IN THE HIGH COURT OF MALAYA

AT KUALA LUMPUR

CIVIL SUIT NO. WA-22C-72-09/2019

BETWEEN

1. PBJV GROUP SDN BHD

2. MACFEAM SDN BHD PLAINTIFFS

AND

PRPC UTILITIES AND FACILITIES SDN BHD DEFENDANT

GROUNDS OF DECISION

Introduction

[1] This is an application to stay the action to be referred to arbitration.

[2] The Plaintiffs are private limited companies involved in onshore and offshore pipeline construction business.

[3] The Defendant is also a private limited company involved in the refinery and petrochemical business.

Salient Background Facts

[4] By a letter award dated 6 April 2016 ("Letter of Award"), the Defendant appointed the Plaintiffs as contractor to carry out "Utilities Interconnecting Offsite (UIO) Facilities: Procurement, Construction & Commissioning (PCC) of Underground Pressurized Non Metallic Piping – Firewater Network East Side (Package14-0701)("Contract").

[5] The Letter of Award, inter alia, incorporated the following documents:

(i) Form of Agreement;

(ii) Special Conditions; and

(iii) Conditions of Contract.

[6] In the course of carrying out the works under the Contract, there were disputes and differences that arose between the parties resulting in the Defendant terminating the Contract.

[7] As a result, the Plaintiffs on 12 September 2019 instituted this action to, inter alia, claim for the following:

(i) Certified sum of RM6,579,806.74;

(ii) Uncertified progress claim no. 10 sum of RM23,144,592.02;

(iii) Variation work of RM4,557,400.00;

(iv) Return of performance bond of RM8,414,802.80; and

(v) Declaration that the termination of the Contract was wrongful.

[8] After having filed its appearance on 10 October 2019, the Defendant on 21 October 2019 filed this application to stay the action to be referred to arbitration pursuant to s.10 of the Arbitration Act 2005 ("Application").

[9] The affidavits that were filed for purposes of this Application are as follows:

(i) Defendant's first affidavit in support affirmed by Gnei Hartini Jainudeen dated 18 October 2019;

(ii) Plaintiffs' affidavit in reply affirmed by Rasdee bin Abdullah dated 7 November 2019; and

(iii) Defendant's second affidavit in support affirmed by Melvinder Singh a/l Jagindar Singh dated 19 November 2019.

[10] The Application came before me on 12 February 2020 and 19 June 2020. After having read the written submissions of the parties as well as oral argument of counsel, I allowed the Application in terms of prayer (1) thereof with costs of RM10,000.00 subject to 4 % allocator.

Contentions and Findings

[11] According to the Defendant, the Plaintiffs claimed against the Defendant for breach of Article 32.6 and 32.13 of the Conditions of Contract for failing to settle certified payment claim no. 9 and breach of Article 32.6 of the Conditions of Contract for rejecting the Plaintiffs' progress claim no.10 and variation work. In addition, the Plaintiffs contended that the termination of the Contract by the Defendant and resultant call on the performance bond was wrongful.

[12] The Defendant submitted that these are arbitrable disputes and the action must hence be stayed and referred to arbitration pursuant to clause Article 52 of the Conditions of Contract which reads:

"ARTICLE 52. DISPUTE RESOLUTION

52.1 In the event of a DISPUTE and unless otherwise stated in the SPECIAL CONDITIONS, a Party wishing to initiate the process set out in this ARTICLE 52 in respect of that DISPUTE must deliver a written notice to the other Party that identifies the DISPUTE (a "NOTICE OF DISPUTE").

52.2 If the Parties meet to attempt to resolve the DISPUTE, in whole or in part:

(a) unless otherwise agreed in writing, all communications at or relating to the meeting are without prejudice;

(b) each Party must send a representative to the meeting with authority to resolve the DISPUTE; and

(c) any agreement reached at the meeting must be in writing and signed by the authorised representative of each Party.

52.3 If a DISPUTE has not been resolved within thirty (30) calendar days after the relevant NOTICE OF DISPUTE was delivered, whether or not without prejudice meeting occurred, then either Party may by notice refer the DISPUTE to arbitration under the UNCITRAL Arbitration Rules (the "RULES") in force from time to time.

..."

[13] The Plaintiffs however opposed the Application on two distinct grounds. Firstly, the Plaintiffs contended that the Arbitration Agreement is null and void, inoperative or incapable of performance because:

(i) Article 52 of the Conditions of Contract is optional and not mandatory;

(ii) There is another conflicting dispute resolution clause in a document entitled Form of Direct Agreement which formed part of the Contract that provides as follows:

"18. GOVERNING LAW AND JURISDICTION

18.1 ...

18.2 Jurisdiction

(a) The Courts of England have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this agreement or its subject matter, negotiation, validity, termination or enforceability (including any non contractual dispute or claim) (a "DISPUTE").

(b) The Parties agree that the Courts of England are the most appropriate and convenient courts to settles DISPUTES and accordingly no party will argue to the contrary.

(c) This clause 18.2 is for the benefit of the FINANCE PARTIES only. As a result, no FINANCE PARTY shall be prevented from initiating or pursuing proceedings relating to a DISPUTE in any other courts with jurisdiction. To the extent allowed by law, the FINANCE PARTIES may initiate or pursue concurrent proceedings in any number of jurisdictions irrespective of whether proceedings have already been initiated by any party in England."; and

(iii) s. 7C of the Petroleum Development Act 1974 conferred jurisdiction upon the Sessions Court to try the dispute.

Further or alternatively, the Plaintiffs' secondly contended that the Defendant's affidavits did not disclose the dispute which has arisen under the Contract, hence the dispute has not been ascertained.

[14] It is provided in s. 10 of the Arbitration Act 2005 as follows:

"10. Arbitration agreement and substantive claim before court

(1) 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.

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.

(2A) Where admiralty proceedings are stayed pursuant to subsection (1), the court granting the stay may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest-

(a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute; or

(b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

(2B) Subject to any rules of court and to any necessary modifications, the same law and practice shall apply in relation to property retained in pursuance of an order under subsection (2A) as would apply if it were held for the purposes of proceedings in the court making the order.

(2C) For the purpose of this section, admiralty proceedings refer to admiralty proceedings under Order 70 of the Rules of the High Court 1980 and proceedings commenced pursuant to paragraph 24(b) of the Courts of Judicature Act 1964.

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

(4) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia."

[15] In the Federal Court case of ***Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd*** **[2016] 5 MLJ 417**, Ramly Ali FCJ held as follows:

"[32] The clear effect of the present s. 10(1) of the 2005 Act is to render a stay mandatory if the court finds that all the relevant requirements have been fulfilled; while under s. 6 of the repealed 1952 Act, the court had a discretion whether to order a stay or otherwise.

[33] What the court needs to consider in determining whether to grant a stay order under the present s. 10(1) (after the 2011 Amendment) is whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed. The court is no longer required to delve into the details of the dispute or difference. (see TNB Fuel Services Sdn Bhd (supra)). In fact the question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under s. 10(1). It is an issue to be decided by the arbitral tribunal.

...

[38] The court must acknowledge the competency of an arbitral tribunal to decide on its own jurisdiction without interference. The intention of Parliament is clear. Reading ss. 8,10 and18 together would indicate that Parliament has given the arbitral tribunal much wider jurisdiction and powers; and such powers extend to cases where even its own jurisdiction or competence or the scope of its authority, or the existence or validity of the arbitration agreement or clause, is challenged. To comply with the requirements of s. 10(1) the court should restrict its enquiry only to the issue of whether there is in existence a binding arbitration agreement or clause between the parties and whether the arbitration agreement or clause is null and void, inoperative or incapable of being performed. If the court is satisfied that the arbitration agreement or clause does not fall into any of these exceptions, it must order a stay of proceedings and refer the matter to arbitration."

[16] Moreover in the case of ***FAMG Idaman Resources v Jasmadu Sdn Bhd*** **[2019] 9 CLJ 763**, Lee Swee Seng J (now JCA) held as follows:

"[20] The mandatory nature of the new section 10 of the AA 2005 had been highlighted in a number of cases. The current position is that once there is an arbitration agreement and that the party applying for stay has not taken any other steps in the proceedings, a stay is mandatory and the Court shall grant a stay. It is otherwise if it can be shown that the arbitration agreement is null and void, inoperative or incapable of being performed. Here it is not in dispute that there is an arbitration agreement and that the Defendant had not taken other steps in the proceedings other than entering an appearance.

[21] Whilst under the old Arbitration Act 1952 ("AA 1952") the word used was "may", under the new Arbitration Act 2005 the word used is now "shall", signifying a clear shift towards referring such a matter to arbitration and indeed making it mandatory as opposed to the old Arbitration Act 1952 where the discretion is reposed with the Court on whether or not to grant stay..."

[17] Upon my perusal of the Contract, I find that it is plainly stated as follows in the Letter of Award:

"10.0 DISPUTES, assignment, governing law

10.1 The parties shall comply with ARTICLE 52 of the CONDITIONS OF CONTRACT in relation to any DISPUTE arising out of or in connection with this LOA (and for this purpose, references in ARTICLE 52 and in the definition of DISPUTE in the CONDITIONS OF CONTRACT to "CONTRACT" shall be read as "LETTER OF AWARD")

10.2 ...

10.3 This LOA and any DISPUTE or CLAIM arising out of or in connection with it shall be governed by and construed in accordance with the laws of Malaysia.

10.4 This LOA supersedes any previous instructions, correspondence, or other discussions between OWNER and PACKAGE CONTRACTOR in relation to the CONTRACT and, pending execution of the CONTRACT, represents the entire agreement between OWNER and PACKAGE CONTRACTOR in relation to the CONTRACT and can only be varied in writing by duly authorized representatives of both parties."

[18] In ***Thien Seng Chan Sdn Bhd v Teguh Wiramas Sdn Bhd & Anor*** **[2017] 1 LNS 1066**, Lee Swee Seng J (now JCA) held as follows:

"[38] The Plaintiff did not dispute the existence of the arbitration clause in the Conditions of Contract. Their only complaint is that the Conditions of Contract was not signed and so the arbitration agreement therein could not be incorporated into the Letter of Award which is the agreement between the parties.

...

"[45] There is no conflict between the Letter of Award and the CIDB Conditions of Contract. The latter supplements the former and compliments it. The fact there is no specific reference in the Letter of Award is not a bar to incorporating the arbitration agreement in another document by reference. The Federal Court in Ajwa for Food Industries Co 's case (supra) confronted this complain as follows:

"[26] Section 9(5) of the Act therefore clarifies that the applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration made 'by reference'. Section 9(5) of the Act in our view addresses the situation where the parties, instead of including an arbitration clause in their agreement, include a reference to a document containing an arbitration agreement or clause. It also confirms that an arbitration agreement may be formed in that manner provided, firstly, that the agreement in which the reference is found meets the writing requirement and secondly, that the reference is such as to make that clause part of the agreement. ***The document referred to need not to be signed by the parties to the contract*** *(see the case of Astel-Peiniger Joint Venture v. Amos Engineering & Heavy Industries Co Ltd [1994] 3 HKC 328). We are of the view that* ***the mere fact the arbitration clause is not referred to in the contract and that there is a mere reference to standard conditions which was neither accepted nor signed, is not sufficient to exclude the existence of the valid***

arbitration clause. There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required. *" (emphasis added)*

[46] It is clear in this case that parties had by both contract and conduct applied the terms in the Letter of Award together with the CIDB Conditions of Contract when progress claims and Interim Certificates No. 1 to 13 were issued with the Certificate of Practical Completion being finally issued. The provision in the CIDB Conditions of Contract governing Interim Certificates is Clause 42.2 on Valuation and Interim Certificates. As for Certificate of Practical Completion, that is provided for in Clause 20.2. The Plaintiff is claiming for LAD and that is governed by Clause 26.2 under Damages for Non-Completion.

[47] It is too late in the day for the Plaintiff to now contend that the CIDB Conditions of Contract does not apply and that only the Letter of Award applies.

[48] Clause 15.0 of the Letter of Award clearly refers to the Contract Documents which comprised of the Conditions of Contract, among others."

[19] It is therefore crystal clear to me that there is a governing arbitration agreement between the parties in terms of Article 52 of the Conditions of Contract as alluded to by the Defendant in paragraph [12] above.

[20] The cross contention of the Plaintiffs that there is a conflicting dispute resolution/jurisdiction provision in the Contract is in my view misconceived. This is because the clause alluded to by the Plaintiffs in paragraph 13(ii) above is meant for any direct contract to be executed between the Plaintiffs and financial lenders as required by the Defendant, if any. There is no evidence of any such direct contract in place.

[21] Consequently, there is no conflict of dispute resolution provisions in the Contract contrary to that as advanced by the Plaintiffs.

[22] As to s. 7C of the Petroleum Development Act 1974 relied upon by the Plaintiffs, it reads as follows:

"Notwithstanding anything contained in any other written law to the contrary, a Sessions Court shall have jurisdiction to try any offence under this Act or any regulations made thereunder and on conviction to impose the full penalty therefor."

[23] In my view, the Plaintiffs' reliance on s. 7C of the Petroluem Development Act 1974 is similarly misconceived because the Sessions Court has been statutorily clothed therein to specifically try criminal offences under the statute or subsidiary legislation made thereunder but not civil or commercial matters such as the dispute here.

[24] In respect of the Plaintiffs' contention that the dispute resolution via arbitration as stipulated in Article 52 of the Conditions of Contract is only optional but not imperative, the Plaintiffs primarily zeroed in on the word 'may' and relied on the Court of Appeal case of ***Lembaga Pelabuhan Kelang v Kuala Dimensi Sdn Bhd*** **[2011] 2 MLJ 629** where Low Hop Bing JCA held as follows:

"[28] The instant appeals demonstrate the immense importance of drafting agreements and supplemental agreements generally, and arbitration and/or jurisdiction clauses specifically in order to reflect the true intention of the parties. As alluded to above, the relevant clauses to be construed in these appeals are different from those which had been construed in the above categories of authorities.

...

[30] In addition, unlike the peremptory word "shall", the permissive word "may" used in the arbitration clause ie, cl. 11.1 of DA1 is capable of readily abandoning the discretion to refer to arbitration, and opting for litigation instead, as expressed and contractually agreed by the parties in the supplemental agreements..."

[25] Nonetheless, this is a question of construction which must be undertaken contextually. In ***Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd*** **(supra)**, Ramly Ali FCJ further held as follows:

"[70] As stated earlier, an arbitration clause, like any other written agreement, must be construed according to its language and in the light of the circumstances in which it is made. In this regard Viscount Simon LC in Heyman v Darwins (supra) said at p. 360 of the report:

The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (a) what is the dispute and (b) what disputes the arbitration clause covers."

[26] In ***Maya Maju (M) Sdn Bhd v Putrajaya Homes Sdn Bhd*** **[2018] MLJU 1629**, Lee Swee Seng J (now JCA) held as follows in relation to an arbitration agreement of similar nature:

"[56] It is important at this stage to ask what does the auxiliary verb "may" qualify. Here it qualifies the options of either not proceeding further after the E.R.'s decision or no decision from him or to proceed further. If the Plaintiff Contractor chooses to proceed further he has contractually committed himself to arbitration for there is no indication that he may refer the dispute to litigation.

[57] Indeed the whole of the Condition is entitled "Arbitration." It is not a contrast between 2 options i.e. arbitration or litigation. It is a contrast between requiring reference to arbitration or not to require such a reference.

[58] To compel him to refer the dispute to arbitration with the use of the word "shall" rather than "may" for example, would constrain him to proceed further after either the E.R. has made a decision or after he has not made a decision within the time frame. As stated the Contractor may want to proceed no further because he could live with the decision for the time being.

[59] In as much as the word "shall" may at times convey a directional rather than a mandatory requirement, likewise the word "may" depending on the context may also denote a mandatory requirement rather than a directional one when the option is exercised. See the case of Wasim Beg v. State of Uttar Pradesh AIR 1998 SC 1291 and Re Fettel (1952) 52 SR (NSW) 221.

...

[62] I agree with learned counsel for the Defendant that in the event the Plaintiff does not want to resolve the matter in Arbitration, the Plaintiff may choose to let the matter end there and then. It does not in any event, confers a discretionary right for the Plaintiff to either litigate or arbitrate the matter."

See also ***Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd*** **[2014] WASC 10**.

[27] I share the views of Justice Lee and find that the word 'may' as used in Article 52.3 of the Conditions of Contract here is also in the context of an option of either to proceed to arbitration or to proceed no further after the meeting held pursuant to Article 52.2 of the same is exhausted. It is not an option of either to arbitrate or litigate the disputes as so interpreted by the Plaintiffs.

[28] In the premises, I find and hold that the Plaintiffs' contention that arbitration is non mandatory is misconceived too.

[29] Finally, the Plaintiffs' contended that the Defendant did not disclose the dispute which has arisen under the Contract in its affidavits and there is hence no ascertainable dispute for the action to be stayed.

[30] Again in the Federal Court case of ***Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd*** **(supra)**, Ramly Ali FCJ also held as follows:

"[71] The answer as to what the dispute is all about has to be gathered from the affidavits filed in the application for stay, from the correspondence before the writ as exhibited in those affidavits and from the endorsement on the writ itself."

[31] It is therefore plain that the dispute need not necessarily be ascertained from the Defendant's affidavits only but also from the endorsement on the Plaintiffs' writ. This will include the contents of the statement of claim.

[32] Upon my perusal of the statement of claim, the Plaintiffs have alleged that the Defendant breached the contract for not making payments under the Contract as well as wrongfully terminated the Contract. These must be the disputes between the parties as a matter of inference.

[33] In ***Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd*** **[1986] 1 MLJ 177**, George J (later JCA) held as follows:

"... Where a claim is admitted it does not call for a settlement by arbitration. All that is called for is for payment of the admitted amount which can be by an action in the Courts as has been done in the instant case."

[34] The Defendant's actions did not indicate that the Defendant admitted to the Plaintiffs' claim. Rather, it is clear that the Defendant rejected the Plaintiffs' claim. This can be gleaned from the correspondences of the parties' solicitors exchanged between 22 August 2019 and 7 November 2019 which are exhibited in the Defendant's second affidavit in support. The disputes between them including brief particulars thereof are ascertained therefrom.

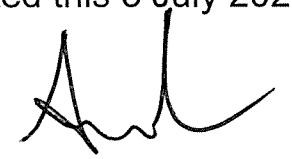
[35] Premised on the same, the Plaintiffs' contention is also flawed.

[36] I am therefore satisfied that the Defendant has made out a meritorious application under s. 10 of the Arbitration Act 2005.

Conclusion

[37] It is for the foregoing reasons that I allowed the Application as so ordered.

Dated this 3 July 2020



LIM CHONG FONG

JUDGE

HIGH COURT KUALA LUMPUR

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