

## Extensions Requests in Court when There's an Arbitration Agreement — One Step Too Far?

### Introduction

When disputing parties have agreed to resolve matters through arbitration, courts are expected to respect this choice. However, actions taken during litigation, particularly in its early stages, can potentially compromise this right.

The recent Court of Appeal decision in **Esa Jurutera Perunding Sdn Bhd v Universiti Malaya** [2025] 2 MLJ 618 serves as a timely reminder of how carefully one must tread when seeking procedural indulgences while preserving the right to arbitrate.

This case turned on the meaning of “*taking any other steps in the proceedings*” under section 10(1) of the **Arbitration Act 2005** (“AA 2005”).

### Brief facts

The appellant, Esa Jurutera Perunding Sdn Bhd (“the Defendant”), was appointed as a civil and structural consultant by Universiti Malaya (“the Plaintiff”) under a Memorandum of Agreement dated 3 June 2008 which included an arbitration clause under clause 4 of the conditions of engagement.

Despite this clause, the Plaintiff filed a Writ and Statement of Claim in the High Court on 6 October 2022. The Defendant entered an appearance and sought two extensions of time to file its defence, which the Plaintiff granted.

On 30 November 2022, the Defendant issued a notice to produce documents and notified the Plaintiff of its intention to file its defence. However, on 1 December 2022, the Defendant issued a Notice of Arbitration and filed an application to stay the court proceedings under section 10(1) AA 2005.

The High Court dismissed the Defendant’s stay application and held that the Defendant’s prior conduct in requesting extensions of time and serving the notice to produce constituted steps in litigation, thereby waiving its right to arbitration. The Defendant appealed.

## Arbitration Update

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DBKL sought to set aside the Award, arguing that the arbitrator had flagrantly disregarded established Malaysian law and substituted his own legal theories without allowing parties to address them.

## Findings

The Court of Appeal allowed the appeal and granted a stay of proceedings, holding that the Defendant's conduct did not amount to an unequivocal intention to submit to the jurisdiction of the court.

### *1. The Effect of Section 10 (1) AA 2005*

The Court of Appeal relied on the Federal Court case of **Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd** [2016] 9 CLJ 1 where it was held that section 10(1) of the AA 2005 makes it mandatory for the Court, upon application by a party, to stay and refer any dispute which is subject to an arbitration agreement to arbitration provided that the application is made before the party takes any other steps in the proceedings and that the agreement is not null and void.

Further, section 10(1) of the AA 2005 is consistent with the principle of sanctity of contract. Therefore, if a party to an agreement chose to file its claim in Court, it will be in breach of that agreement. (**Airbus Helicopters Malaysia Sdn Bhd (formerly known as Eurocopter Malaysia Sdn Bhd v Aerial Power Lines Sdn Bhd** [2024] 2 MLJ 471)

### *2. Interpretation of "Steps in the Proceedings"*

The Court of Appeal adopted a holistic approach, emphasising that section 10(1) of the AA 2005 must be construed to minimise judicial interference and to uphold arbitration agreements where possible.

The Court of Appeal referred to **Sanwell Corp v Trans Resources Corp Sdn Bhd** [2002] 3 CLJ 213 where the Federal Court outlined three categories of conduct:

- The entry of appearance is a mandatory procedural step to be taken and it is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings;
- If a party has served any pleadings, then he has clearly taken a step in the proceedings, he has thereby elected to proceed with litigation and would be barred from applying for a stay of proceedings; and

- If the party has taken any other action in the proceedings other than the two stated above, the court will then consider whether such action indicates an unequivocal intention to proceed with the suit.

The Court also cited the Singapore Court of Appeal's decision in **Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd** [2008] 4 SLR 460, which held that "*steps in the proceedings*" are those that "*advance the hearing of the matter in court*" as opposed to steps taken to halt or resist the litigation.

### 3. *Reservation of Rights Is Key*

Central to the decision was the Defendant's express reservation of rights on multiple occasions:

- In a covering letter dated 7 March 2022, the Defendant stated: "*In the meantime, all of our Client's rights are reserved*".
- The same reservation was reiterated when the Defendant eventually filed its defence, with the phrase: "*tanpa prejudis kepada hak Defendan untuk merujuk pertikaian ... kepada prosiding timbang tara*".

The Court found that these reservations were sufficient to demonstrate the Defendant's continuing intention to pursue arbitration.

## Conclusion

All in all, it is of utmost importance for practitioners to navigate initial Court proceedings with care when arbitration is the agreed mode of dispute resolution.

While the Court leaned in favour of upholding the arbitration clause in this case, this decision should not be viewed as a *carte blanche*. Thus, parties should proceed with caution from the very first procedural step to avoid inadvertently waiving their right to arbitrate.

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