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Extension Of Time To File Defence And Notice To Produce: Do They Amount To Steps In Court Proceedings?

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Pursuant to Section 10(1) of the Arbitration Act 2005 (AA 2005), where the plaintiff commences court proceedings in respect of a matter that is subject to an arbitration agreement, the defendant will ordinarily be entitled to seek a stay of the proceedings in favour of arbitration, provided the application is made before 'taking any other steps in the proceedings' which indicates the defendant's election to proceed with the legal action in Court, such as delivering any pleadings. Conversely, where a defendant has 'taken a step in the proceedings', the defendant will be considered to have waived his right to proceed by way of arbitration and precluded from subsequently applying for a stay of proceedings.

In this regard, the Federal Court in *Universiti Malaya v Esa Jurutera Perunding Sdn Bhd* [2026] MLJU 2093 considered whether: (i) a request for an extension of time to file a Defence; and (ii) the service of a Notice to Produce Documents Referred to in the Pleadings pursuant to Order 24 Rule 10 of the Rules of Court 2012 (ROC 2012) amounted to taking steps in the proceedings, thereby precluding the Defendant from subsequently relying on its right to arbitrate.

Key Facts

The Plaintiff, Universiti Malaya, appointed the Defendant, Esa Jurutera Perunding Sdn Bhd, as its civil and structural engineering consultant for the completion and construction of additional examination halls and lecture halls buildings (the Project).

The parties' contractual arrangement culminated in the execution of a Memorandum of Agreement, the Conditions of Engagement of Consulting Engineer for Professional Services, and the Schedule to the Conditions of Engagement (the Agreement). The Agreement contained an arbitration clause. Following the alleged failure, refusal and/or neglect on the part of the Defendant to fulfil its obligations under the Agreement and its statutory duties, the Plaintiff commenced a writ action against the Defendant in the Kuala Lumpur High Court.

After entering appearance, the Defendant obtained extensions of time to file its Defence and also served a Notice to Produce Documents Referred to in Pleadings under Order 24 Rule 10 of the ROC 2012. The Plaintiff then provided the requested documents on 30 November 2022.

Thereafter, the Defendant issued a Notice of Arbitration on 1 December 2022 and filed an application to stay the High Court proceedings under Section 10(1) of the AA 2005 on 2 December 2022.

The Plaintiff opposed the stay application on the basis that the Defendant have taken steps in the proceedings, among others, having requested extensions of time to file its Defence, indicated that it would file its Defence, and served the Notice to Produce Documents on the Plaintiff. It contended that the Defendant have thereby waived its right to arbitrate and submitted to the Court's jurisdiction.

The High Court accepted the Plaintiff's argument and dismissed the stay application. However, the Court of Appeal reversed the High Court's decision and granted the stay. The Plaintiff then appealed to the Federal Court.

The Federal Court's Ruling

The Federal Court dismissed the appeal and held that, in the circumstances, neither the requests for extensions of time nor the service of the Notice to Produce Documents amounted to 'taking any other steps in the proceedings' under Section 10(1) of the AA 2005.

A Holistic Assessment Of The Defendant's Conduct

At the outset, the Federal Court emphasised that Section 10(1) of the AA 2005 reflects a legislative policy in favour of arbitration and minimum court intervention. Unlike the repealed Arbitration Act 1952, under which the grant of a stay was discretionary, a stay under Section 10(1) of the AA 2005 is mandatory once the arbitration agreement is operative, and not null and void or incapable of being performed. Accordingly, the courts should, as far as possible, give effect to the parties' agreement to arbitrate.

The Federal Court further affirmed that not every act taken after the commencement of court proceedings constitutes a step in the proceedings. The relevant question is whether the defendant's conduct demonstrates a clear and unequivocal intention not to arbitrate and to submit to the jurisdiction of the court. This is a question of fact to be determined by assessing the defendant's conduct holistically.

Relying on its earlier decision in *Yeo Eng Lam v Infinity Vantage Sdn. Bhd.* (02(i)-20-03/2019(W)), the Federal Court reiterated that a necessary but peripheral application or action that does not touch on the merits of the substantive dispute will generally not amount to a step in the proceedings.

Extension Of Time To File A Defence

The Federal Court recognised that an extension of time may be obtained either by agreement between the parties or through a formal application to the court. Under Order 3 Rule 5(3) of the ROC 2012, the parties may agree in writing to extend time without an order of the court being made for that purpose.

However, the Federal Court cautioned against adopting a blanket approach which treats an extension of time secured through an extra-judicial agreement as being precluded from constituting a step in the proceedings, while treating a formal application culminating in a court order as necessarily constituting such a step. Accordingly, the surrounding circumstances and the Defendant's overall conduct must be assessed holistically to determine whether there was a clear and unequivocal intention on the part of the Defendant to proceed with the suit and abandon its right to arbitrate. The Federal Court also clarified that the observations in *Sanwell Corp v Trans Resources Corp Sdn Bhd* [2002] 2 MLJ 625, which suggested that requesting an extension of time amounted to a step in the proceedings, were obiter dicta. The issue in *Sanwell* concerned the entry of an unconditional appearance, and its observations on extensions of time were made without substantive consideration of the relevant authorities in their proper factual context.

On the facts, the Federal Court found that the requests for extensions of time to file a Defence, as well as a mere indication in the Defendant's correspondence of an intention to file a Defence, did not evince an unequivocal intention to proceed with the suit and, consequently, did not amount to steps in the proceedings as contended by the Plaintiff. This was particularly so because the indication was made before the Defendant had access to documents that were not in its possession.

Service Of Notice To Produce Documents

The Federal Court also held that the Defendant's service of the Notice to Produce Documents under Order 24 Rule 10 of the ROC 2012 did not constitute a step in the proceedings. The nature of a Notice to Produce Documents is to enable the inspection of documents referred to in the pleadings. The Notice to Produce is purely peripheral to the substantive disputes between the parties and does not advance the merits of the case in any manner.

In the present case, the Defendant deposed in an affidavit that more time was required as the events and documents dated as far back as 2008 and that some documents were not in its possession. This averment was neither challenged nor contradicted by the Plaintiff. The Federal Court found that the Defendant's Notice to Produce Documents was reasonable and necessary, and have been issued and served in good

faith. Therefore, the service of Notice to Produce Documents by the Defendant's solicitors did not indicate an intention to waive the Defendant's right to arbitrate.

Express Reservation Of Arbitration Rights And Delay

The Federal Court further clarified, with reference to *Yeo Eng Lam,* a defendant's reservation of rights, *per se*, does not automatically preclude a finding that a step has been taken in the proceedings. In other words, the inclusion of a reservation cannot protect a defendant where its overall conduct clearly demonstrates submission to the court's jurisdiction.

Delay is also relevant but is not automatically fatal. The mere passage of time does not in itself, result in a defendant losing the right to obtain a stay of proceedings in favour of arbitration. Therefore, the court must consider the defendant's conduct in its entirety rather than focus solely on the presence or absence of an express reservation of rights or the mere passage of time.

On the facts, the Defendant acted with reasonable expedition and did not acquiesce through any undue lapse of time. It received the requested documents on 30 November 2022, issued the Notice of Arbitration on 1 December 2022 and filed the stay application on 2 December 2022. Although the Defendant's earlier correspondence did not expressly refer to the arbitration clause, the Federal Court held that the Defendant's general reservation of "all rights", viewed together with the overall factual circumstances, was sufficiently clear and wide to preserve its right to arbitrate.

Conclusion

This Federal Court's decision provides useful guidance on evaluating what amounts to 'taking any other steps in the proceedings' under Section 10(1) of the AA 2005. While Malaysia adopts a pro-arbitration policy, the decisive consideration is the defendant's conduct, which must be assessed holistically. The key lesson from this decision is that a defendant must remain vigilant upon being served with a statement of claim and should promptly ascertain whether the governing contract contains an arbitration agreement and, if so, apply for a stay of proceedings without delay unless they intend to waive their right to arbitrate.

Pending the stay application, a defendant should avoid any conduct that may suggest election to proceed with the legal proceedings and submission to the court's jurisdiction. Where certain acts are necessary such as requesting an extension of time to file Defence or serving a Notice to Produce Documents, they should be undertaken with the defendant's express intention to preserve its right to arbitrate.

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