

LHAG Insights

International Arbitration



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Non-payment of Arbitrator's Fees – Is the Arbitration Agreement Still Operative?

The cost of an arbitration, which includes the fees of an arbitrator, is usually negotiated and agreed upon between parties and the arbitral tribunal before or at the start of the proceedings. Subject to the applicable arbitral rules and procedures, parties are typically required to pay deposits of the arbitration cost at the early stages of an arbitration.

What happens if a party to an arbitration refuses to pay the arbitrator's fees or the deposit of the arbitration cost? Will such conduct render an arbitration agreement inoperative? This issue was considered by the High Court in the recent decision of ***JKP Sdn Bhd v Anas Construction Sdn Bhd***.¹

Brief Facts

The Plaintiff engaged the Defendant as the main contractor for the construction of a building in Penang.

The Plaintiff commenced a civil suit against the Defendant for the failure to supply goods in accordance with the specifications of the contract ("**Suit**"). The Defendant applied to: (i) strike out the Suit on the ground that there exists an arbitration agreement; or (ii) alternatively, stay the Suit pending resolution of the dispute in arbitration ("**Striking Out and Stay Application**").

Before filing the Suit, the Plaintiff commenced an arbitration against the Defendant pursuant to the AIAC Arbitration Rules

¹ ***JKP Sdn Bhd v Anas Construction Sdn Bhd*** [2023] 2 AMR 443 (HC); [2022] MLJU 3058 (HC).

2018. As the Defendant refused to pay the second tranche of the arbitrator's fees and deposit, the arbitrator gave the Plaintiff the option to either: (i) pay the Defendant's portion of the arbitrator's fees and deposit; or (ii) terminate a part of the arbitration proceedings, i.e., the Defendant's counterclaim and third-party claim against another party. The Plaintiff chose neither of these options, and instead elected to terminate the entire arbitration proceedings.

In the Suit, the Plaintiff argued that the Striking Out and Stay Application should be dismissed on two grounds: (i) first, the arbitration agreement is no longer operative, as the Defendant failed to pay the arbitrator's fees and deposit; and (ii) second, the Defendant has submitted to the jurisdiction of the court by filing a striking out application.

Decision

The High Court dismissed the Plaintiff's arguments and ordered that the Suit be stayed pending arbitration. The thrust of Anand Ponnudurai J's judgment can be summarised as follows:

- a. There are no provisions in the Arbitration Act 2005 nor the AIAC Arbitration Rules 2018 which suggest that the mere non-payment of deposits by one party would render an arbitration agreement as inoperative;
- b. If the failure by one party to pay the arbitrator's fees and deposit would nullify an arbitration agreement, this may lead to a situation where parties could easily circumvent an arbitration agreement by refusing to pay their portion of the deposit. By electing not to pay the second tranche of the arbitrator's fees and deposit, this only shows that the Defendant was prepared to forgo their counterclaims and the third-party claim; and
- c. The filing of a striking out application by the Defendant does not constitute as taking a step in the court proceedings (which would, in turn, abandon the agreement to arbitrate), if it does not express an unequivocal willingness to the matter being determined by the court instead of arbitration. The Court of Appeal decision in ***Comos Industry Solution***² was affirmed.

² ***Comos Industry Solution GMBH v Jacob and Toralf Consulting Letrikon Sdn Bhd & Ors*** [2012] 4 MLJ 573 (CA).

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Key Takeaways

Our main takeaways from this decision are as follows:

- a. Generally, the failure by one party to pay the deposits for the arbitration cost would not affect the right of other party to have their claim determined in an arbitration. An arbitration can proceed without the non-paying party's claims or counterclaims. The rules of most leading arbitral institutions, such as the AIAC³ and SIAC⁴ Arbitration Rules, allow for partial termination of an arbitration or the withdrawal of the relevant claims or counterclaims, in the event of non-payment of the arbitrator's fees or deposits;
- b. The failure of one party to pay the deposits for the arbitration cost would not render an arbitration agreement inoperative. An arbitration agreement will only be considered as inoperative or unenforceable in very rare circumstances, such as if it violates the law or public policy; and
- c. It is imperative for parties to an arbitration to carefully consider the repercussions of prematurely terminating an arbitration before the conclusion of the proceedings. An injudicious decision to terminate an arbitration may lead to, among others, wasted litigation costs and unnecessary delay in the resolution of the dispute.

On its face, this decision may appear to be harsh on the party who is desirous to achieve a resolution of the dispute, and faced with a disobliging counterparty who refuses to pay the arbitrator's fees or deposits.

However, this judgment once again re-affirms the Malaysian judiciary's reluctance to intervene and encroach on disputes where there exists a valid arbitration agreement. Commercial parties can take comfort in ensuring that an arbitration agreement will not be easily circumvented, unless parties have demonstrated clear and unequivocal intention to abandon their rights to arbitrate.

If you have any queries on legal issues relating to International Arbitration, please do not hesitate to contact the author, **Soh Zhen Ning** (szn@lh-ag.com) or his team partner, **Crystal Wong Wai Chin** (wwc@lh-ag.com).



³ Rule 14(7) of the AIAC Arbitration Rules 2018; Rule 41.9(b) of the AIAC Arbitration Rules 2021.

⁴ Rule 34.6(b) of the SIAC Arbitration Rules 2016.