STAY OR NAY: THE COURT'S APPROACH TO A STAY OF PROCEEDINGS PENDING DISPOSAL OF ARBITRATION AGAINST NON-PARTIES IN MALAYSIA

* Sandhya Saravanan

ABSTRACT

The topic issue is stay of proceedings and the key issue is stay of proceedings pending disposal of arbitration against non-parties. This essay shall examine the court's approach in determining the merits of an application for a stay of proceedings pending disposal of arbitration proceedings with a narrow perspective of circumstances where the application is brought against and involves a non-party to the arbitration proceedings. This essay will study the case of *Protasco Bhd v Tey Por Yee* with an understanding of how the Commonwealth counterparts have dealt with the same as discussed in the case, and its application to cases that have later developed in Malaysia, in line with the main tenet of the legal and justice system i.e. prompt and efficient disposal of litigation.

Keywords: civil procedure, stay of proceedings pending disposal of arbitration, court's inherent powers, duplication of proceedings, section 10 of the Arbitration Act 2005

* E-mail: ssarandhya@gmail.com

INTRODUCTION

While a stay of proceedings pending disposal of arbitration between parties to the arbitration is mandatory pursuant to section 10(1) of the Arbitration Act 2005 ("AA"), the same cannot be said when one of the parties to the stay application involves a non-party to the arbitration proceedings. This was decided in the case of *Protasco* Bhd *v Tey Por Yee* ("*Protasco*") and confirmed by the Federal Court in the case of *Jaya Sudhir A/L Jayaram v Nautical Supreme Sdn Bhd & Ors ("Jaya Sudhir")*. Therefore, section 10 AA is inapplicable in these circumstances. The Court of Appeal in *Protasco* explained that the power to grant a stay in such circumstances would be derived from its inherent power to stay court proceedings pending arbitration, in the interest of justice of the particular case according to Order 92 Rule 4 of the **Rules of Court 2012.** The grounds of judgments are worth studying.

THE BACKGROUND FACTS OF THE *PROTASCO* CASE

In this case, Protasco Bhd had brought a claim against PT ASU (company) as the first defendant, Tey Por Yee, as the second defendant, and Ooi Kock Aun as the third defendant. The dispute between Protasco and PT ASU was governed by an arbitration clause in the sale and purchase agreement concerning 76% of the total issued share capital of PT ASI from PT ASU. The claim relates to how Tey and Ooi, directors of Protasco Bhd brought a proposal for investment that envisaged that Protasco Bhd could control and benefit from a new venture in Aceh, Indonesia for the development and production of oil and gas at an oil field. A first sale and purchase agreement was entered into between parties two weeks after Ooi was appointed as director.

A second sale and purchase agreement was executed and one of the salient terms of the agreement is that the entire purchase price of USD22 million be payable upon execution of the agreement. PT ASU, however, failed to comply with the terms of the agreement, and the agreement was eventually terminated. Pursuant to an

investigation conducted by Protasco Bhd on the said transaction, it was found that PT ASU is owned, related, or is the alter-ego of Tey and Ooi. Protasco Bhd's cause of action against Tey and Ooi, amongst others, is premised on deceit, fraud and breach of fiduciary duties.[1]

Tey and Ooi subsequently filed a stay of proceedings in the High Court pending disposal of the arbitration proceedings between Protasco Bhd and PT Asu, and the application was allowed. Protasco appealed against the stay on the ground that they were not parties to the arbitration agreement.

THE APPROACH TAKEN BY OTHER COMMONWEALTH JURISDICTIONS

In arriving at its decision, the Court of Appeal in *Protasco* had referred to several Commonwealth jurisdictions in an attempt to study how the courts have approached the issue in similar circumstances. In the UK case of *Reichhold Norway ASA and Another v Goldman Sachs International*[2], it outlined the standard to be adhered to: (a) whether there are rare and compelling circumstances to allow the stay; (b) whether there are very strong reasons for granting such stay; and (c) whether the benefits likely to result from granting such a stay of proceedings outweigh any disadvantage to the non-party.[3] From the standard outlined, it can be gleaned that the threshold set to allow for a stay of proceedings in such circumstances is high. The 'rare and compelling circumstances" test was applied in the High Court case of *Siemens Industry Software GmbH & Co And Ors*[4] and affirmed by the Court of Appeal.

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1 See paragraphs 8 to 27 of the Protasco judgment.

2 [2000] 2 All ER 679.

3 See paragraph 33 of the Protasco judgment. This was later applied in the English High Court case of Mabey and Johnson v Danor and Others [2007] All ER (D) 177.

4 [2013] 1 LNS 914.

In Hong Kong, the guiding principles outlined in the case of *Linfield Ltd v Taoho Design Architects Ltd and Others*[5] are: (a) that the stay must cause injustice to the claimant in the arbitration; and (b) that the applicant for a stay must satisfy the court that the continuance of the arbitration would be oppressive or vexatious to him or an abuse of court process. Here, the court took into account the fact that the parties (both the arbitrating party and not) did not agree to be bound by any findings in the arbitration proceedings and, as such, any findings made in the arbitration would not bind the parties in the court. As such, there was no point in the stay pending the outcome of the arbitration proceedings - a logical justification for the stay dismissal.

In Australia, however, in the case of *Hi-Fert Ltd v Kiukiang Maritime Carriers Inc*[6], the Federal Court has taken a different approach to justifying a dismissal of a similar stay application. The plaintiff has initiated their actions against two defendants. The plaintiff's claims against the first defendant are premised on both, contractual claims that fall within the scope of the arbitration clause between the parties, and non-contractual claims. The second defendant, who is not a party to the arbitration, along with the first defendant made a stay application pending disposal of arbitration between the arbitrating parties. The Court held that the plaintiff having properly commenced proceedings in Australia was entitled to prosecute the proceedings against the defendants in court. If the plaintiff succeeds in the proceedings, there would not be a need to pursue the contractual claims in arbitration. Therefore, the court imposed a condition on the stay of the contractual claims that the reference to arbitration in respect of the contractual claims does not proceed until after the final determination of the proceedings in the Federal Court.[7] As observed by the Court of Appeal, the factor that weighed

5 [2002] HKCFI 513. See paragraphs 37 and 38 of the Protasco judgment.

6 [1998] 159 ALR 142.

7 See paragraphs 39 to 45 of the Protasco judgment.

heavily in the outcome of the case was the need to avoid re-litigation on the same issues.

The Singapore Court of Appeal case of *Tomolugen Holdings Ltd And Another v Silica Investors Ltd and other Appeals* ("*Tomolugen*")[8], however, viewed that the "rare and compelling circumstances" test as propounded in the case *Reichhold Norway* should not have a high threshold. The Singapore Court of Appeal further identified four options that could be adopted in such circumstances. **Option A** would be to stay the whole court proceedings, including that of the non-parties, an option preferred by Tey and Ooi too (2nd and 3rd Defendants). **Option B** would be to allow the proceedings against non-parties not caught by the arbitration agreement would be heard and determined first, followed by the arbitration proceedings. **Option C** would be to allow for the court proceedings against the non-parties and the arbitration proceedings to run concurrently. **Option D** would be to allow for a stay of the court proceedings on certain issues, while allowing other issues to be concurrently determined by the court and in arbitration.[9]

The Singapore Court of Appeal, in arriving at its decision, considered the following factors relating to both the arbitration and the court proceedings:[10]

a) Overlap in parties;
b) Overlap of issues;
c) Overlap in factual matrix giving rise to the cause of action;
d) Overlap in witnesses; and
e) Overlap in reliefs.

8 [2015] SGCA 57.

9 See paragraphs 47 to 50 of the Protasco judgment.

10 See paragraph 51 of the Protasco judgment.

The Singapore Court of Appeal decided that in order for a stay to be granted in favour of arbitration, the applicant must establish a prima facie case that:[11]

a) There was a valid arbitration agreement between the parties to the court proceedings;
b) The dispute in the court proceedings fell within the scope of the arbitration agreement; and
c) The arbitration agreement was not null and void, inoperative or incapable of being performed.

In this case, the Singapore Court of Appeal reversed the High Court's findings and allowed a stay of the court proceedings against the non-party Defendants. It was determined that whether or not the Plaintiff is willing to offer to arbitrate the main issue with the remaining Defendants, the court proceedings against them on all allegations would still be stayed, as it would serve the interest of case management which the court exercised pursuant to its inherent power.

However, the application of the *Tomolugen* case in *Protasco* focusses narrowly on considering the potential for overlap of issues raised in both the court proceedings and the arbitration. The cause of action of conspiracy to defraud or to injure will require ventilation, during the arbitration proceedings, of Tey and Ooi's alleged engineering and implementation of the conspiracy. The cause of action in breach of contract will also, to a considerable extent, touch on the facts relating to the parts played in this venture by Tey, Ooi and Dato' Chong as well as both parties' agents and/or nominees.

In determining the best option to adopt, the Court of Appeal evaluated the scope of the arbitration clause in the agreement between Protasco Bhd and PT ASU i.e. whether it encompasses all the causes of action namely conspiracy to defraud. This would include determining whether it

11 See page 175 of the Tomolugen judgment.

involved disputes arising from pre-contractual inducements to enter into the agreement.

On this point, the House of Lords has taken an expansive interpretation of the arbitration agreement in that it includes any dispute arising out of the relationship into which the parties have entered, as seen in the case of *Premium Nafta Products Limited and Others v Fili Shipping Company Limited and Others* ("*Fiona Trust*")[12]. Accordingly, arbitration clauses were to be construed in accordance with this presumption unless intended otherwise.[13]

Following *Fiona Trust* and bound by the Federal Court decision in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd*[14], both conspiracy to defraud and imposition of a constructive trust would be dealt with in any putative arbitration, adopting a commercial purpose and interpretation of the arbitration clause between parties.

It follows that the Court of Appeal had two options available in determining whether a stay of proceedings should be granted to the non-parties:[15]

a) Stay the court proceedings only to the extent required under section 10 of the *AA* but on the condition that the parts falling outside the scope of section 10 be resolved by the court first; or

b) Stay the court proceedings only to the extent required under section 10 of the *AA* where PT ASU is concerned, and allow the arbitration and remaining court proceedings to run concurrently.

Ostensibly, the first option is a better option. The reasoning by the Court of Appeal is that if the arbitration proceeds before the court proceedings, the arbitrator is

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12 [2007] UKHL 40.

13 See paragraphs 57 to 61 of the Protasco judgment.

14 [2016] 5 MLJ 417.

15 See paragraph 62 of the Protasco judgment.

bound to consider the allegations of a conspiracy to defraud against PT ASU. This would inevitably mean that the arbitrator would make a finding of facts concerning Tey and Ooi and the issues of conspiracy to defraud would be relitigated in the court proceedings. While this may be so, it cannot be argued that such a re-litigation would amount to res judicata since Tey and Ooi are not parties to the arbitration agreement and the arbitrator's findings are not binding on the court.[16]

What seems to be the Court of Appeal's primary concern is the veracity of the evidence of Tey and Ooi when given in arbitration, and then again in court proceedings balanced against the right of a party to an action to be afforded a full and proper opportunity to defend serious allegations and causes of action made against him personally which carry grave consequences. The failure to accord a full opportunity to defend such causes of action might potentially result in a breach of natural justice based on the facts of the case.[17]

THE *PROTASCO* DECISION

Therefore, in adopting *Tomolugen's* reasoning, the court is bound to strike a balance between the following considerations:[18]

a) The plaintiff's right to choose whom it wants to sue and where;
b) The court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause;
c) The court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes; and
d) The balance that is achieved should be just in all the circumstances of the case.

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16 See paragraphs 64 to 73 of the Protasco judgment.
17 See paragraphs 74 to 89 of the Protasco judgment.
18 See paragraphs 90 to 97 of the Protasco judgment.

The Court of Appeal, at the close of the parties' submissions, invited relevant parties to consider entering into a consensus on whether parties would want to be bound by certain issues raised in the course of the arbitration. No concessions were made.[19] Taking into account the myriad factors involved, the Court of Appeal reversed the findings of the learned High Court judge and ordered for the arbitration between Protasco Bhd and PT ASU to be stayed until the court proceedings between Protasco Bhd and Tey and Ooi were determined.[20] This can be viewed as a peculiar decision since the Court of Appeal was tasked with deciding on the merits of a stay of the court proceedings, i.e., whether it should stay the court proceedings or not. Given the circumstances of the case, the Court of Appeal viewed that it was in the interest of justice to stay the arbitration proceedings instead.

Therefore, *Protasco* should rightly also be considered an authority for the Court's discretion to stay arbitration proceedings pending disposal of court proceedings, even when it can arguably be said that *AA* envisions arbitration proceedings to be prioritised. While the Court of Appeal, in the earlier part of the judgment, referred to the high threshold required to warrant a stay, there was neither express application of what amounted to special circumstances or rare and compelling circumstances based on the facts of the case.

Notwithstanding the decision, the Court of Appeal, in obiter, acknowledged that the plaintiff's right to sue while being a fundamental right, is not an absolute one. It may be stayed even against non-parties to an arbitration agreement.

And that is, in fact, the decision the Court of Appeal took in its earlier decision in a factually similar case of *Dr Dieter Gobbers v Jacob and Toralf Consulting Sdn Bhd*

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19 A similar consideration was made in the Hong Kong High Court case of Linfield Ltd v Taoho Design Architects Ltd and Others [2002] HKFCI 513.

20 See paragraphs 92 to 97 of Protasco judgment.

& Ors and other appeals.[21] The First Defendant's stay application for the matter to be referred to arbitration was allowed. A similar application was made by the Second to Fifth Defendants to stay the proceedings pending the outcome of the arbitration between the Plaintiffs and the First Defendant. It was held that concurrent proceedings would cause confusion and injustice and that the applicants/said defendants would be put to considerable expense and inconvenience if duplicated proceedings amounted to special circumstances to warrant a stay of proceedings against non-parties of the arbitration proceedings. It must be highlighted that it was also the non-parties to the arbitration proceedings who applied for the stay of court proceedings pending arbitration between parties. This case was not referred to in *Protasco*.

CASES POST-PROTASCO AND THE APPLICATION OF THE PROTASCO PRINCIPLES

Shortly after the Court of Appeal's decision in *Protasco*, on a different panel of judges, the Federal Court in *Jaya Sudhir*[22] had the occasion to decide on a related issue and took a similar stance as in the case of *Protasco*, albeit on a different application i.e. an injunction to freeze the arbitration proceedings pending the disposal of the plaintiff's (non-party) suit. The Federal Court accepted that courts may decline to give effect to the exclusive jurisdiction clause or arbitration clause where interests of third parties are involved or where there is a risk of parallel proceedings and inconsistent decisions arising out of the conduct of an arbitration.

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21 [2015] 1 MLJ 507. The Plaintiff alleged that pursuant to negotiations between the Plaintiffs and the First Defendant, the Plaintiff were induced into entering a settlement agreement. The Plaintiffs claim to be indemnified for the losses and damages from the Second to Fifth Defendants as a result of the alleged inducement.

22 The ***Protasco*** decision has been affirmed in the Jaya Sudhir case, at [74] and [91].

The Federal Court further explained once duplication of proceedings is identified, the following considerations should be made: a) the court's desire to hold commercial parties to their bargain; and b) prevention of parallel proceedings and the risk of inconsistent findings and avoiding causing inconvenience to third parties. In arriving at its decision, the court held that it would be oppressive, vexatious, and unconscionable for the arbitration proceedings to continue because the appellant is not a party as his proprietary rights may be impinged.[23]

In a more recent case of *Handal Energy Bhd & Ors v Brian Chang & Ors*[24], the High Court had the occasion to decide a similar issue. Following the decision of Protasco, Quay Chew Soon JC (as he then was) recognised that a stay may be granted in respect of non-parties to an arbitration agreement. It is important to understand the facts of the case. The stay application premised on an arbitration clause between the 2nd Plaintiff and the 4th Defendant was made by the Defendants (both parties and non-parties to the arbitration) on 28.12.2020 pursuant to section 10 of *AA* and Order 92 Rule 4 of the *Rules of Court 2012*. The parties had commenced arbitration proceedings in Singapore as per the agreed arbitration clause between the 2nd Plaintiff and the 4th Defendant.

On 23.2.2021, the 2nd Plaintiff filed a Notice of Discontinuance, thereby discontinuing its action against the Defendants without leave of the Court as the Defendants have yet to file their Defence. Therefore, with the discontinuance of action by the 2nd plaintiff, the stay application pursuant to section 10 of the *AA* was no longer in effect. The Court applied the *Protasco* principle to

23 See paragraphs 60 to 82 of the Jaya Sudhir judgment.

24 [2021] MLJU 1077.

decide the stay application against non-parties. On appeal, the High Court's decision was affirmed.[25]

What stood out in this case was the last-minute exit of the only party to the arbitration proceedings, which resulted in an unsuccessful invocation of a mandatory section 10 stay application. Was this exit a strategy to circumvent having to be bound by the arbitration proceedings? Should this fact be given more weight when considering a stay application, especially if it is within the court's discretion? These remain rhetorical questions. The author, however, opines those factors such as whether the non-party is the Plaintiff or the Defendant, whether it is the non-party seeking a stay of proceedings, and the intention of the party to circumvent the operation of an arbitration clause should be considered on a case-by-case basis.

Similarly, in *LNH Landscaping Sdn Bhd*[26], notwithstanding it was obiter, Wong Kian Kheong J (as he then was) remarked that he would not have allowed the stay against the non-party, following *Protasco*. He further stated that in determining whether to allow the stay, a balancing exercise must be carried out by taking into account: a) the overriding consideration is justice and prevention of abuse of court process; b) the factors to be considered are not exhaustive, however, the court should not consider the merits of the suit and arbitration in question; c) the court may attach any weight to any factor as the court deems fit; and d) the court may accept certain factors in preference to other matters. This reinforces that the judges who are ultimately triers of facts, while guided by the principles set out by the higher courts, should

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25 The Defendant appealed to the Court of Appeal vide Civil Appeal No. W-02(IM)(NCvC)-685-04/2021 and leave to appeal before the Federal Court was dismissed vide Civil Application No. 08(i)-102-02/2022(W).

26 See LNH Landscaping Sdn Bhd v TKH Construction Sdn Bhd and Other Appeals [2021] MLJU 761.

consider them on a case-to-case basis. No one-fits-all solution would be ideal.[27]

In the case of *Samling Resources Sdn Bhd v Ekovest Bhd*[28], the court held that the path of least resistance is for the present action for, amongst others, negligent misrepresentation against the 1st Defendant (party which engaged in discussions with the Plaintiff before designating the 2nd Defendant to procure a subcontract from the Plaintiff) to proceed and be disposed of before the arbitration between the Plaintiff and the 2nd Defendant (wholly owned subsidiary of the 1st Defendant and the party to the JVA agreement with the Plaintiff) is allowed to proceed. Based on the Plaintiff's allegation, it would be reasonable to ensure that issues between the said parties are ventilated before the arbitration proceedings between the Plaintiff and the 2nd Defendant commences.

On a different factual matrix, in the case of *Grand Dynamic Builders Sdn Bhd v KSK Land Sdn Bhd*[29], the courts were tasked with ascertaining the special circumstances for a stay pending disposal of arbitration between arbitrating parties against a non-party which is the Corporate Guarantor in an enforcement of a Corporate Guarantee proceedings. The Defendant's main argument for an order for stay is that the Plaintiff is claiming for

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27 See paragraph 7 of the Protasco judgment.

28 [2022] 9 MLJ 803. Vide a letter of award, Lebuhraya Borneo Utara Sdn Bhd awarded the said works package in the sum of more than RM2 billion to the Plaintiff. The Plaintiff claims against the Defendants for negligent misrepresentations and/or misstatements arising from the signing of a Joint Venture Agreement which provides for the incorporation of a joint venture company (SEJV) with 70% (Plaintiff): 30% (2nd Defendant) shareholding structure to pursue and undertake the project and for the Plaintiff to ensure any subcontracts awarded to subcontractors be assigned to SEJV. The defendants recommended several subcontractors which were not suitable to carry out the works under the project and the subcontractors failed to perform their obligations under the contracts.

29 [2023] MLJU 3113.

the same sum in both the arbitration and the corporate guarantee suit, the issues concerning the outstanding sum ought to be ventilated between the principal debtor (not a party to the court action) and creditor (Plaintiff) before the Corporate Guarantee can be rightfully enforced.

The court held that it was an irrevocable and unconditional guarantee from a prima facie reading of the Corporate Guarantee. The High Court further explained that the issues relating to the Corporate Guarantee are independent of, and distinct from, the facts or dispute in the arbitration. The High Court further rejected the argument of potential invocation of issue estoppel and res judicata should a stay not be allowed, explaining that they can be raised in the appropriate forum at the appropriate time depending on whether the Court or the Tribunal has determined any issue or matter. Guided by the *Protasco* decision, the High Court also observed that common factors between the suit and the arbitration proceedings are merely the initial factual matrix in both proceedings. However, they devolve into different causes of action i.e. in the suit, the issue of liability under the Corporate Guarantee as opposed to the Arbitration where the dispute between the Plaintiff and the principal debtor for the outstanding sum allegedly not paid for works done in the project. Stay was not granted in this case.

In the Court of Appeal case of *Abd Rahman bin Soltan*[30], in dismissing the appeal against the High Court's decision to proceed with the suit despite the commencement of the arbitration, the court took into account public interest factor. Should the proceedings be stayed, the Defendant may rely on section 41A(1)(a) and

[30] See the Court of Appeal case of Abd Rahman bin Soltan & Ors v Federal Land Development Authority & And another and other Appeals [2023] 4 MLJ 318. The Learned Panel consist of Lee Swee Seng JCA, Hadhariah Syed Ismal JCA and Wong Kian Kheong JJCA, specifically paragraph 67 of the judgment.

(b)[31] of the *AA* to assert that proceedings in the arbitration and subsequent award of the arbitrator cannot be disclosed to the public. However, public interest demanded that the issues be tried expeditiously in open court.

In the case of *Tumpuan Megah Development Sdn Bhd v Ing Bank N.V. & Anor*, the Plaintiff commenced an action pursuant to section 37 of the *AA* to set aside the Malaysian Award made in the Malaysian Arbitration. By a stay application, the Plaintiff is seeking to stay the action pending the disposal of the REJA (UK Award) setting aside application. Interestingly, the High Court viewed that the Protasco test of rare and compelling circumstances would equally apply to parties of the arbitration. In assessing whether there are rare and compelling circumstances to necessitate a stay, the court considered: a) whether the outcome of the REJA Setting Aside application would affect the present action; and b) Whether the balance of justice lies in favour of allowing the stay application. The Court dismissed the stay application.[32]

It can be observed that the main theme flowing from the cases post-*Protasco* is the interests of the non-party should a stay of the court proceedings be allowed and the arbitration between parties proceed. In most cases, albeit unconsciously, the courts have weighed the need to avoid parallel proceedings and inconsistent decisions when arriving at their judgments.[33] It must be borne in mind that this should be so since the invocation of section 10 of the *AA* between parties to the arbitration is mandatory and the court has very little wiggle room to decide

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31 Section 41A (1) provides that no party may publish, disclose or communicate any information relating to the arbitral proceedings under the arbitration agreement or an award made in those arbitral proceedings unless otherwise agreed by the parties.

32 [2024] MLJU 2689**.** See paragaphs 21 to 25 of the Tumpuan Megah case.

33 See paragraph 48 of the Samling Resources judgment, see paragraph 67 of Abd Rahman bin Soltan judgment, see paragraphs 37 to 41 of the Grand Dynamic Builders judgment.

otherwise. With the expectation of a mandatory stay between parties to the arbitration, the court would need to be tactful about deciding the interests of the non-party of the arbitration vis-à-vis a mandatory stay of proceedings pending disposal of arbitration proceedings, which is evident from the cases mentioned above.

At this juncture, it is important to reflect on the cases discussed above and note that, beginning with the *Protasco* decision and continuing through to the most recent case, the correct test in those circumstances remains unclear. Is it the rare and compelling circumstances as applied in the case of *Reichold Norway* and discussed in the *Protasco* case or the traditional test of special circumstances as applied in most stay of proceedings applications? While most cases have applied the special circumstances test, few have instead applied the rare and compelling circumstances[34] test. The author views that the former should still be the test, as it would be for the other stay applications. That said, it can perhaps be agreed that both tests set a high threshold to meet.

CONCLUSION

Has the dust settled? The way moving forward

While this issue may not be a novel one, the differing factual matrix of each case warrants a fresh perspective of the principles every time they are applied. Following *Protasco*, the courts have a point of guidance in determining the merits of a stay application pending disposal of arbitration proceedings against a non-party. The application of the *Protasco* principles has so far been consistent and somewhat predictable in that a stay of the court proceedings is usually not allowed.

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[34] See paragraph 59 of the Samling Resources judgment, see paragraph 22 of the Tumpuan Megah case and see paragraph 28 of Apex Marble Sdn Bhd v Leong Tat Yan [2021] 1 LNS 37 .

This, of course, is notwithstanding the orbiter made in the *Protasco* case in that the Plaintiff's right to sue while being a fundamental right, is not an absolute one. It may be stayed even against non-parties to an arbitration agreement.

'Special circumstances', following the cases discussed above, has arguably a high threshold. What will amount to 'special circumstances' is still open for discussion and should rightly be so. With the increase in plaintiffs commencing court actions against both parties and non-parties to arbitration, the court's task in dealing with this issue would always involve striking a delicate balance between the avoidance of duplicity of proceedings and ensuring prompt and efficient disposal of litigation, on the one hand, and, undoubtedly, the interests of justice, on the other.