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To Members of the Malaysian Bar

### **Arbitration & Construction Law Case Spotlight (April 2026)**

The Bar Council Arbitration and Construction Law Committee is pleased to issue the April edition of *Case Spotlight*, which features key decisions on arbitration or construction, drawn from both Malaysian and foreign jurisdictions. The objective is to keep Members updated on emerging jurisprudence and procedural developments that may be of interest to arbitration or construction law practitioners.

The cases covered in this edition are as follows:

- (1) ***Hashim Bin Abdul Razak & Ors v Pembinaan PD Jaya Sdn Bhd (Dalam Likuidasi) [2025] MLJU 4374 (Court of Appeal)***

**Keywords:** Arbitration – Stay of Proceeding – Section 10 of Arbitration Act – Doctrine of Separability – Section 18 of Arbitration Act – Liquidation – Section 49 of Arbitration Act

**Written by:** Christine Lay Kei Een

- (2) ***Kasugi Prima Sdn Bhd v Cobrain Holdings Sdn Bhd and another appeal [2025] 3 MLJ 960 (Court of Appeal)***

**Keywords:** Arbitration – Delay – Procedure – Breach of natural justice

**Written by:** Haemarubini d/o Pushpa Rajah

- (3) ***Yes Travel & Holidays Sdn Bhd v Miki Travel (Hong Kong) Ltd & Anor [2025] MLJU 4726 (High Court)***

**Keywords:** Arbitration Act 2005 – Section 10 – Stay of court proceedings – Scope of arbitration agreement – Whether quotation constituted a standalone agreement – Commercial framework of master agreement – Non-signatory defendant – Claims in tort

**Written by:** Deepak Mahadevan

The case highlights may be accessed [here](#) (see page 2 onwards).

Thank you.

**Nimalan Devaraja and Abang Iwawan  
Co-Chairpersons  
Bar Council Arbitration and Construction Law Committee**

# Case Spotlight | Arbitration & Construction Law Committee

## Case

*Hashim Bin Abdul Razak & Ors v Pembinaan PD Jaya Sdn Bhd (Dalam Likuidasi)* [2025] MLJU 4374

## Jurisdiction

Malaysia

## Court

Court of Appeal

## Keywords

Arbitration – Stay of Proceeding – Section 10 of Arbitration Act – Doctrine of Separability - Section 18 of Arbitration Act – Liquidation – Section 49 of Arbitration Act

## Introduction

In *Hashim Bin Abdul Razak & Ors v Pembinaan PD Jaya Sdn Bhd (Dalam Likuidasi)*, the Court of Appeal addressed a key question: does the liquidation or bankruptcy of a party render an arbitration agreement inoperative or incapable of being performed? The appeal arose from the High Court's decision to grant a stay of proceedings under section 10 of the Arbitration Act 2005 (“AA”). The Court of Appeal held that, under the doctrine of separability codified in section 18 of the AA, an arbitration clause is an autonomous agreement, independent of the underlying contract. Consequently, even a fundamental event such as the liquidation or bankruptcy of a party to the agreement does not render the arbitration agreement inoperative or incapable of being performed.

## Facts

On 14 January 2002, the Appellants, as registered landowners, and the Respondent, as developer, executed a Joint Venture Agreement (“JVA”) to develop the Appellants’ land into a three-storey shop office. Under the JVA, the Appellants contributed the land, while the Respondent bore all development costs. The JVA was conditional upon converting the land from Malay reserve to freehold status, which was gazetted on 15 May 2002, making the JVA unconditional.

Pursuant to Clause 4(i) of the JVA, the Respondent was required to submit a proposed layout plan for land conversion and subdivision within six months of the JVA becoming unconditional. Clause 17 stipulated that, in the event of a breach, the Respondent must return the Issue Document of Title (“IDT”) to the Appellants free of encumbrances. The Respondent failed to return the IDT and was subsequently wound up on 14 March 2018 following a winding-up petition filed on 28 December 2017.

In April 2021, the Appellants filed a civil action to recover the IDT for breach of Clause 4(i) of the JVA. The Respondent filed a Notice of Application on 14 December 2021 seeking a stay of proceedings and referral to arbitration under Clause 27 of the JVA. On 14 June 2022, the High Court allowed the Respondent’s application (“**Stay Order**”). The Appellants did not file any appeal against the Stay Order and did not refer their claim to arbitration for over two years.

On 7 December 2023, the Appellants applied to set aside the Stay Order and continue their claim in the High Court, arguing inter alia, that (i) the arbitration agreement was inoperative or incapable of being performed, (ii) the Respondent was under liquidation, and (iii) the liquidator was unwilling to cooperate. Leave was granted on 3 May 2024 for the Respondent’s contributory, Roselyn Jalong, to oppose the application on behalf of the Respondent company.

## High Court’s Decision

On 6 September 2024, the High Court dismissed the Appellants’ application to set aside the Stay Order, based on several reasons, including:

- (a) **Res judicata:** The Appellants had previously argued that the arbitration agreement was inoperative, which was rejected when the Stay Order was granted. Having not appealed, they were estopped from re-litigating the same issue.
- (b) **Responsibility to initiate arbitration:** The Stay Order did not require the Respondent to commence arbitration. The obligation to initiate arbitration rested with the Appellants if they wished to pursue their claim.

## Issue for Determination

The central issue before the Court of Appeal was whether the High Court erred in refusing to set aside the Stay Order, particularly considering the Appellants’ claim that the arbitration agreement was inoperative under section 10 of AA.

## Court of Appeal’s Decision

The Court of Appeal upheld the High Court’s dismissal of the Appellants’ application to set aside the Stay Order. The Court of Appeal held as follows:

- (a) **Legal framework for arbitration claims against a liquidated company:** The Court clarified that Section 49 of AA applies exclusively to individuals adjudged bankrupt and does not extend to corporate entities in liquidation. The Appellants’ reliance on Section 49 was

thus misdirected. The Respondent, as a private limited company in liquidation under the Companies Act 2016, falls under the corporate insolvency regime. Consequently, leave must be sought from the High Court under Section 471 of the Companies Act 2016 to proceed against a company in liquidation.

(b) **Stay of proceedings under Section 10 of AA:** The Court reaffirmed that the arbitration agreement is neither inoperative nor incapable of being performed merely because the Respondent is in liquidation. The doctrine of separability, codified in Section 18 of the AA, ensures that an arbitration agreement is autonomous and independent of the underlying contract. Applying *Peninsula Education (Setia Alam) Sdn Bhd v. Bixis (M) Sdn Bhd (In Liquidation)* [2024] 6 MLRA 160, the Court held that fundamental events, such as the liquidation or bankruptcy of a party, do not automatically render the arbitration agreement inoperative or incapable of being performed. Clause 27 of the JVA satisfied the legal requirements for a valid arbitration agreement and pursuant to the doctrine of separability, such arbitration agreement survives challenges arising from the Respondent's liquidation.

(c) **Arbitrability of post-liquidation claims:** The Court considered whether the dispute remained arbitrable following the Respondent's liquidation. It held that the dispute was arbitrable because it arose from pre-insolvency contractual rights and obligations under the JVA and did not involve the operation of the insolvency regime or insolvency-specific remedies. The Court distinguished this case from *V Medical Services v. Swissray Asia Ltd* [2025] 2 MLJ 744, noting that in *V Medical Services* the issue concerned a creditor's winding-up petition, a collective, statutory process for the benefit of all creditors. The Federal Court there clarified that such petitions do not automatically trigger a mandatory stay under Section 10 of the Arbitration Act 2005, and that arbitration and winding-up serve different purposes: arbitration is private and consensual, whereas winding-up is collective in nature.

Relying on the framework in *Larsen Oil and Gas Pte Ltd v. Petropod Ltd* [2011] SGCA 21, the Court reaffirmed the following distinctions:

- (i) Disputes arising directly from the operation of the insolvency regime itself are deemed non-arbitrable due to public policy, including the need to protect creditors' interests.
- (ii) Disputes concerning the company's pre-insolvency rights and obligations, may be arbitrable, even after liquidation.

Applying this principle, the Court held that the Appellants' claim for breach of the JVA and return of the IDT, which arose before the Respondent's insolvency, fell squarely into category (ii) above. The arbitration agreement survived the Respondent's liquidation, and the mandatory stay of court proceedings under Section 10 of AA was properly granted.

### Commentary

This case reaffirms that pre-insolvency contractual disputes remain arbitrable even after liquidation, giving practitioners certainty when dealing with claims against liquidated companies. It also makes clear that Section 49 of AA applies only to bankrupt individuals, so claimants must seek leave under Section 471 of Companies Act 2016 to arbitrate against a company in liquidation. The decision reinforces that arbitration continues to be an effective mechanism for resolving contractual disputes, while placing responsibility on claimants to follow the correct procedural steps.

Written by  
Christine Lay Kei Een

## Case

*Kasugi Prima Sdn Bhd v Cobrain Holdings Sdn Bhd and another appeal* [2025] 3 MLJ 960

## Jurisdiction

Malaysia

## Court

Court of Appeal

## Keywords

Arbitration – Delay – Procedure - Breach of natural justice

## Introduction

This case primarily concerns whether an arbitrator's authority is confined to only procedural matters under section 21(3)(b) of the Arbitration Act 2005 ("AA"). S21(3)(b) confers power upon the arbitral tribunal to draw on its own knowledge and expertise when conducting an arbitration.

## Background

The Appellant, Kasugi Prima Sdn Bhd was appointed as the main contractor for the construction of Bank Kerjasama Rakyat Malaysia Bhd ("**Project**"). In relation to the M&E works of the Project, the Appellant subcontracted the works to the Respondent, Cobrain Holdings Sdn Bhd, for a contract sum of RM82.2 million.

During the execution of the Project, delays arose, resulting in the completion date being extended from 31.9.2012 to 30.9.2013, with the certificate of practical completion only issued in June 2014.

This led to a payment dispute whereby the Appellant blamed the Respondent for the delays and unilaterally deducted sums from the Respondent's progress claims, contending that the Respondent owed RM6.37 million. The Respondent, however, maintained that the Appellant owed them RM8.99 million for work completed.

Subsequently, the Respondent pursued adjudication under CIPAA and obtained an award of RM5.47 million against the Appellant. Following this, the Appellant commenced arbitration against the Respondent.

The arbitration ultimately found in the favour of the Respondent. Following the final award, the parties entered into a consent order for full payment of the award sum. Notwithstanding this, the Appellant sought to set aside the final award in the High Court, arguing, amongst others, that the arbitrator had wrongfully and prematurely invoked the powers under section 21(3)(b) of the AA. The High Court dismissed the Appellant's application and the Appellant subsequently appealed to the Court of Appeal.

## Key Issues

The issues before the Court of Appeal were as follows: -

1. Whether an arbitrator's authority under section 21(3)(b) of the AA is only invocable purely as to matters of procedures (and not to matters of fact, substance or merit)?
2. Whether the learned High Court judge was correct in finding that the learned arbitrator's invocation of her authority under section 21(3)(b) of the AA was not premature; and

3. Whether the learned High Court judge was correct in finding that the manner in which the learned arbitrator invoked her authority under section 21(3)(b) of the AA did not breach the rules of natural justice.

## Findings of the Court of Appeal

In dismissing the appeal, the Court of Appeal held as follows:-

1. An arbitrator's authority under Section 21(3)(b) of the AA is not limited to procedural matters and extends to matters of fact, substance, and merit. While the Court acknowledged the restrictive tenor of sections 21(1) and (2) of the AA, it held that a strict literal interpretation confining section 21(3)(b) of the AA to procedural matters alone would lead to consequences that are erroneous and otiose. Instead, adopting a purposive approach in line with section 17A of the Interpretation Acts 1948 and 1967, would be consistent with the very purpose and objective of the AA. In fact, the recent Federal Court decision in ***Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd*** reaffirms this position.
2. The learned High Court judge was correct in finding that the arbitrator's invocation of her authority under section 21(3)(b) of the AA was not premature. In this regard, the Court rejected the Appellant's argument that procedural disagreement is a condition precedent of section 21(3) of the AA. Imposing such a pre-condition would unnecessarily restrict an arbitrator's ability to perform their core duty of examining and appreciating evidence, contrary to Parliament's intention. In any event, a procedural disagreement already existed on the facts and the Appellant itself had expressly urged the arbitrator to invoke her authority under the same provision to deal with the evidence presented before the tribunal.
3. The learned High Court judge was correct in finding that the manner in which the arbitrator had invoked her authority under section 21(3)(b) of the AA did not breach the rules of natural justice. At all material times, the arbitrator had drawn upon her own expertise and knowledge in reliance on the available evidence. As such, the arbitrator was not required to give notification or opportunity to rebut to the parties. Accordingly, the Appellant's contentions that the arbitrator (i) factored in extraneous or external evidence and (ii) in referring to extraneous evidence, failed to provide notice or consultation or opportunity for the parties to address, do not hold water.

Written by  
Haemarubini d/o Pushpa Rajah

## Case

*Yes Travel & Holidays Sdn Bhd v Miki Travel (Hong Kong) Ltd & Anor* [2025] MLJU 4726

## Jurisdiction

Malaysia

## Court

High Court

## Keywords

Arbitration Act 2005 – Section 10 – Stay of court proceedings – Scope of arbitration agreement – Whether quotation constituted a stand-alone agreement – Commercial framework of master agreement – Non-signatory defendant – Claims in tort

## Background

The plaintiff, Yes Travel & Holidays Sdn Bhd, is a Malaysian travel agency. The first defendant, Miki Travel (Hong Kong) Ltd, arranged overseas land tour services for the plaintiff, while the second defendant acted as a coordinating office for the first defendant.

On 18 April 2022, the plaintiff and the first defendant entered into a Core Business Agreement (“CBA”) governing their commercial relationship. Clause 20 of the CBA provided that disputes concerning the interpretation of the agreement or the parties’ rights and liabilities were to be resolved by arbitration in Hong Kong.

In 2023, the plaintiff engaged the defendants to arrange a Paris group tour. An ad-hoc quotation was issued by the second defendant on behalf of the first defendant setting out the itinerary and pricing. A dispute subsequently arose when the first defendant demanded payment allegedly outstanding from an unrelated London tour and later cancelled the Paris tour.

The plaintiff commenced proceedings in the Sessions Court claiming damages and alleging that the defendants had conspired to injure its business.

The defendants applied for a stay of proceedings pursuant to s 10 of the Arbitration Act 2005, relying on the arbitration clause in the CBA. The Sessions Court granted the stay on the basis that the quotation formed part of the contractual framework governed by the CBA. The plaintiff appealed.

## Issues

Two issues arose for determination:

1. Whether the dispute concerning the Paris tour fell within the arbitration clause in the CBA, or whether the quotation constituted a stand-alone agreement without an arbitration clause; and
2. Whether the stay of proceedings should extend to the second defendant, which was not a signatory to the CBA and was sued in tort for conspiracy.

## Decision of the High Court

The High Court dismissed the appeal and affirmed the stay of proceedings pending arbitration.

The High Court rejected the plaintiff’s contention that the quotation constituted an independent agreement governing the Paris tour. Objectively construed, the quotation merely contained pricing and itinerary details and did not set out operative contractual terms regulating rights, liabilities, governing law or dispute resolution. By contrast, the CBA expressly governed the commercial relationship between the parties and provided the contractual framework for the provision of tour services.

Having regard to the parties’ course of dealings, the High Court held that the quotation functioned only as a transaction-level document issued pursuant to the CBA. To treat the quotation as the operative contract would render the CBA effectively redundant and leave the parties without a coherent contractual framework. The dispute relating to the cancellation of the Paris tour therefore arose within the scope of the CBA.

Clause 20 of the CBA applied broadly to disputes concerning the rights and liabilities of the parties, and the plaintiff’s complaint of wrongful termination of the tour arrangements fell squarely within that scope. The High Court reiterated that under s 10 of the Arbitration Act 2005, once an arbitration agreement exists and the dispute is prima facie arbitrable, the court must stay the proceedings without examining the merits.

The High Court also upheld the stay against the second defendant notwithstanding that it was not a party to the CBA. On the plaintiff’s pleaded case, the second defendant acted merely as a coordinating office assisting the first defendant. The alleged conspiracy between the defendants was therefore derivative of the contractual dispute concerning the cancellation of the Paris tour.

Relying on authorities including *Renault SA v Inokom Corp Sdn Bhd* and *Protasco Bhd v Tey Por Yee*, the Court emphasised that plaintiffs should not be permitted to circumvent arbitration agreements by joining non-party defendants in order to pursue litigation in court. Allowing the claim to proceed against the second defendant alone would risk inconsistent findings and overlapping determinations in light of the pending arbitration concerning the same underlying dispute. In the circumstances, a stay against the second defendant was warranted to give full effect to the parties’ agreed dispute resolution mechanism.

## **Comment**

The decision reinforces the pro-arbitration approach of Malaysian courts in applying s 10 of the Arbitration Act 2005. In particular, the Court emphasised that where a master agreement governs the parties' commercial relationship, subsequent transactional documents such as quotations will ordinarily operate within the framework of that agreement, absent clear evidence that the parties intended to create a separate contractual regime.

The case also illustrates the courts' willingness to extend a stay to closely connected non-signatory parties where the claims against them arise from the same factual matrix as the arbitrable dispute. This approach promotes coherent dispute resolution and prevents parties from undermining arbitration agreements.

Written by  
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