration in Malaysia, see here

References

?1 Section 13(5)(b) of Arbitration Act 2005.
?2 Section 13(6) of Arbitration Act 2005.
?3 Section 13(7) of Arbitration Act 2005.
?4 Section 19(2)(a) of Arbitration (Amendment) Act 2018.
?5 Section 11(1)(a) of Arbitration (Amendment) Act 2018.

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