

And Never the Twain Shall Meet? – Nature and Extent of Overlap Necessary for a Litigation Case Management Stay in Favour of Arbitration

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Introduction

While litigation and arbitration are conceptually separate dispute resolution mechanisms, the Singapore Court is empowered to order a stay of court proceedings, either in favour of anticipated arbitration proceedings or where arbitration proceedings are afoot, in appropriate circumstances, and particularly where there is a sufficient overlap between the litigation and arbitration proceedings. In *CJY v CJZ* [2021] 5 SLR 569, the Singapore High Court considered and expounded upon how much of an overlap is sufficient, particularly as the court proceedings involved only one party to the arbitration (and five others who were not party to the arbitration).

The Claimant in an arbitration had subsequently commenced court proceedings against the five Defendants. Although the Respondent in the arbitration was not a party to the litigation, and the causes of action were different, the Court granted the First Defendant's application for a case management stay of proceedings pending the conclusion of the arbitration.

Counsel for the First Defendant submitted that, despite the apparent differences between the arbitration and litigation proceedings, there were key areas of overlap in the parallel proceedings, including: (a) the issues in dispute; (b) the parties to the proceedings – principally the Plaintiff, although the First Defendant was also an employee of the Respondent in the arbitration, and the other Defendants were similarly involved in the disputed project; and (c) the remedies sought. The Court found in favour of the First Defendant and granted the stay sought, demonstrating that a complete overlap is not required for the grant of a stay of proceedings. Some or considerable overlap suffices.

The First Defendant was successfully represented by Gregory Vijayendran SC and Devathas Satianathan of Rajah & Tann Singapore LLP.

An appeal against the decision of the High Court to the Court of Appeal was subsequently withdrawn by the Plaintiff.

Brief Facts

The Respondent in the arbitration, as the employer, had appointed the Claimant as its main contractor to carry out works for a project ("**Project**"). Following the project architect's issuance of a list of defects ("**Defects**") in the Claimant's works, the Respondent called on a performance bond and guarantee against the Claimant (the "**Calls**"). The Respondent and the Claimant then entered into a settlement agreement, under which the Respondent returned the money from the performance bond and guarantee in exchange for a banker's guarantee from the Claimant.

The Claimant then initiated arbitration proceedings against the Respondent (the "**Arbitration**"), alleging that the Calls were wrongful. The Respondent submitted that (a) the Claimant could not pursue its claim because of the settlement agreement, and (b) it was justified in making the Calls as the Claimant had failed to perform its construction works in a satisfactory manner, causing the Defects which it had failed to rectify in a timely manner.

More than two years and eight months after commencing the Arbitration, the Claimant commenced litigation proceedings (the "**Suit**") against the five Defendants. The First Defendant, who was an employee of the Respondent, had been named in the Arbitration by the Claimant as a contact of the Respondent. The other four Defendants were the quantity surveyor and architect (in either case, both the individual and company) appointed for the Project. The Claimant did not name the Respondent as a Defendant in the Suit.

The Claimant alleged in the Suit that the Defendants essentially conspired against it via a conspiracy to injure by lawful and unlawful means to arrive at the list of defects, and claimed damages against the Defendants to be assessed in respect of the various torts. The First Defendant applied for a case management stay of the Suit until final determination of the Arbitration and was successful before the Assistant Registrar.

Holding of the High Court

The High Court upheld the Assistant Registrar's decision to grant the case management stay of the Suit.

Case management

The Court set out the principles relating to case management stays:

1. Where there are overlapping court and arbitration proceedings, the Court may exercise its case management powers to ensure the efficient and fair resolution of the dispute as a whole.
2. In doing so, the Court will consider the extent and nature of overlap between the arbitration and the suit, in terms of the parties, the issues, and the remedies.

Extent of overlap

The Court found that there was some overlap in parties. Although the Respondent in the Arbitration was not named in the Suit, the Claimant in the Arbitration was the Plaintiff in the Suit. Further, in the Arbitration, the Claimant had named the First Defendant as one of the Respondent's contact persons, and the other Defendants as persons involved in the Project.

The Court also found that there was some, and in fact, considerable, overlap in issues. The issues in the Suit relating to the Calls, the Defects, and the estimated rectification costs, were all issues in the Arbitration (or at least within the scope of the arbitration agreement). Crucially, damages was an element of the Plaintiff's causes of action in the Suit (not disputed in argument).

Finally, the Court found that there was an overlap in remedies. In both the Arbitration and the Suit, the Claimant sought compensation for the allegedly wrongful Calls. Although the Claimant quantified its claim in the Arbitration based on interest on the sum the Respondent obtained from the Calls and claimed damages to be assessed in the Suit, the Court found that there was in substance no difference between the compensation claimed in the Arbitration and the Suit.

Stay of proceedings

The Court found it appropriate to stay the Suit as a whole pending the determination of the Arbitration.

The Court reasoned that the outcome of the Arbitration would either have the effect of resolving the Suit because it was dispositive of the common issues, or at least pave the way for the Suit to be resolved as between the parties. In particular, if the Claimant were to fail in its claim in Arbitration, it could not then procure the opposite outcome from the Court in the Suit, as it would be an impermissible collateral attack on the arbitration award against the Plaintiff (which might also become a court judgment in the same terms) and an abuse of process.

The Court observed that for good measure, the First Defendant agreed to be bound by the Arbitration. That did not satisfy the Plaintiff, nor did the Plaintiff offer likewise to be bound. To the Court, "*This was telling: it indicated that if the plaintiff were to lose the Arbitration, it intended nevertheless to try to snatch victory from the jaws of defeat by pressing on with the Suit.*"

In this case, the common issues would be dispositive of the Claimant's claims against the Defendants in the Suit. It would not make practical sense for the same issues to be fought over concurrently in arbitration and in Court.

Confidentiality

In the course of the stay application, the Plaintiff took issue with the First Defendant filing Arbitration documents. This was framed as an objection on the basis of confidentiality. The objection was dismissed at first instance, and despite not filing an appeal, resuscitated its objection by way of an oral application to expunge the First Defendant's affidavits before the Court.

The Court dismissed the objection, noting that (a) first, no appeal had been filed in respect of the dismissal of the objection below; and (b) secondly, the objection was in any event without merit as (i) the disclosure

was reasonably necessary; and (ii) in the interests of justice, for the Court to be informed of the overlapping Arbitration.

Concluding Observations

The Court's decision demonstrates that it will readily use its powers of case management where appropriate to prevent the concurrent running of overlapping proceedings. This is also aligned with the pro-arbitration approach that has been consistently adopted by the Singapore Courts.

This case is also instructive because the case management stay was granted not just because there was an actual overlap but also **potential/prospective overlap**. This represents an important judicial recognition and extension of the principle underlying case management stays in this context. In the High Court's words enunciating the statement of principle, "*Where there are overlapping (or potentially overlapping) court and arbitration proceedings, the court may exercise its case management powers to ensure the efficient and fair resolution of the dispute as a whole*" (emphasis ours).

The Court has also demonstrated it will not be taken in by form; rather, it will look to the substance of the proceedings to determine the sufficiency of overlap. Disputants should not be able to engineer overlapping applications across different fora (whether for tactical reasons or otherwise), or to slice and dice artificial distinctions to circumvent the litigation and arbitration proceedings. The Court does not require a complete overlap in issues, parties and remedies. Although there should be some commonality, they need not be identical.

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