

WHEN DOES STARTING A COURT ACTION END THE RIGHT TO ARBITRATE

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Parties are sometimes advised that the choice between arbitration and litigation is final, and that taking one path permanently excludes the other. In *BMO v BMP* [2017] SGHC 127 ("**BMO**"), however, the Singapore High Court ("**Court**") clarified that this is not always the case.

The defendant in *BMO* had initially filed court proceedings against the plaintiff in breach of an arbitration agreement ("**Agreement**"), but later abandoned them in favour of arbitration. At the arbitration and subsequently in Court, the plaintiff argued unsuccessfully that the tribunal did not have the jurisdiction to hear the matter, as the defendant's prior pursuit of litigation now barred it from arbitrating the dispute.

Waiver by election

The plaintiff's first contention was that the defendant, by electing to litigate rather than arbitrate, had taken a position inconsistent with its right to arbitrate. This constituted a "waiver by election" of its right to arbitrate and rendered the Agreement inoperative.

As the Court explained, however, a waiver by election could only arise as a response by one party to the conduct of the other – typically when an innocent party elected between two inconsistent rights in response to a counterparty's wrongful conduct. In the present case, the party breaching the arbitration agreement by initiating litigation was the same party re-asserting the right to arbitrate. There was therefore no conduct by the plaintiff that the defendant was responding to, and no election that could give rise to a waiver.

Contractual repudiation

The plaintiff's second contention was that the defendant's commencement of litigation amounted to a repudiatory breach of the Agreement, which the plaintiff had accepted by

participating in the litigation proceedings, thus bringing the arbitration agreement to an end.

The Court noted that there were two requirements for repudiation to be established, neither of which was satisfied:

- First, it had to be shown that the defendant no longer intended to be bound by the Agreement. However, the Court accepted that the defendant's actions in filing the court proceedings did not point to such an intention, as the defendant was not aware of the Agreement when litigation commenced.
- Second, even if the defendant intended to repudiate the Agreement, it had to be demonstrated that the plaintiff accepted the repudiation. On this point, the Court found that the actions taken by the plaintiff in the litigation were not "steps in the proceedings" (i.e. acts that advance the hearing of the matter in court), and therefore did not constitute unequivocal acceptance of a repudiatory breach.

Promissory estoppel

The plaintiff's final contention was that the defendant was precluded by promissory estoppel (i.e. a promise not to enforce a legal right) from pursuing arbitration, as its actions in litigating the matter constituted a representation that it would not enforce its right to arbitrate the dispute.

This argument was also unsuccessful, as the Court did not agree that the defendant's commencement of litigation could be characterised as a forbearance of any legal right. Further – as with waiver by election – promissory estoppel could only be raised *against* a party seeking to enforce its rights in response to another party's breach. In this case, it was being raised by the party seeking to enforce its rights.

Comments

As illustrated in the *BMO* decision, a party's commencement of litigation may not, in itself, bar a subsequent switch to arbitration, provided the following is satisfied:

- First, the party seeking to switch to arbitration must not have previously elected litigation over arbitration in

response to the wrongful conduct of the other party.

- Second, the arbitration agreement must give both parties the right to arbitrate, as the initiation of litigation may otherwise constitute a unilateral waiver of that right.
- Third, the prior commencement of litigation must not have been done with the intention of rejecting or repudiating the arbitration agreement.
- Fourth, if the party had in fact initiated litigation with repudiatory intent, the repudiation must not have been accepted; i.e. the other party must not have taken any steps in the proceedings.

Even if this change of forum is possible, as a lot of time and money will likely have to be spent in front of the tribunal and the courts before it can be effected. It is therefore crucial that the decision to litigate or arbitrate a dispute is only made after a careful review of the documents and a thorough review of the available options.

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