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IMPOSING CONDITIONS ON A STAY OF PROCEEDINGS IN FAVOUR OF ARBITRATION

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I. Introduction

1 Requesting for a stay of court proceedings under s 6(1) of the International Arbitration Act 1994[1] ("IAA") is a key string in any arbitration practitioner's bow. However, the ancillary strategic tool under s 6(2) of the IAA is similarly crucial to gaining an advantage for one's client in the ensuing arbitration.

2 Section 6(2) of the IAA has no statutory limits to the types of terms or conditions which the court can order when a stay of proceedings in favour of arbitration is granted. Correspondingly, this confers an unfettered discretion on the court to impose "such terms or conditions as it may think fit".[2] In *The Navios Koyo*,[3] the Court of Appeal laid down a general framework for the exercise of the court's discretion under s 6(2) of the IAA. Accordingly, understanding the court's exercise of discretion will be invaluable when crafting the appropriate conditions to advance one's case in arbitration.

1 2020 Rev Ed.
2 *The Duden* [2008] 4 SLR(R) 984 at [12]; *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] 4 SLR 182 at [78].
3 [2021] SGCA 99.

3 This article briefly discusses *The Navios Koyo* to explore the available range of potential conditions which have been granted in Singapore and provides a comparative perspective based on the equivalent mechanism as applied by the courts in Australia and Malaysia. The Australian and Malaysian cases discussed in this article shed light on the various (and different) considerations that the respective courts take into account when deciding whether to impose a condition alongside an order for a stay of proceedings in favour of arbitration.

II. Imposition of conditions on a stay in Singapore

A. The Navios Koyo

4 The Court of Appeal's recent decision in *The Navios Koyo* provides an in-depth review of the jurisprudence in Singapore pertaining to the power of the court to impose conditions on a stay of proceedings under s 6 of the IAA, and the factors governing the court's exercise of its discretion to impose such conditions. In that case, the appellant was identified as the notify party under four bills of lading, which the appellant had received on or about 12 September 2019. The cargo was discharged from the Taikoo Brilliance by 23 September 2019, allegedly without the knowledge of the appellant.

5 The appellant commenced admiralty actions on 18 August 2020 against the respondent as the carrier and/or party in physical possession of the cargo, alleging it was not informed of the discharge of the cargo contrary to the terms of the bills of lading, and that the respondent had failed to only deliver the cargo as demanded, upon presentation of the bills of lading. Upon commencement of the admiralty actions, the appellant further obtained an order for the arrest of the Navios Koyo on 18 September 2020, a vessel owned by the respondent but unconnected with the events set out above, as security.

6 On 23 September 2020, solicitors for the time charterer of the Taikoo Brilliance specifically informed the appellant of the incorporation of an arbitration clause and requested confirmation that upon provision of security, the appellants would "release

the vessel and discontinue the proceedings in Singapore". On 24 September 2020, upon the request of the appellant, the solicitors for the time charterer further provided the charterparty and noted the clauses which provided for arbitration.

7 Following the provision of security, the Navios Koyo was released on 25 September 2020, but the admiralty actions were not discontinued. Hence, on 6 November 2020 the respondent applied for a stay in favour of arbitration, on the basis of the arbitration clause incorporated into the bills of lading. The appellant, amongst other things, argued that if the court was minded to order a stay, it should be granted on condition that the respondent waive any defence of time bar it might seek to rely on in the arbitration. This contention arose because the bills of lading appeared to incorporate the Hague and Hague-Visby Rules which provide for a time bar after one year from the delivery of the cargo, hence the appellant's claims made after 23 September 2020 would be time-barred.

8 Before the Court of Appeal, the issue was narrowed to whether the stay of the admiralty actions should be unconditional, or conditional on the respondent's waiver of its defence of time bar in the London arbitration (as arbitration proceedings had by 22 December 2020 already been commenced). With regard to the lay of the land under s 6(2) of the IAA, the Court of Appeal identified that the conditions imposed were generally of two natures: (a) administrative conditions and (b) substantive conditions.

9 Administrative conditions refer to conditions consequential upon the stay order and seek to facilitate or give effect to the arbitration agreement.[4] Examples include (a) imposing a timeline to commence arbitration, (b) requiring a party to appoint solicitors to accept service, (c) ordering parties not to frustrate the appointment of the tribunal, and (d) provision of security for arbitration.[5]

4 *The Navios Koyo* [2021] SGCA 99 at [27].
5 *Splosna Plovba International Shipping and Chartering d o o v Adria Orient Line Pte Ltd* [1998] SGHC 289.

10 Substantive conditions refer to conditions that purport to decide any substantive issue which perhaps should rightly be determined in the arbitration.[6] A key example of such a condition was the waiver of the defence of time bar.[7] Where a condition does not merely facilitate or give effect to the arbitration agreement, it "ought to be subject to a heightened level of scrutiny, and the threshold for such conditions to be granted may be said to be considerably higher than that applicable for essentially administrative conditions".[8]

11 The Court of Appeal then succinctly summarised factors governing the court's exercise of its discretion:[9]

> 30 As alluded to above, the Court should take cognizance of all of the surrounding facts and circumstances in determining whether it should exercise its discretion to impose conditions on a stay. In particular, the exercise of the Court's discretion to impose conditions on a stay under s 6(2) of the IAA must be informed by the *justice of the case*. This entails consideration of whether the party seeking the stay is able to put forward a **proper justification** for the imposition of any condition. In determining whether such justification is established, the Court should have regard to (a) the *reasons* for the conditions being sought, and whether those reasons could have been obviated by the applicant's own conduct; (b) whether the need for any of the conditions was contributed to or caused by the conduct of the respondent; and (c) the *substantive effect* on the parties of any condition that the court may impose. This is broadly similar to the approach of the Judge below – see [21] of the GD though in our analysis, in examining whether there was any such proper justification, it is not strictly necessary for the Court to find that the applicant's conduct was "unreasonable" in failing to commence the arbitration within time. [emphasis in original]

12 In the context of the condition of waiver of time bar, it had also specifically noted that "the size of the claim is not relevant in determining whether hardship would be engendered if a condition was not imposed", for three reasons: (a) it is impossible to draw a line in the sand as to when a claim was "sizeable enough to

6 *The Navios Koyo* [2021] SGCA 99 at [27].
7 *The Xanadu* [1997] 3 SLR(R) 360; *The Duden* [2008] 4 SLR(R) 984.
8 *The Navios Koyo* [2021] SGCA 99 at [29].
9 *The Navios Koyo* [2021] SGCA 99 at [30].

warrant the imposition of a condition that a time bar defence be waived"; (b) the size of the claim was a double-edged sword; and (c) the nature of such a waiver would be absolute, hence the size of the claim would "have highly dramatic and potentially disproportionate effects if it were deemed to be relevant".[10]

13 Upon considering the factors stated above, the Court of Appeal declined to impose the condition requiring the respondent to waive its defence of time bar. This was because while the appellant knew that there was a potential arbitration clause from the face of the bills of lading, it chose (a) not to take any steps to review the arbitration clause, and had (b) "sat on its hands for almost a whole year, taking a risk which was clear and apparent from the Bills of Lading, a risk it could be inferred that it had *elected* to accept".[11]

B. Conditions which have been imposed in Singapore

14 While the Court of Appeal sought to lay down a general framework, it must be emphasised that at the end of the day, the court's discretion under s 6(2) of the IAA is unfettered and even the Court of Appeal recognised that the court "should take cognizance of all of the surrounding facts and circumstances in determining whether it should exercise its discretion to impose conditions on a stay" and the exercise of its discretion "must be informed by the justice of the case".[12] Hence, ultimately the factors stated above should not be viewed as a closed and/or comprehensive list. Indeed, the very decisions referenced by the Court of Appeal in *The Navios Koyo* indicate that there might be other compelling factors or reasons for the imposition of conditions separate from the conduct of the parties and the substantive effect of the condition on the parties.

15 In *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd*[13] ("*KVC*") and *The Duden*[14] ("*Duden*"), the court identified that

10 *The Navios Koyo* [2021] SGCA 99 at [42].
11 *The Navios Koyo* [2021] SGCA 99 at [34].
12 *The Navios Koyo* [2021] SGCA 99 at [30].
13 [2017] 4 SLR 182.
14 [2008] 4 SLR(R) 984.

in determining the appropriate conditions to impose, "[t]he key guiding principle is that the courts should be slow to interfere in the arbitration process".[15] Further, the court in *KVC* rejected all the plaintiffs' proposed conditions and instead imposed its own condition because it noted that "the conditions imposed should seek to support and give effect to the parties' intention, and should avoid rewriting the parties' agreement to impose on them an arbitration that was not within the contemplation of either party".[16]

16 Further, other decisions in Singapore indicate that conditions separate from the arbitration may be imposed. *BAF v BAG*[17] ("*BAF*") concerned whether the court should grant a stay of all the court proceedings on condition that the plaintiff is at liberty to serve interrogatories on certain defendants, and the said defendants were to answer the interrogatories. The defendant's main objection to the requested condition was that the plaintiff's application for interrogatories ought to be made to the tribunal first, and only upon the tribunal's finding that the matter was not within the scope of the arbitration could the plaintiff seek assistance from the court.[18] In finding that the plaintiff was not required to make the application to the tribunal first, the court reasoned that the interrogatories were to allow the plaintiff to take action against third parties which were not parties to the arbitration agreement, and hence were of no concern to the tribunal.

17 *BAF* shows that the court may grant conditions which are not necessarily directly relevant to the arbitration.

18 Separately, in *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* the court was confronted with a potentially pathological clause which required the dispute be "settled by the Arbitration

15 *The Duden* [2008] 4 SLR(R) 984 at [15]; *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] 4 SLR 182 at [78]. This approach was also followed in *Drydocks World-Singapore Pte Ltd v Jurong Port Pte Ltd* [2010] SGHC 185 at [15] and [20].

16 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] 4 SLR 182 at [79].

17 [2016] SGHC 251.

18 *BAF v BAG* [2016] SGHC 251 at [46].

Committee at Singapore under the rules of The International Chamber of Commerce".[19] In finding that the arbitration clause was not so pathological that it was "null and void, inoperative or incapable of being performed" within the meaning of s 6(2) of the IAA,[20] the court then had to deal with the thorny ancillary issue of which arbitral institution in Singapore could administer the arbitration applying the rules of the International Chamber of Commerce ("ICC Rules"). Given the defect in the arbitration clause, the court ordered a stay of the proceedings on condition that "parties obtain the agreement of the SIAC or any other arbitral institution in Singapore to conduct a hybrid arbitration applying the ICC rules".[21]

19 However the saga continued when the defendant raised Art 1(2) of the ICC Rules which "provided that only the International Court of Arbitration of the ICC may administer an ICC arbitration".[22] Despite this, the court retained the condition as it had imposed, reasoning that while Art 1(2) claims that the International Court of Arbitration is the sole authority to administer ICC arbitrations, the power of the ICC Rules to bind emanates from the consent of the parties:[23]

> 10 … Art 1(2) cannot curtail the freedom of parties to agree to be bound by the result of an arbitration administered by a different arbitral institution applying the ICC Rules, neither can it curtail the power of the court to give an interpretation to a pathological arbitration clause, where that clause uses language which admits the possibility of different arbitral institutions, which provides a wider range of solutions to the parties.

III. Imposition of conditions on a stay in other jurisdictions

A. Australia

20 As seen from some of the decisions in Singapore such as *KVC*, *Duden* and *BAF*, a major consideration in imposing conditions

19 *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5 at [1].
20 *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5 at [29].
21 *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5 at [37].
22 *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 8.
23 *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 8 at [10].

is whether the condition sought to be imposed is a matter within the scope of the arbitration.

21 This is consistent with the approach of the courts in Australia.[24] In *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd*[25] ("*Cape Lambert*"), a dispute arose with regard to an agreement for the sale of certain mining tenements and related assets for the sum of $390 million, which was payable in three tranches. The first two payments were made but the third tranche of $80 million was not. The appellants commenced proceedings in the Supreme Court of Western Australia while the respondent sought a stay of proceedings and did not submit to the court's jurisdiction. The appellants then subsequently applied for an order that the respondent pay the $80 million into an escrow account as a condition on any stay of the proceedings, or as an interim order in conjunction with any stay.

22 The Supreme Court of Western Australia in *Cape Lambert* held that the condition should not be imposed since an arbitrator would have the power to make orders for payment of funds into escrow, and the court should not intervene and impose conditions which would, in effect, usurp the powers of the arbitrator in circumstances where there is no pressing need or justification for the imposition of such conditions.[26]

23 In fact, the Supreme Court of Western Australia listed down examples of conditions that could be imposed alongside an order for a stay of proceedings, which included: (a) that the disputes be referred to a single arbitrator; and (b) parties have

24 See *Orient Overseas Container Line Ltd v APL Co Pte Ltd (No 2)* [2021] FCA 606 at [14]–[15], where the Court of Appeal held that the court should be taken to "facilitate the agreement of the parties to resolve their disputes by arbitration", and that national courts should be slow to intervene and only have a strictly limited supervisory role in the arbitration proceedings. See also *The Titan Unity* [2013] SGHCR 28 at [47]: "It is not for the courts to pick and determine what issues should be placed before the arbitral tribunal by way of imposing conditions to a stay of court proceedings, where parties have already consented to refer their dispute to arbitration, and where the relevant issues fall within the scope of the arbitration agreement."

25 [2013] 298 ALR 666.

26 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] 298 ALR 666 at [100]–[101].

the option of requiring this escrow dispute be determined as a preliminary issue by the arbitrator should they wish to. The court held that these orders have the "character of facilitative machinery orders, and do not usurp or subvert the powers of [the] arbitrator".[27]

24 As seen, the test in Australia can be summarised in two steps:

(a) What powers does the arbitrator have under the arbitration agreement?

(b) Does the order that a party is seeking before the court usurp or subvert the powers of the arbitrator?

25 In the recent case of *Orient Overseas Container Line Ltd v APL Co Pte Ltd (No 2)*,[28] the Federal Court of Australia dealt with three proceedings – an arbitration proceeding ("Arbitration"), a court proceeding ("First Proceeding") and the current court proceeding ("Present Proceeding"). In the First Proceeding, a number of cargo interests asserted claims against the defendants to the Present Proceeding and a number of other parties including the plaintiff to the Present Proceeding. In the Present Proceeding, the plaintiff claimed for indemnities against the defendants in respect of any liability that it might have to cargo interests.

26 Parties had agreed that there was a significant overlap of issues between the First Proceeding and the Present Proceeding, and hence, also between the First Proceeding and the Arbitration, once the Present Proceeding was stayed. Thus, parties agreed that the stay of the Present Proceeding should be on the condition that the Arbitration is not to proceed until the determination of the First Proceeding. However, parties disagreed on what the appropriate stage of that determination should be.

27 The defendants proposed that the Arbitration be stayed pending the final determination, including on any appeal, or appeals, of the claims in the First Proceeding, while the plaintiff

27 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] 298 ALR 666 at [101].

28 [2021] FCA 606.

proposed that the stay of the Arbitration should end when any claim against either the plaintiff or the first defendant is concluded at first instance in the First Proceeding.

28 In substance, the Federal Court of Australia applied the two-step test. It held that "it is really a matter for the arbitral tribunal whether it should stay its proceedings pending the outcome of the [First Proceeding] or whether for whatever reason and on whatever basis the [Arbitration] should continue in tandem with the [First Proceeding]",[29] and since the parties had agreed to arbitrate those matters, the court should not exercise its powers to impose conditions on the stay of proceedings that would "trespass upon the arbitration which the parties agreed to and which this Court is bound to support, not undermine".[30]

29 Accordingly, the Federal Court of Australia refused to impose any conditions as to when the stay of Arbitration should end.

B. Malaysia

30 The Malaysian courts have dealt with the same issue that the Singapore Court of Appeal grappled with in *The Navios Koyo*.

31 In *Lineclear Motion Pictures Sdn Bhd v Measat Broadcast Network Systems Sdh Bhd*[31] ("*Lineclear Motion*"), the plaintiff had filed a suit against the first defendant in September 2020 for breach of an investment agreement, while the second defendant was sued as a guarantor. The first defendant then filed a stay application on 9 February 2021. The court below dismissed the stay application on 13 April 2021 and the first defendant appealed. The plaintiff also sought, as a condition for the stay, an order to preclude the first defendant's right to plead the defence of limitation in the arbitration.

29 *Orient Overseas Container Line Ltd v APL Co Pte Ltd (No 2)* [2021] FCA 606 at [18].
30 *Orient Overseas Container Line Ltd v APL Co Pte Ltd (No 2)* [2021] FCA 606 at [18].
31 [2021] MLJU 1826.

32 The Kuala Lumpur High Court in *Lineclear Motion* held that there was a valid arbitration agreement and granted a stay of proceedings. However, the court imposed a condition that the first defendant was precluded from raising the defence of limitation in the arbitration proceedings pertaining to the dispute.

33 In imposing the condition, the court looked at relevant circumstances of the case. First, the court found that the plaintiff's cause of action had become time-barred by March 2021.[32] Second, the plaintiff's letter of demand dated on 17 August 2020 was met with no response.[33] Third, when the plaintiff filed its suit in September 2020, it was well within the limitation period.[34] Fourth, judgment in default was entered against the first defendant as it had neither responded nor appeared to defend the suit. Fifth, a month after judgment in default was entered on 29 December 2020, the first defendant applied to set aside the judgment.

34 In these circumstances, even though the stay application in the court below was disposed of on 13 April 2021 (and after the limitation period), the Kuala Lumpur High Court held the situation which had occurred was "through no fault of the Plaintiff"[35] and the suit was filed "well within time".[36] The following factors were also considered:

(a) Whether the plaintiff was misled by the first defendant, which the court held that the circumstances were "beyond the Plaintiff's control as the [first] defendant did not respond to the letter of demand, the

32 *Lineclear Motion Pictures Sdn Bhd v Measat Broadcast Network Systems Sdh Bhd* [2021] MLJU 1826 at [23].
33 *Lineclear Motion Pictures Sdn Bhd v Measat Broadcast Network Systems Sdh Bhd* [2021] MLJU 1826 at [24].
34 *Lineclear Motion Pictures Sdn Bhd v Measat Broadcast Network Systems Sdh Bhd* [2021] MLJU 1826 at [26].
35 *Lineclear Motion Pictures Sdn Bhd v Measat Broadcast Network Systems Sdh Bhd* [2021] MLJU 1826 at [26].
36 *Lineclear Motion Pictures Sdn Bhd v Measat Broadcast Network Systems Sdh Bhd* [2021] MLJU 1826 at [32].

Writ and SOC and chose to remain silent until after JID was entered".[37]

(b) Whether the first defendant was prejudiced by the delay, which the court held that there was "no room" for the defendant to claim it would be prejudiced when it chose to remain silent.[38]

(c) The amount at stake, which the court held that the plaintiff's claim amounted to close to RM 1 million and the plaintiff would be deprived of the opportunity to arbitrate its claim.

35 While the approach in *Lineclear Motion* was similar to *The Navios Koyo*, the key difference lay in the relevance of the quantum of the claim. As summarised at para 12 above, the Singapore Court of Appeal in *The Navios Koyo* provided sound reasons for why the quantum of the claim is irrelevant in deciding whether to impose a condition which may not have been not raised to the Kuala Lumpur High Court. Ultimately, the approach in *The Navios Koyo* is in line with the principle for the court's exercise of discretion under s 6(2) of the IAA, which is the "justice of the case",[39] as the justice of a case should not depend on the quantum of the claim (*ie*, it may be just to impose a condition that the defence be waived if the quantum is high and *vice versa*).

IV. Conclusion

36 *The Navios Koyo* provides greater guidance and clarity to the conditions that the court may impose when granting a stay of proceedings in favour of arbitration. With this guidance on the legal framework, as well as the cases from Singapore, Malaysia

37 *Lineclear Motion Pictures Sdn Bhd v Measat Broadcast Network Systems Sdh Bhd* [2021] MLJU 1826 at [32].

38 *Lineclear Motion Pictures Sdn Bhd v Measat Broadcast Network Systems Sdh Bhd* [2021] MLJU 1826 at [32].

39 *The Navios Koyo* [2021] SGCA 99 at [30]; See also *Lineclear Motion Pictures Sdn Bhd v Measat Broadcast Network Systems Sdh Bhd* [2021] MLJU 1826 at [30] where the Kuala Lumpur High Court similarly held that the court should impose conditions to a stay of proceedings "as the justice of the case requires".

and Australia which illustrate the different facts and factors that might be considered under s 6(2) of the IAA, arbitration practitioners are better equipped to more effectively frame their arguments to advocate for their client's case and obtain (or resist) an order imposing conditions to a stay of proceedings.

37 The cases from the various jurisdictions explored above are also a timely reminder to parties to consistently conduct themselves above board and not to be opportunistic in the proceedings. This will help parties gain a strategic advantage in the arbitration proceedings and/or ensure that they do not suffer a disadvantage in the same.