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Rebalancing the Scales: Requiring Contractors to Fund a Sub-Contractor's Arbitration?

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FAMG Idaman Resources v Jasmadu Sdn Bhd^[1]

Assume that a subcontractor seeks to sue a main contractor for monies. Should the main contractor be made to start and finance the subcontractor's arbitration against it? Interestingly, the High Court in the recent case of *FAMG Idaman* appears to have agreed with this approach.

A subcontractor commenced a court action against a main contractor, seeking payment for construction works done. The main contractor immediately applied to stay the court action under Section 10 of the Arbitration Act 2005, seeking to enforce the parties' arbitration agreement. Consistent with established law, the High Court granted the arbitration-related stay. Unusually, however, the stay was made conditional on the main contractor commencing the arbitration within 30 days, rather than the subcontractor, who had in fact initiated the proceedings.

In its decision, the court was especially mindful of the inequality of resources between the financially-challenged subcontractor — which was a sole proprietor, and would therefore lack the resources necessary to properly prosecute an arbitration — and the large, wealthier main contractor. Notably, common law courts, including Malaysia, have typically dismissed impecuniosity as a consideration in arbitration-related stays. Instead, courts typically take the view that if a party agrees to arbitration, it must ensure that it has sufficient resources to finance the arbitration. Accordingly, the *FAMG Idaman* case appears to moderate the strict legal position to reflect the realities of a cashflow-driven industry.

The proposition in the *FAMG Idaman* case is one that is extensible to all players in the construction industry, including employers and developers. Although the case is under appeal, the court's findings will be of especial relevance to arbitration-related stays in the meantime. Industry players will no doubt find the case to be of considerable interest.

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