



## Newsletter 11/2021

A non-exhaustive summary of judicial consideration of the phrase “steps in the proceedings” which is found in Section 10(1) of the Arbitration Act 2005.

### Steps in the Proceedings

#### Introduction

Section 10(1) of the Arbitration Act 2005 provides the following:

“A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application **before taking any other steps in the proceedings,** stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed” (Emphasis ours)

It is clear from the above that a party who has taken steps in proceedings will be precluded from obtaining a stay of proceedings pending arbitration.

This will be the case even if the arbitration agreement is valid, operable, and capable of being performed.

The courts have been faced with various scenarios and considered whether steps have in fact been taken in the proceedings.

#### What could amount to steps in the proceedings?

- i. Serving of pleadings;<sup>1</sup>
- ii. Requesting for extension of time to file Defence;<sup>2</sup>
  - However, there are conflicting cases on this<sup>3</sup>
- iii. Filing of a Counterclaim;<sup>4</sup>

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<sup>1</sup> *Sanwell Corp v Trans Resources Sdn Bhd* [2002] 2 MLJ 625 (FC), at p. 638

<sup>2</sup> *Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd* [2010] 3 CLJ 634 (HC), at para 17; *Mun Seng Fook v AIG Malaysia Insurance Bhd* [2018] 8 CLJ 394 (HC), at paras 19-20

<sup>3</sup> See e.g. *IFCI Ltd v Bishopgate Capital Ltd & Anor* [2020] MLJU 2380 (HC), at paras 17-31



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- iv. Issuance of Notice to Produce Documents referred to in pleadings, without any qualification/reservation;<sup>5</sup> and
- v. Filing of a striking out application on the grounds that a claim is scandalous, frivolous or vexatious.<sup>6</sup>

Although the Federal Court in *Sanwell Corp v Trans Resources Sdn Bhd* [2002] 2 MLJ 625 (“**Sanwell Corp**”) held that the serving of pleadings would amount to a step in the proceedings, the High Court in *Apex Marble Sdn Bhd & anor v Leong Tat Yan* was of the view that:

“The filing of a defence and counterclaim was necessary as the Court had, during case

management, directed the defendant to file the cause papers as the case was moving towards trial.”<sup>7</sup>

However, the Court of Appeal reversed the High Court’s decision.<sup>8</sup>

The Defendant subsequently applied for leave to appeal to the Federal Court but the application was dismissed.<sup>9</sup>

As such, the position in *Sanwell Corp* in relation to the serving of pleadings amounting to a step in the proceedings remains the current legal position.

<sup>4</sup> *China State Construction Engineering (M) Sdn Bhd v Astaka Padu Sdn Bhd* [2021] MLJU 2108 (HC), at paras 17-20

<sup>5</sup> *CLS Power System Sdn Bhd v. Sara Timur Sdn Bhd* [2015] 1 LNS 149; [2015] MLJU 0298 (HC)

<sup>6</sup> *Kebangunan Petroleum Operating Co Sdn Bhd v Mikuni (M) Sdn Bhd & Ors* [2021] 1 MLJ 693 (CA), at paras 36-41

<sup>7</sup> *Apex Marble Sdn Bhd & Anor v Leong Tat Yan* [2018] MLJU 39 (HC), at para 62

<sup>8</sup> See <http://bonia.listedcompany.com/misc/ar2018.pdf>. Court of Appeal Civil Appeal No. W-02(NCvC)(W)-202-01/2018.

<sup>9</sup> See [https://cdn1.i3investor.com/my/files/st88k/9288-BONIA/gr/2021-06-30/9288\\_BONIA\\_QR\\_2021-06-30\\_BoniaGroup4thQrt2021300621-1768984153.pdf](https://cdn1.i3investor.com/my/files/st88k/9288-BONIA/gr/2021-06-30/9288_BONIA_QR_2021-06-30_BoniaGroup4thQrt2021300621-1768984153.pdf). Federal Court Civil Application No. 08(i)-361-07/2018(W).



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### What would not amount to steps in the proceedings?

- a. The entry of appearance;<sup>10</sup>
- b. An application to set aside the Writ on the grounds of jurisdiction;<sup>11</sup>
- c. Filing of affidavits to discharge an ex-parte interlocutory injunction;<sup>12</sup> and
- d. Filing of affidavits to oppose a Summary Judgment application.<sup>13</sup>

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<sup>10</sup> *Sanwell Corp v Trans Resources Sdn Bhd* [2002] 2 MLJ 625 (FC), at p. 638

<sup>11</sup> *Comos Industry Solution GmbH v Jacob & Toralf Consulting* [2011] 1 LNS 1770 (CA), at paras 14-16

<sup>12</sup> *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716 (SC), at p. 727

<sup>13</sup> *Dynaciate Engineering Sdn Bhd v Punj Lloyd Sdn Bhd* [2020] MLJU 2388 (HC), at para 15 read together with paras 18 and 32