

25 MAY 2022

## Conditions For Stay Of Proceedings Pending Arbitration

### Contact Persons:

Datuk D P Naban  
Senior Partner

+603 6209 5405  
naban@rdslawpartners.com

Nagarajah Muttiah  
Partner

+603 6209 5400  
naga@rdslawpartners.com

Nur Syafinaz Vani  
Partner

+603 6209 5422  
syafinaz@rdslawpartners.com

Rosli Dahlan  
Partner

+603 6209 5420  
rosli@rdslawpartners.com

R Rishi  
Partner

+603 6209 5400  
rishi@rdslawpartners.com

Kenny Lam Kian Yip  
Senior Associate

+603 6209 5400  
kenny@rdslawpartners.com

Shaun Tan Cheng Hong  
Senior Associate

+603 6209 5400  
shaun@rdslawpartners.com

Whilst courts are entitled to impose conditions with respect to stay of the court proceedings pending reference to arbitration pursuant to Section 10(2) of the Arbitration Act 2005 (AA 2005), the High Court in *Lion Pacific Sdn Bhd v Pestech Technology Sdn Bhd* [2022] MLJU 108, clarified that the discretion to impose conditions is not absolute.

Specifically, the High Court held that it should not impose conditions on matters which are within the exclusive jurisdiction of the arbitral tribunal.

### Background

Lion Pacific Sdn Bhd (Lion Pacific) was appointed by a consortium as the subcontractor for the design, construction, equipping and maintenance of a project. In turn, Lion Pacific engaged Pestech Technology Sdn Bhd (Pestech) as its subcontractor for the Project (Sub-Contract).

A dispute arose between the parties in relation to payment for Pestech's execution of the works, which led to adjudication proceedings being commenced by Pestech against Lion Pacific. Ultimately, Lion Pacific was adjudged liable to pay the sum of RM12,522,732.71 by the adjudicator (Adjudication Decision).

On 18.2.2020, Lion Pacific then served Pestech a Notice to Arbitrate and also applied to set aside and stay the Adjudication Decision at the High Court. On the other hand, Pestech applied to enforce the Adjudication Decision. On 29.9.2020, the High Court dismissed Lion Pacific's application to set aside and stay the Adjudication Decision and allowed the application to enforce the Adjudication Decision. Lion Pacific appealed against the High Court's decisions, which are pending appeal.

In relation to the arbitration proceedings, given that Pestech did not pay the security deposit as directed by the arbitrators, it had resulted in the arbitration proceedings being terminated.

**REIMAGINING  
LEGAL  
SOLUTIONS**

## Instant Suit

Pending the appeals mentioned above, Lion Pacific initiated separate court proceedings to set aside the High Court's orders and to set aside the Adjudication Decision once more. This time by alleging that in the adjudication proceedings, Pestech had fraudulently included the claim of RM8,831,611.33 which was in fact a claim for loss and expense. Lion Pacific alleges that this amount had not been certified by the Ministry of Transport as spelt out in the terms of the Sub-Contract, which certification was necessary before payment could be made.

Pestech then applied to stay Lion Pacific's action pursuant to Section 10 of the AA 2005 on the ground that the Sub-Contract between the parties contains an arbitration clause and that the matter of certification for loss and expense is a matter which falls squarely within the arbitration agreement and ought to be referred to arbitration. This application was resisted by Lion Pacific.

The principal issues before the High Court were:

- a. Is Lion Pacific's claim within the scope of the arbitration agreement?
- b. In the event the stay is allowed, whether the Court ought to impose a condition that Pestech be ordered to pay its share of the deposit in the prospective arbitration (as prayed for by Lion Pacific), given that Pestech had previously caused the termination of the previous arbitration proceedings by its default in payment.

## Is Lion Pacific's Claim Within The Scope Of The Arbitration Agreement?

There is no dispute that there is a valid arbitration agreement providing for the resolution of the disputes arising out of or in connection with the Sub-Contract. What was disputed was whether Lion Pacific's claim against Pestech which is founded on fraud committed in the adjudication proceedings falls under the arbitration agreement.

The High Court was of the view that the said dispute is one which is well within the ambit of the arbitration agreement and stated that *the mere fact the cause of action is in fraud*

### OUR EXPERTISE:

Administrative Law  
Appellate Advocacy  
Competition Law  
Civil & Commercial Disputes  
Contractual Disputes  
Construction & Arbitration  
Debt Recovery  
Defamation  
Employment & Industrial Relations  
Intellectual Property  
Probate  
Judicial Review & Administration Law  
Shipping & Maritime  
Tax & Customs Disputes  
Trusts

*does not take the dispute out of the scope of the arbitration agreement.* This is in line with the Federal Court case of *Press Metal Sarawak Sdn Bhd v Etiqa Takaful* [2016] 5 MLJ 417.

Hence, the arbitral tribunal would have the jurisdiction to deal with the essential issue of whether Pestech's alleged claim for loss and expense is a valid claim or otherwise. The High Court concluded that it has no discretion to refuse a stay since the requirements in Section 10 of the AA 2005 have been fulfilled, i.e. there being a valid arbitration agreement which is not null and void, and that the dispute falls within the scope of the arbitration agreement.

## Whether The Court Ought To Impose A Condition That Pestech Be Ordered To Pay Its Share Of The Deposit In The Prospective Arbitration?

Lion Pacific argued that even if the High Court was minded to grant the stay, it ought to impose a condition that Pestech be ordered to pay its share of the deposit in the prospective arbitration. This is to avoid a repeat of the arbitration proceedings being stifled previously due to the refusal of Pestech to pay the security deposit.

Lion Pacific relied on Section 10(2) of the AA 2005 which allows the High Court, in granting a stay of proceedings, to also impose any condition as it deems fit. However, the court disagreed with Lion Pacific's contention principally for the following reasons:

- a. The costs and expenses of an arbitration are to be decided by the arbitral tribunal pursuant to Section 44 of the AA 2005.
- b. The above provision when read with Section 8 of the AA 2005 clearly shows that the issue of costs and expenses of an arbitration are within the exclusive jurisdiction of the arbitral tribunal. Section 8 of the AA 2005 states that "*No court shall intervene in matters governed by this Act, except where so provided in this Act.*"
- c. It is thus clear that Section 8 of the AA 2005 curtails the power of court to intervene in the discretionary jurisdiction of the arbitrator.

### OUR EXPERTISE:

Administrative Law  
Appellate Advocacy  
Competition Law  
Civil & Commercial Disputes  
Contractual Disputes  
Construction & Arbitration  
Debt Recovery  
Defamation  
Employment & Industrial Relations  
Intellectual Property  
Probate  
Judicial Review & Administration Law  
Shipping & Maritime  
Tax & Customs Disputes  
Trusts

## Contact Persons:

Datuk D P Naban  
Senior Partner

+603 6209 5405  
naban@rdslawpartners.com

Nagarajah Muttiah  
Partner

+603 6209 5400  
naga@rdslawpartners.com

Nur Syafinaz Vani  
Partner

+603 6209 5422  
syafinaz@rdslawpartners.com

Rosli Dahlan  
Partner

+603 6209 5420  
rosli@rdslawpartners.com

R Rishi  
Partner

+603 6209 5400  
rishi@rdslawpartners.com

Kenny Lam Kian Yip  
Senior Associate

+603 6209 5400  
kenny@rdslawpartners.com

Shaun Tan Cheng Hong  
Senior Associate

+603 6209 5400  
shaun@rdslawpartners.com



## About Us

We are a full-service commercial law firm with a head office in Kuala Lumpur and a branch office in Penang. Our key areas of practice are as follows:-

- Appellate Advocacy
- Banking & Finance (Conventional and Islamic)
- Capital Markets (Debt and Equity)
- Civil & Commercial Disputes
- Competition Law
- Construction & Arbitration
- Corporate Fraud
- Corporate & Commercial
- Personal Data Protection
- Employment & Industrial Relations
- Energy, Infrastructure & Projects
- Construction & Arbitration
- Fintech
- Government & Regulatory Compliance
- Intellectual Property
- Medical Negligence
- Mergers & Acquisitions
- Real Estate Transactions
- Shipping & Maritime
- Tax, SST & Customs
- Tax Incentives
- Trade Facilitation

## Commentary

Courts often have the power to impose conditions on stay pursuant to Section 10(2) of the AA 2005, such as requiring either party to commence arbitration within a stipulated period or that the defendant is precluded from raising the defence of limitation under Section 6(1) of the Limitation Act 1953. The list is not exhaustive and the conditions to be imposed would depend on the facts of the case and if it is in the interest of justice to do so.

However, as with the above case, the High Court's powers must be exercised within the boundaries and that matters within the exclusive jurisdiction of the arbitral tribunal are not to be interfered. This basically means that if a respondent in the arbitration refuses to pay its share of the security deposit, the claimant must first advance the deposit on behalf of the respondent for the arbitration to proceed. The advance can then be recouped in the arbitral award subsequently if the claim is eventually decided in favour of the claimant.

Nonetheless, whether that is the only recourse would depend on the arbitration rules which have been adopted by the parties. For example, in the context of the PAM Arbitration Rules 2019, the arbitral tribunal can nevertheless choose to proceed with the arbitration and may exercise his lien over the award until all payments towards the cost of arbitration has been paid by both parties or either of them.

Authored by Clament Tay, an associate from the firm's Dispute Resolution practice.

**REIMAGINING  
LEGAL  
SOLUTIONS**