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Arbitration: Alternative Restraint for Winding Up Petitions

Awangsa Bina Sdn Bhd v Mayland Revenue Sdn Bhd^[1]

Suppose that a creditor is seeking to wind up your company. Can you rely on the existence of an arbitration clause to restrain winding up proceedings? In the recent decision of *Awangsa Bina*, the Malaysian High Court affirmed this possibility.

Awangsa Bina concerned a dispute regarding a final account under a construction contract that contained an arbitration clause. As outstanding sums were unpaid, the contractor filed a winding up petition against the employer. In response, the employer sought to rely on the arbitration clause and filed two court applications:

- (1) A stay of the winding up proceedings pending arbitration under Section 10 of the Arbitration Act 2005; and
- (2) An alternative application to strike out the winding up proceedings.

The employer's stay application was dismissed. Affirming international trends, the court viewed that the statutory stay regime — i.e. Section 10 of the Arbitration Act — did not apply to winding up petitions. As such, winding up proceedings could not be stayed on the basis of the arbitration clause.

However, the court granted the alternative application and struck out the winding up proceedings to give effect to the arbitration clause. By its decision, the court effectively sought to enable the resolution of the parties' contentions over the disputed debt by arbitration in line with the parties' intention having included an arbitration clause.

Notably, the court distinguished arbitration-related striking out applications from the conventional regime. In doing so, it held that a less stringent standard should apply to such applications. All that an applicant would now have to show to restrain a winding up proceeding is that a *prima facie* dispute over the contented debt exists.

Ultimately, *Awangsa Bina* showcases the growing arbitration-friendly inclination of Malaysian courts and the jurisdiction's commitment to becoming a leading arbitration hub in Asia.

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