

When May Conditions be Imposed for Stay of Court Proceedings in Favour of Arbitration?

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Introduction

Whilst the Singapore Court is empowered to impose terms and conditions as it may think fit when ordering a stay of court proceedings in favour of arbitration, when will it do so? This question was answered by the Court of Appeal in *The Navios Koyo* [2021] SGCA 99 where it also considered whether the quantum of a potentially time-barred claim may be taken into consideration in assessing whether a waiver of a time bar defence should be imposed as a condition for the stay.

We had earlier covered the High Court decision on this case in *The Navios Koyo* [2021] SGHC 131. The Client Update on "*Singapore High Court Refuses to Impose Conditions in Ordering a Stay of Proceedings in Favour of Arbitration in London*" is available [here](#). The Court of Appeal has since dismissed the claimant's appeal of the High Court's decision and in doing so laid out the factors the Court may take into consideration in assessing when conditions may be imposed when ordering a stay of court proceedings in favour of arbitration.

Brief Facts

The Appellant, who was the endorsee and holder of several bills of lading, commenced admiralty proceedings in the Singapore High Court against the Respondent (shipowner) for the alleged mis-delivery of a cargo of logs shipped under the bills. The Appellant's contention was that the carrying vessel had completed the

discharge of the cargo in India by 23 September 2019 without presentation of the bills, and it had suffered damages thereby.

The bills of lading however, identified a charterparty dated 3 July 2019 and Clause 1 on the reverse side stated as follows:

"All terms and conditions... of the Charter Party, dated as overleaf, including the Law and Arbitration Clause are herewith incorporated."

The Appellant did not have any charterparty in hand as its role in the transaction giving rise to the shipment under the bills was merely that of a financier. In the event, after the arrest of the vessel, the Respondent furnished a copy of the charterparty on 24 September 2020 which contained an arbitration clause as follows:

"Any dispute arising from or in connection with this Charter Party shall be referred to arbitration in London..."

Under the Hague Rules and the Hague-Visby Rules, which were incorporated by the bills, there is a one-year time bar from the discharge of the cargo (or when the cargo ought to have been discharged) for arbitration claims brought under the said bills of lading. Here, by the time the Appellant obtained a copy of the charterparty on 24 September 2020, more than one year had passed since the cargo had been discharged in India. The Appellant argued before the Court of Appeal that the stay of court proceedings should be conditional on the waiver of the time bar defence in the arbitration proceedings.

Holding of the Court of Appeal

The Court of Appeal declined to impose any condition on the facts of the case at bar, and in doing so provided guidance as to the factors that may be taken into consideration in assessing when it may be appropriate to impose conditions for a stay of court proceedings in favour of arbitration. The Court of Appeal stated that its discretion to impose a condition depends on the true nature of the condition sought, and distinguished between conditions which are:

- (a) Administrative in nature where the conditions sought are aimed at facilitating the arbitration agreement by, for example, imposing a timeline to commence arbitration, requiring a party to appoint a solicitor to accept service, or ordering parties not to frustrate the appointment of the tribunal; and
- (b) Substantive in nature where the substantive rights of the parties are affected, such as whether a party is entitled to rely on a time bar defence in the arbitration.

The Court of Appeal cautioned that a "*heightened level of scrutiny*" will be given when conditions affecting the substantive rights of the parties are sought and stated that the Court would have regard to the following factors when a party seeks conditions to be imposed when an application is made to stay court proceedings in favour of arbitration:

- (a) The reasons for the conditions being sought, and whether those reasons could have been obviated by the party's own conduct;
- (b) Whether the need for any of the conditions was contributed to or caused by the conduct of the counterparty; and
- (c) The substantive effect on the parties of any condition that the court may impose.

With respect to the first factor, the Court of Appeal stated that a party seeking a condition will only have itself to blame if the reasons for the condition being sought arise entirely from its own conduct.

In relation to the second factor, the Court of Appeal opined that a condition may be imposed if there was some unconscionable or improper conduct on the part of the other party – for example, if there was misrepresentation, wilful non-disclosure, or deliberate design in waiting for a time bar defence to set in prior to applying for the stay.

As for the third condition, the Court of Appeal said that it will look at the substance of the condition sought and consider if the substantive issues in the arbitration may be affected by imposing such a condition – i.e. whether the condition may deprive a party of a substantive and accrued defence which ought properly to be determined at the arbitration. The Court of Appeal emphasised that if the condition sought has such an effect, it is a very strong factor *against* the imposition of such a condition.

Application to the Facts

On the facts before the Court of Appeal, it was held that there was no legal basis for exercising its discretion in favour of the Appellant to grant the condition sought because:

- (a) The Appellant knew from the outset that there was a potential arbitration clause which would govern any disputes arising under the bills of lading, but chose not to take any steps to verify or find out about that clause.
- (b) The Appellant claimed that it had asked its customer for the charterparty, but that was apparently only 10 months after it came into possession of the bills of lading and even then, there was no documentary evidence of the Appellant's efforts to obtain a copy of the charterparty.
- (c) The Appellant seemed to have elected to look to its customer for payment rather than the Respondent notwithstanding its awareness that the Respondent was allegedly in breach of the bills of lading.
- (d) Fundamentally, the Appellant simply failed to ask the Respondent for a copy of the charterparty.
- (e) There was no improper conduct on the Respondent's part, as it had alerted the Appellant to the existence of the arbitration agreement shortly after the arrest and had furnished the relevant charterparty within a reasonable time upon the Appellant's request.

Size of Claim

The Court of Appeal also clarified that the size of the claim is irrelevant in determining whether the condition sought ought to be imposed and reasoned as follows:

- (a) It would be impossible to conclusively state when the line would be crossed such that a claim was sizeable enough to warrant the imposition of a condition that a time bar defence be waived.
- (b) If the size of the claim were relevant, the party who is required to waive the time bar defence would suffer hardship that is equally disproportionate to that of the party seeking the condition.
- (c) Imposing a condition that the defence be waived would either preclude the raising of a time bar defence altogether, or not at all. The size of a claim would thus have highly dramatic and potentially disproportionate effects if it were deemed to be relevant.

Concluding Words

The decision of the Court of Appeal provides guidance on when it may be appropriate to impose a condition when applying for a stay of court proceedings in favour of arbitration. Parties seeking the imposition of such a condition should consider whether the condition may be characterised as an administrative one or is substantive in nature to properly assess the viability of their application. The decision also demonstrates that it may be an uphill task to obtain a waiver of the time bar defence as a condition for a stay. Therefore, claimants should ensure that they are aware of all relevant deadlines in a dispute, and they should take the necessary steps to comply with such deadlines.

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