

EXTENSION OF TIME IN COMMENCEMENT OF ARBITRATION
PROCEEDINGS

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DEDICATION

~To my beloved family for your love and prayers~

~To my siblings for your love and support me to finish my study~

~I love you all~

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ABSTRACT

Arbitration may be defined as a method of settling disputes and differences between two or more parties. The high court has power with respect to the appointment of arbitrator and umpires, revocation of their authority at the instance of the parties to an arbitration agreement or otherwise and to make consequential orders, to grant an extension of time for making an award by the arbitrator or for the commencement of arbitration proceedings under an arbitration agreement which has a time limit clause. The objective of this study is to identify the circumstances that to the court will give an extension of time for commencing of arbitration proceedings. In this study, the core reason for the court to grant an extension of time for commencement of arbitration proceedings is to relieve the parties if the undue hardship that might be caused by time-limit clauses in the agreement. This research is based on the arbitration cases that was brought to the court. Acquisition of case information is through "Malaysian Law Journal (MLJ)". However, the cases involved are analysed and studied through the requirements needed for extension of time. According to the study, the cases that meet the requirements for an extension of time will be awarded by the court to extend the time for commencing of court proceedings. The requirement for approving extension of time include the length of the delay, the amount at stake, the degree of blameworthiness, the plaintiff misled and the delay no prejudice to defendant.

ABSTRAK

Timbangtara boleh ditakrifkan sebagai satu kaedah menyelesaikan pertikaian dan perbezaan antara dua pihak atau lebih. Mahkamah tinggi mempunyai kuasa mengenai pelantikan penimbang tara dan pengadil, pembatalan kuasa mereka atas kehendak pihak-pihak kepada suatu perjanjian timbang tara atau selainnya dan membuat perintah yang berbangkit, untuk memberikan pelanjutan masa untuk membuat award oleh Penimbang atau untuk permulaan prosiding timbangtara di bawah suatu perjanjian timbangtara yang mempunyai satu klausa had masa. Jadi, objektif kajian ini adalah untuk mengenal pasti keadaan berkaitan kepada mahkamah untuk memberikan pelanjutan masa untuk memulakan prosiding timbang tara. Dalam kajian ini, sebab utama bagi mahkamah untuk memberikan pelanjutan masa untuk memulakan fasal timbang tara adalah untuk memberikan bantuan kepada pihak-pihak jika kesusahan yang tidak wajar yang mungkin disebabkan oleh had masa dalam perjanjian timbangtara. Penyelidikan ini berasaskan kes-kes timbangtara yang dibawa kepada mahkamah. Pemerolehan data - data kes adalah melalui "Malaysian Law Journal (MLJ)". Walau bagaimanapun, kes-kes yang terlibat dianalisis dan dikaji melalui keperluan yang diperlukan untuk lanjutan masa. Menurut hasil kajian, kes yang menepati keperluan untuk lanjutan masa akan dianugerahkan oleh mahkamah untuk melanjutkan masa untuk prosiding mahkamah.

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LIST OF ABBREVIATIONS

AC	-	Law Reports : Appeal Cases
All ER	-	All England Law Reports
AMR	-	All Malaysia Reports
Ch	-	Cases in Chancery
Ch D	-	The Law Reports, Chancery Division
CLJ	-	Current Law Journal (Malaysia)
CLR	-	Commonwealth Law Reports
Constr LR	-	Construction Law Reports
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
PAM	-	Pertubuhan Arkitek Malaysia
PC	-	Privy Council
PWD	-	Public Works Department
QB	-	Queen Bench
SCR	-	Session Cases Report
SLR	-	Singapore Law Report
WLR	-	Weekly Law Report

CHAPTER 1

INTRODUCTION

1.1 Background of Research

Construction projects are increasingly complex, resulting in complex contract documents. Complex construction can likewise result in complex disputes. The disputes are inevitable in construction projects which predominantly arise from the complexity and magnitude of works, multiple prime contracting parties, poorly prepared and executed contract documents, inadequate planning, financial issues and communication problems. Any one of these factors can overturn a project and lead to complicated litigation and arbitration, increasing costs, overrun time, and a breakdown in the parties' interest and relationship.¹

¹ Koh Cheo Poh, 2005.

Lord Chief Justice Sir Robert Raymond stated that ‘an arbitrator is a private extraordinary judge between the parties, chosen by their mutual consent to determine controversies between them. Arbitrators are so called because they have an arbitrary power for if they observe the submission and keep within due bounds, their sentence is definite from which there lies no appeal’. Arbitration is a voluntary procedure, available as an alternative to litigation, but not enforceable as the means of settling the dispute except where the parties have entered into an arbitration agreement.²

The disputes between the contractor and the client are too common and normally arise because of delayed in getting the work, insufficient work and delayed in payments. Construction that is affected to any dispute can consume a lot of time and money. Today, there are consultations with an attorney experienced in handling construction disputes who can help to pursue the claim with efficient and effective cost.³ Disputes usually can be resolved through alternative dispute resolution rather than through litigation. The disputes between the parties in the construction industry are too complex. Thus, it is not easy to take the disputes to the courts because it is more formal, costly, time consuming, confrontational yet takes a long time to be solved. These factors are the result of the adversarial system of justice applied in the civil courts.

Arbitration can be described in general terms as a consensual, private process for the submission of the dispute for a decision of a tribunal, comprising one or more independent third person. In making a decision, the tribunal must follow certain basic requirement, such as to act impartially and fairly. Contradict to court proceedings, arbitration is a consensual process that a party cannot be compelled to arbitrate a dispute unless the parties involved agree to go for the arbitration. Furthermore, arbitration is a

² A. Stephenson, Douglass (1993). Arbitration Practice in Construction Contract. London: E & FN SPON.

³ Sally & Fitch LLP

private and the parties have the power to select the tribunal and choose the rules and language that will apply to the proceedings of the arbitration.⁴

Many construction contracts require the disputes arose from the contract to be resolved by arbitration. The courts will order the case to be submitted to arbitration before allowing it to go to trial. The dispute then will be heard by one or more arbitrators, who are selected from a panel of neutral arbitrators. Depending on the local practices and rules, the arbitrators may be attorneys or people who are knowledgeable in the construction industry. The arbitrators will act like a judge in which they will listen to the case and make a final decision based on the evidence presented.

1.2 PROBLEM STATEMENT

The arbitration is widely used as an alternative dispute resolution in Malaysia. It is very prominent compared to other dispute resolution. According to the Minister of Human Resources Minister Datuk Dr S. Subramaniam (2003) , the arbitration system can help to complete the number of outstanding cases. Through the arbitration system, a total of 4,000 cases pending in court are expected to be reduced to 2,000 cases⁵. However, there is still problem occurred in the arbitration where the time allocated is limited. Usually, the parties in the contract have limited time to file or find the evidence in the arbitration process. Thus, the parties involved need to apply for an extension of time to extend the time for commencing arbitration proceedings. The limitation period

⁴ Capper, Philip (2004), International Arbitration Handbook. Third Edition. LPP

⁵ Mohr, 2003. Sistem timbang tara bantu selesaikan kes tertunggak.[online] Available at: <http://www.mohr.gov.my> [Accessed 15 March 2012]

is a vexing issue for any party involved in the commercial disputes. This truism applies even more to construction disputes because there are varieties of events that may trigger the beginning of the limitation period. The limitation issue becomes even more vexing when the proceeding can be either by way of arbitration, by way of an action or by way of a counterclaim. Add to that confusion a motion by one party to stay its own action in favor of arbitration.

The court has the power to extend time for commencement of the arbitration proceedings, if it is of the opinion that in the circumstances of the case 'hardship would otherwise be caused' and notwithstanding that the time so fixed in the arbitration agreement has expired. In that provision, the court's power to extend time is without prejudice to any written law limiting the time for the commencement of arbitration proceedings. Under the Law of Limitation Act which governs the limitation of claims, the word "arbitration" is defined to mean arbitration on a submission or under any written law. Section 40 of the Law of Limitation provides that the Act applies to arbitrations in the same manner as it applies to other proceedings. For the purpose of limitation, the law considers that where a submission contains a term that no cause of action shall accrue in respect of a matter, the cause of actions shall accrue in respect of any such matter at the time when it would have accrued but for the term in the submission. The Law of Limitation provides further under section 40(3) as follows:-

(3) For the purposes of this Act, an arbitration shall be taken to have commenced when one party to the arbitration serves on the other party a notice requiring him to appoint an arbitrator or, where the submission provides that the reference shall be to the person named or designated in the submission, requiring him to submit the dispute to the person so named or designated

Usually, a construction contract may contain certain provisions which trigger the commencement of claims. For instance, under the standard construction contracts such as clause 66 of ICE Conditions and clause 30.9 of JTC 98 respectively, the engineer or architect's decision on the certificate is final and binding unless it is challenged by a notice of arbitration. In one English case of *Crow Estate Commissioner v Mowlew*⁶, the employer sought to rely upon the power of the court to extend time for commencing arbitration proceedings in order to avoid the binding effect of the final certificate under the JCT 80 form of contract. The court held that the power to extend time for arbitration could override the binding effect of the final certificate as agreed upon in construction contract by the parties. Based on the old English Arbitration law, the courts could not avoid the effect of time-bar and binding effect of the decisions by the engineer or contract administrator in respect of the final certificate. However, the position has now being revised by section 12 of the Arbitration Act 1996 in which the court can use its discretion to extend the time only if the claimant proves that:

The circumstance which barred or extinguished the claimant's rights to begin the arbitral proceedings or other dispute resolution such as they are out of the reasonable contemplation of the parties when they agreed the provisions in question, and that it would be just to extend the time; and the conduct of one party make it unjust to hold the other party to the strict terms of the provision in question. As opposed to the above-referred English position, section 7 of the Arbitration Act gives a wider discretion to the judge to determine extensions of time by importing the word "hardship" without further clarification.

The section in the Arbitration Act 1952 that relates to the extension of time is section 28.⁷ With the existence of this clause, the action to apply for an extension of time is supported within certain conditions. Section 28 states that:

⁶ *Crow Estate Commissioner v Mowlew* (1994) 70 B.L.R 1

⁷ Arbitration Act 1952.

Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given, or an arbitrator is appointed, or some other step to commence arbitration proceedings is taken, within a time fixed by agreement and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms if any, as the justice of the case may require, but without prejudice to any written law limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper.⁸

However, in the Arbitration Act 2005, the section that relates to the extension of time for commencing arbitration proceeding is Section 45.⁹ This section states that:

Where an arbitration agreement provides that arbitral proceedings are to be commenced within the time specified in the agreement, the High Court may, notwithstanding that the specified time has expired, extend the time for such period and on such terms as it thinks fit, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused.¹⁰

This section provides the High Court with the power to extend time where an arbitration agreement provides that arbitral proceedings are to be commenced with a specified time.¹¹ The yardstick is ‘undue hardship in all the circumstances’. Referring

⁸ Arbitration Act 1952.

⁹ Arbitration Act 2005

¹⁰ Ibid.

¹¹ Sundra Rajoo, (2009). *Law, Practice and Procedure of Arbitration - The Arbitration Act 2005 Perspective*. Kuala Lumpur, Malaysia: Malayan Law Journal Sdn. Bhd.

to the case of Dancom Telecommunications (M) Sdn Bhd vs Uniasia General Insurance Bhd [2008] 6 MLJ 52; [2008] 5 CLJ 551, the Court of Appeal had to consider the validity of an arbitration clause which is limited of the time frame for referring a dispute to the arbitration. The specific clause reads as followed:

“All differences arising out of this policy shall be referred to arbitration...If the company shall disclaim liability to the insured for any claim...and such claim shall not within 12 calendar months from the date of such disclaimer have been referred to arbitration...the claim shall...be seemed to have been deemed... abandoned.”

The arbitration agreement was governed by the Arbitration Act 1952. Dancom Telecommunications (M) Sdn Bhd contended that a clause imposing a time frame on referring claims to arbitration was void and based their contentions on the content of section 29 of the Contract Act. Clause 29 provided that any agreement by which a party to it is restricted absolutely from enforcing its rights under or in respect of any agreement by the usual legal proceedings in the ordinary tribunal is void. The Court of Appeal held that a contract which incorporates a valid arbitration clause for referring a dispute to arbitration within a specified timeframe as agreed by the parties is valid and enforceable. The Court of Appeal held that Section 29 uses the term ‘ordinary tribunal’, which means the ordinary courts of law. Section 29 does not render any contract illegal where the parties have agreed to refer their disputes to arbitration.

The court of appeal held that express provisions as contained within Section 28 of the Arbitration Act 1952 and Section 45 of the Arbitration Act 2005, clearly contemplate the extension of time frames for the commencement of arbitration proceedings, which suggest the clauses that limit such timeframes must be valid. The situation forced the parties to apply for an extension of time for commencing arbitration proceedings because the time has expired. Usually, arbitration agreement provides that

arbitral proceedings are to be commenced within the time specified in the agreement.¹² This research is to identify the circumstances that will allow the Court to give an extension of time in commencing of arbitration proceedings relating to the arbitration cases that were brought to court. Reasons for an extension of time given by the Court were different and very unique. In this research, the circumstances for extension of time that were granted by the Court were explored and explained clearly at the end of the study to achieve the objective of this research.

1.3 Aims and Objectives

From the problem statement, the objective of this study is to identify the circumstances that is referred to the Court in giving extension of time in commencing of arbitration proceedings relating to undue hardship.

1.4 Scope of Study

This research was based on case law. Cases that are related to extension of time in commencing of arbitration proceedings were discussed in detail in the study. The cases found were derived from the interpretation of court of Arbitration Act 1952. In order to meet the objective, the primary data collection is based on Malaysia Law

¹² Section 45, Arbitration Act 2005.

Journal (MLJ) court cases. The selection of cases was related to construction law cases only. Also, the study will discuss on the provision that provide under Arbitration Act 1952 as well as Arbitration Act 2005 and the Kuala Lumpur Regional Center for Arbitration (KLRCA).

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