

STAY OF ARBITRATION PROCEEDINGS

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I'M A DREAMER, AND TODAY ONE OF MY DREAMS COMES TRUE.

THIS IS FOR YOU, ME.

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ABSTRACT

Arbitration is an alternative to the judicial process and is one of the available methods appropriate for resolving complex disputes. When a dispute arises between parties to an arbitration agreement, a party may initiate an arbitration proceedings. However, it is possible that if a party finds, in the course of the proceedings, the dispute is not suitable, for a certain reason, for arbitration that party may seek the court's assistance to stay the arbitral proceedings. The Arbitration Act 2005 does not contain a specific provision for this eventuality. The only way is for that party to apply to the court for stay the arbitration proceedings by way of an injunction. The law cases show that it is made available only in limited circumstances. There is no clear pronouncement from the courts. Therefore, this master project intends to identify what are the circumstances that the courts take into consideration when granting or refusing an application of injunction relief to restrain the arbitration proceedings. This project is carried out mainly through documentary analysis of law cases that are reported in law journals, such as Malayan Law Journal, Singapore Law Report, Building Law Report, etc. The result shows that there are six circumstances in which injunctions are granted to stay arbitral proceedings and four circumstances that are considered by the court in refusing to grant injunction. The circumstances in which injunctions are granted to stay of arbitral proceedings are allegation of fraud, parties not part of arbitration agreement, no dispute arises, impeachment of validity of arbitration agreement, balance of inconvenience, and unqualified arbitrator. While the circumstances that the courts take into consideration in refusing to grant an injunction for stay of arbitration proceedings are abuse of the process of the court, delay in applying injunction relief, partiality of arbitrator, and reference to adjudication. Therefore, it is hoped that both the successful and unsuccessful application for injunctions that has been discussed would provide a guideline to parties of arbitration agreement when they resort to injunction for stay of arbitration proceedings.

ABSTRAK

Timbangtara adalah satu alternatif kepada proses kehakiman dan merupakan salah satu daripada kaedah sedia ada yang relevan untuk digunakan bagi menyelesaikan pertikaian antara pihak-pihak yang bertelagah. Apabila timbul pertikaian antara pihak-pihak kepada perjanjian timbang tara, pihak boleh memulakan prosiding timbang tara. Walau bagaimanapun, ia boleh didapati bahawa jika suatu pihak mendapati, dalam perjalanan prosiding itu, pertikaian itu tidak sesuai, bagi sebab-sebab tertentu, untuk diadili di dalam proses timbang tara, maka pihak tersebut boleh mendapatkan bantuan mahkamah untuk menengguhkan prosiding timbang tara. Akta Timbangtara 2005 tidak mengandungi peruntukan tertentu untuk perkara tersebut. Satu-satunya cara untuk mendapatkan penangguhan prosiding timbang tara adalah dengan memohon injunksi mahkamah. Kes-kes undang-undang menunjukkan bahawa injuksi ini disediakan hanya dalam keadaan yang tertentu, tanpa sebarang keadaan yang jelas daripada mahkamah. Ianya juga hanya disediakan dalam keadaan terhad sahaja. Oleh itu, kajian sarjana ini bercadang untuk mengenal pasti keadaan yang dipertimbangkan oleh mahkamah dalam memberi atau menolak permohonan penangguhan injunksi untuk menghalang daripada prosiding timbang tara berterusan. Kajian ini dijalankan terutamanya melalui analisis kes undang-undang yang dilaporkan dalam dokumentari jurnal undang-undang, seperti *Malayan Law Journal*, *Singapore Law Report*, *Bangunan Law Report*, dll. Hasil kajian menunjukkan bahawa terdapat enam keadaan di mana perintah-perintah akan tersedia untuk penggantungan prosiding timbang tara dan empat keadaan yang dianggap oleh mahkamah dalam enggan untuk memberi injunksi untuk menghalang, salah satu pihak perjanjian timbang tara atau penimbang tara dalam prosiding timbang tara. Keadaan yang diberikan kepada penggantungan prosiding timbang tara adalah dakwaan penipuan, bukan pihak sebahagian daripada perjanjian timbang tara, tiada pertikaian timbul, pemecatan kesahan perjanjian timbang tara, kira-kira kesulitan, dan penimbang tara yang tidak berkelayakan. Keadaan yang diambil kira mahkamah dalam enggan memberikan suatu injunksi untuk penggantungan prosiding timbang tara pula adalah penyalahgunaan proses mahkamah, kelewatan dalam memohon relief injunksi, berat sebelah penimbang, dan merujuk kepada pengadilan. Oleh itu, adalah diharapkan bahawa penjelasan mengenai kedua-dua permohonan sama ada berjaya ataupun tidak untuk perintah-perintah yang telah dibincangkan dapat difahami dan akan menyediakan satu garis panduan kepada pihak-pihak perjanjian timbang tara apabila mereka mengambil jalan keluar dengan injunksi untuk penggantungan prosiding timbang tara.

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LIST OF ABBREVIATIONS

AC	Law Reports: Appeal Cases
All ER	All England Law Reports
AMR	All Malaysia Reports
App Cas	Appeal Cases
Build LR	Building Law Reports
Ch	Cases in Chancery
Ch D	The Law Reports, Chancery Division
CLJ	Current Law Journal (Malaysia)
CLR	Commonwealth Law Reports
Const LR	Construction Law Reports
ER	Equity Reports
EWCA Civ	Court of Appeal, Civil Division (England & Wales)
FMSLR	Federated Malay States Law Reports
HL	House of Lords
KB	King Bench
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
MLJ	Malayan Law Journal
PC	Privy Council
QB	Queen Bench
SLR	Singapore Law Report

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CHAPTER I

INTRODUCTION

1.1 Background of Studies

Arbitration represents an alternative to the judicial process and is one of the available methods appropriate for resolving complex disputes between the parties¹. Arbitration is the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of a court of law².

According to Widdis (1979)³, one distinct difference between arbitration and litigation that is critically important is that arbitration is agreement based and not always provided with standards, as is litigation. Mustill and Boyd (1989)⁴ have

¹ Sundra Rajoo, "Trade Disputes Solving Mechanisms", pp. 6.

² Sundra Rajoo, "Drafting Effective Arbitration Agreements", Malayan Law Journal Articles, (Lexis Nexis Asia: 2005), pp.1

³ Widdiss, A.I., "Arbitration: Commercial Disputes, Insurance, and Tort Claims". (New York: Practising Law Institute, 1979) , pp.32

⁴ Sir Michael J. Mustill, Steward C. Boyd, "The Law and Practice of Commercial Arbitration in England", Second Edition, (London and Edinburgh: Butterworths, 1989), pp. 41,42

listed some of the attributes which must be present for an agreement to be considered as an arbitration agreement as follows:

- 1) The jurisdiction of the tribunal to decide the rights of the parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration;
- 2) The agreement must contemplate that the substantive rights of the parties will be determined by the agreed tribunal;
- 3) The tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides;
- 4) The agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law; and
- 5) The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

It must be stressed that the presence of an arbitration agreement does not prohibit either or both parties from referring their disputes to the courts⁵. However, on the one hand, if a party to an arbitration agreement commences a court action against another party relating to a dispute that is within the scope of the arbitration agreement, then the other party can apply to the court to have the action stayed

⁵ Oon Chee Kheng, "Arbitration in Construction Disputes: A Procedural and Legal Overview" (UTM, 2003), pp. 6.

pending arbitration⁶. The power of the court to stay such a court action is contained in section 10 of the Arbitration Act 2005⁷.

On the other hand, when a party refers a dispute to arbitration and the other party does not agree to arbitrate the dispute, that other party may apply to the court for a stay the arbitration proceedings⁸. However, this situation is not so well established⁹. The obvious way in which to seek a stay of an arbitration proceedings is to apply for an injunction. This is illustrated by the named judge, Zakaria Sam JC in the case of *Jak Kwang Builders & Developers Sdn Bhd v Ng Chee Keong & Ors*¹⁰:

“The only way that the arbitration proceedings could be restrained is by a judge of the High Court issuing an appropriate order for injunction against the third defendant.”

Since there are many rules and governing laws for the granting of injunction, the remedy can be granted by the court when the court thinks that it is proper to grant it¹¹. However, if the court discovers later that the application for injunction was made on suppressed facts, or that the facts upon which the order was granted no longer exist, the injunction can be set aside or dissolved.¹²

⁶ Section 10 of the Arbitration Act 2005 (Act 646)

⁷ Act 646

⁸ “Halsbury’s Laws of Malaysia Vol 13 – Arbitration, Companies”, (Malayan Law Journal, 2002)

⁹ Anthony Walton & Mary Vitoria, “Russel on the Law of Arbitration”, (London: Stevens & Sons Ltd., 1982), pp. 99

¹⁰ [2001] 4 MLJ 391

¹¹ The Rules of the High Court 1980 P.U. (A) 50/80

¹² Lee, Mei Pheng, “General Principle of Malaysian Law.” 4th Edition. (Ipoh, Malaysia: Penerbit Fajar Bakti Sdn Bhd, 2001), pp. 173.

1.2 Problem Statement

The discussion on 1.1 above shows how important an injunction is in the application for stay of arbitration proceedings. Injunction is one of equitable remedies available for breach of contract¹³. According to the Professor Barenson (2002)¹⁴, it is an effective and powerful remedy wielded by the courts today on the fact that injunction is capable of being enforced through the court's contempt power.

There is a unique characteristic of injunctions, which makes it different from another equitable remedy, where an injunction is exceptional, extraordinary and less common¹⁵. It is made available only in limited circumstances¹⁶. This matter also has been mentioned in the court case of *Beddow v Beddow*¹⁷, where the judge held that, "*I have unlimited power to grant an injunction in any case where it would be right or just to do so: and what is right or just must be decided, not by the caprice of the Judge, but according to sufficient legal reasons or on settled legal principles*".

Besides that, the learned judge, Richmond J. mentioned regarding to the injunction for stay of arbitration proceedings in *Eagle v N.I.M.U. Insurance Company*¹⁸:

"In such a case the Court will not easily be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission. There may be special circumstances which will satisfy the Court in this connection"

¹³ Guest, A.G., "Anson's Law of Contract." 24th Edition. (London: Clarendon Press, Oxford, 1975), pp. 531.

¹⁴ Prof. Berenson, "Remedies." (US: Thomas Jefferson School of Law, summer 2002), pp. 4.

¹⁵ Andrew Burrows, "Remedies for Torts and Breach of Contract", Third Edition, (New York: Oxford University Press Inc., 2004), pp.511

¹⁶ Beale, H., "Remedies for Breach of Contract." (London: Sweet & Maxwell, 1980), pp. 125-126; Paterson, J., Robertson, A. & Heffey, P., "Principles of Contract Law." 2nd Edition. (Melbourne: Thomson Law Book Co., 2005), pp. 477.

¹⁷ [1878 B.56.]

¹⁸ 1967 NZLR 698; 1965 NZLR LEXIS 145

However, an injunction for stay of arbitration proceedings is not always available by parties of arbitration agreement, where it only granted if two conditions are satisfied, which is the injunction does not cause injustice to the claimant in arbitration, and the continuance of arbitration would be oppressive, vexatious, unconscionable or an abuse of process.¹⁹ The courts are guided by certain principles in order to grant application for stay of arbitration proceedings²⁰.

Therefore, what are those circumstances or legal principles? Also, the question of “*Whether injunction should be granted for restrain arbitration proceedings?*” is one of the most popular questions asked by judges²¹ when assessing the injunction for parties that made application for the stay of arbitration proceedings. Therefore, the above-mentioned question forms the basis for this research which intends to identify the closest answers of it.

1.3 Objectives of the Study

The objective of this study is to identify the circumstances that are considered by the court in granting or refusing the injunction for stay of arbitration proceedings.

¹⁹ *Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] EWHC 1262 (TCC), HT07 134 at 482

²⁰ *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71 at 14

²¹ *Dorral Tankers Proprietary Ltd v Two Arrows Maritime* 128 SJ 720; *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] QB 644, 659B (CA), [1984] 2 All ER 175, [1984] 2 WLR 676

1.4 Scope of the Study

This study is based on court cases related to the stay of arbitration proceedings and any related cases in relation with circumstances that allow for stay of arbitral proceedings. Besides that, the court cases selected would include Malaysian court case and any other countries (i.e. United Kingdom, England, Singapore, Hong Kong) that related with this study.

1.5 Significance of the Study

The importance of this study is to give an insight of the application for stay of arbitration proceedings that are available to the disputing parties in arbitration agreement. After this study, the parties would have some idea on how they could succeed in the application for injunction and when they can apply for injunction for stay of arbitration proceedings. In addition, they could avoid from the application for injunction to stay arbitral proceedings from being rejected by the court, by identifying circumstances that are considered by the court in refusing to grant an injunction to restrain arbitration proceedings. Both the successful and unsuccessful applications for injunctions will be discussed in order to provide guidelines to the parties when they resort to injunction for stay of arbitration proceedings.

1.6 Research Methodology

The methodologies of this study has been separated into few steps, which is identifying the research issue, literature review, data collection, research analysis, and conclusion and recommendation. This process is to ensure that the collection of the information and the data analyzing can be precisely implemented.

1.6.1 Initial Study and Identifying the Research Issue

The overview of concept for the study was obtained through initial intensive reading of books, journals, articles and newspaper cutting which can easily be attained from the library. Besides that, the discussion with friends who have work experience in construction contract field and also, the knowledgeable lecturer in this industry, has been made in obtaining related information concerning current scenario of construction industry in Malaysia and the contract issues in the industry. From the research issue, the objectives of the study are identified.

1.6.2 Literature Review

Various documentation and literature review regarding to the stay of arbitration proceedings are collected to achieve the research objectives. Books, journals, research papers, reports, newspaper as well as sources from the internet are referred. References were obtained either from Faculty or UTM's library.

1.6.3 Data Collection

Legal cases based on previous court cases, journals, papers, reports which are relevant to the stay of arbitration proceedings are collected from Malayan Law Journals via UTM library collection and electronic database. Primary data includes electronic database, while secondary data such as books, act, articles, and seminar papers are collect for analysis purpose.

1.6.4 Research Analysis

Once the data are collected, case study is conducted on the related legal cases. All the fact of the cases are reviewed and clarified. The focus of the analysis is on the circumstances that considered by the court in granting or refusing application for injunction relief for stay of arbitration proceedings. Further to this, the issues would be discussed critically.

1.6.5 Conclusion and Recommendations

Conclusion and recommendations are made based on the findings during the stage of analysis.

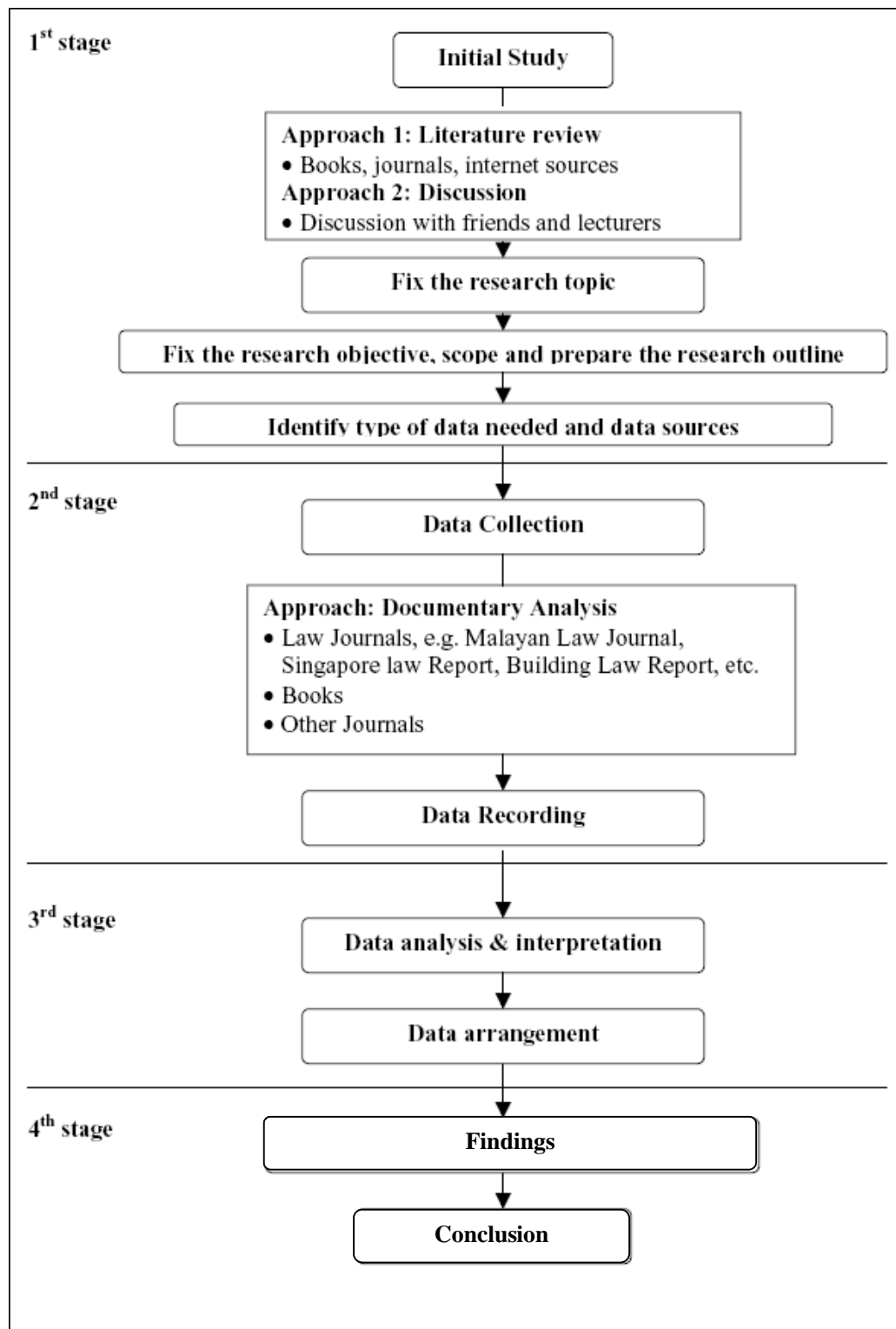


Figure 1.1: Research Methodology Flow Chart

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