

Non-payment of AIAC deposits renders arbitration agreement inoperative

Court of Appeal holds arbitration agreement inoperative for failure to pay deposits.

On 27 October 2023, the Court of Appeal in **JSB v ACSB** (P-02(IM)(NCvC)-2008-10/2022) held a failure to pay the arbitration deposit to the Asian International Arbitration Centre (“AIAC”) rendered the arbitration agreement inoperative.

Facts

A dispute arose between the Plaintiff-Claimant (“JSB”) and the Defendant-Respondent (“ACSB”) in relation to a construction contract.

JSB sued ACSB in Court. JSB then withdrew the suit and commenced arbitration against ACSB at the AIAC. This was primarily premised on ACSB’s insistence on arbitration. Thereafter, once the arbitration was commenced, ACSB refused to pay the AIAC further deposit after having paid the initial deposit. ACSB contended that JSB should pay ACSB’s portion of the deposit and have that included in the final award. JSB refused. The arbitrator terminated the arbitration after consulting with the Director of the AIAC.

JSB then commenced a suit at the High Court against ACSB. ACSB applied to have the same struck out or stayed under section 10 of the **Arbitration Act 2005** (“AA 2005”). The High Court proceedings were stayed pending arbitration.

JSB appealed to the Court of Appeal. The Court of Appeal reversed the High Court’s decision, holding that the non-payment of the further deposit on the part of ACSB rendered the arbitration agreement inoperative. The Court of Appeal also held that the filing of a striking-out application amounted to a step in the proceedings and recognised the Court’s jurisdiction to determine the dispute.

The Court of Appeal in this case held that ACSB’s conduct was akin to a *“sly strategy to scuttle the arbitration with impunity”* pressuring the other party to bear the entire deposit sums due.

Arbitration Update

NOVEMBER 2023

Shearn Delamore & Co
7th Floor

Wisma Hamzah Kwong-Hing,
No 1, Leboh Ampang
50100, Kuala Lumpur, Malaysia

T: 603 2027 2727

F: 603 2078 5625

info@shearndelamore.com

www.shearndelamore.com

www.linkedin.com/company/shearn-delamore-&-co

The Court of Appeal also held that whilst the AIAC Arbitration Rules contain provisions that afford the other party an opportunity to pay the deposits for the non-paying party, there is no obligation to do so.

The Court of Appeal also issued a reminder that applying to strike out court proceedings as an alternative to staying such proceedings in the face of an arbitral clause, is tantamount to having taken steps in the proceedings, from which it was *“too late to resile [...] as the Court’s jurisdiction, once invoked, cannot be revoked or resisted”*.

The Court emphasised the fact that an application under section 10 of the AA 2005 cannot be a hybrid application, and an application to strike out a claim is incompatible with a prayer to stay the court proceedings pending arbitration. ASCB, having both prayed for a striking-out and a stay, was taken to have abandoned arbitration in favour of litigation.

Key Take Aways

This decision is an important reminder that recalcitrant respondents can no longer attempt to frustrate all attempts to determine disputes by seeking to stay court proceedings and refusing to pay the arbitral institution’s deposits. In such a case the arbitration agreement becomes inoperative, leaving the Court tasked to determine the dispute.

If, however, the *“innocent party”* only wishes to arbitrate its dispute, the Court of Appeal held that party would have to pay the full deposits with a view to claiming it back at the conclusion of the arbitration. The innocent party may also apply for security for costs under sections 19(1) and 19(2)(e) of the AA 2005. Should the non-paying party refuse to pay such security for costs, the arbitrator may bar it from defending the dispute until it furnishes such security for costs.

It will be interesting to see if this solution does resolve the difficulties applicants more commonly face these days of respondents attempting to block legitimate dispute resolution processes in court and in arbitration.

This Arbitration Update is prepared by [Wong Wen Sheng](#) and Ching Hao Yan (pupil-in-chambers).

For more information, please reach out to your usual contact from our [Arbitration Practice Group](#):

[K. Shanti Mogan](#)

shanti@shearndelamore.com

[Datin Jeyanthini Kannaperan](#)

jeyanthini@shearndelamore.com

[Rabindra S. Nathan](#)

rabindra@shearndelamore.com

Shearn Delamore & CO.

[Rodney Gomez](#)

rodney@shearndelamore.com

[Dhinesh Bhaskaran](#)

dhinesh@shearndelamore.com

[Rajasingam Gothandapani](#)

rajasingam@shearndelamore.com

[Nad Segaram](#)

nad@shearndelamore.com

[Yee Mei Ken](#)

mkyee@shearndelamore.com

[Jimmy S.Y. Liew](#)

jimmyliew@shearndelamore.com

[Alexius Lee](#)

alexius@shearndelamore.com

[Lilien Wong](#)

lilien.wong@shearndelamore.com

Copyright © 2023 Shearn Delamore & Co. All rights reserved.

This Update is issued for the information of the clients of the Firm and covers legal issues in a general way. The contents are not intended to constitute any advice on any specific matter and should not be relied upon as a substitute for detailed legal advice on specific matters or transactions.