



IN THE HIGH COURT OF MALAYA AT SHAH ALAM

IN THE STATE OF SELANGOR DARUL EHSAN

[CIVIL SUIT NO: 22NCVC -128-03/2016]

BETWEEN

**SHANGHAI ALLGREEN ENVIRONMENTAL
ENGINEERING CO. LTD**

... PLAINTIFF

AND

SOUTH PACIFIC CHEMICAL INDUSTRIES SDN BHD

... DEFENDANT

DECISION

A. INTRODUCTION

[1] This is a Notice of Application (Enclosure 4) by the Defendant to stay all further proceedings for the dispute to be referred to arbitration under Section 10 (1) of the Arbitration Act 2005. The stay application is premised on Clause 5.12 of the “Engineering, Supply of Process Equipment, Valves, Instruments & Technical Services Contract of a 500 MTPD Sulphuric Acid Plant” Agreement dated 27.9.2010 between the Plaintiff and the Defendant.

[2] The Clause 5.12 of the Agreement provides:

“In the event of any dispute or disagreement (“dispute”) arising out of or in connection with or in relation this Contract, the parties shall make every reasonable effort to



agree amicably upon a reasonable solution. Failing a negotiated settlement within 30 days from the commencement of the parties' negotiation/discussion, either party may refer such dispute to arbitration."

[3] While the Clause 5.12 was not disputed by the parties, the Plaintiff objects to the Stay Application and avers that the Court have jurisdiction to hear and dispose of this action since the Defendant by the letter dated 9.12.2014 has effectively, by its own conduct, abandoned the said arbitration clause and is now *estopped* from relying the same in this Application.

B. FACTS

[4] The Plaintiff's claim against the Defendant is for money due and owing in respect of work done and services rendered pursuant to an Agreement dated 27.9.2010 a Supplemental Agreement dated 23.2.2011 and another Supplemental Agreement dated 10.8.2012.

[5] The Defendant disputed the claim on the ground that the Plaintiff has breached its warranties and undertakings in that the Plant and the equipment supplied and/or constructed by the Plaintiff are defective, that there was no Provisional Acceptance Certificate issued due to the results of the Performance Tests being not acceptable to the Defendant. Further, the Plaintiff failed, refused and/or neglected to rectify all defects, deficiency or unconformity notified by the Defendant to the Defendant's satisfaction.

[6] The Defendant also refutes the claim on the grounds that the Plaintiff is liable to pay liquidated damages to the Defendant as the Plant failed to meet the contractual performance guarantees. There was also no Final Acceptance Certificate issued as the Plaintiff did not rectify all defects, deficiency or unconformity. As such, the



Plaintiff in turn had also caused the Defendant to suffer loss and damage due to the breakdown in the operation of the Plant and is entitled to deduct the liquidated damages from the Revised Total Contract Price.

C. GROUNDS OF APPLICATION

[7] The Defendant submitted that it had fulfilled Section 10 (1) of the Arbitration Act since the Plaintiff has expressly admitted the existence of disputes pertaining to the Agreements and the existence of the Arbitration Clause. The Defendant had agreed amicably with the Plaintiff upon a reasonable solution for the disputes over a period of more than 1 year but without any success. The Defendant has also made the application in Enclosure 4 before taking any other steps in the proceedings. No defence have been filed, only a Memorandum of Appearance.

[8] The Defendant also submitted that the Arbitration Clause i.e. Section 5.12 of the Main Agreement is neither null and void, in operative nor incapable of being performed because “the rules and institution as set out in that Section are not in existence in Malaysia. The main intention of the Arbitration Clause is for disputes to be determined by arbitration in Malaysia. As there are no “Rules of the Malaysia International Arbitration Centre” (MIAC) currently in force, this requirement is simply not applicable. The Defendant submitted that it would be wrong to use the phrase “the Malaysia International Arbitration Centre” to frustrate the parties’ intention for the arbitration to be held in accordance with the rules of the international arbitration centre of Malaysia, which is called Kuala Lumpur Regional Centre for Arbitration (KLRCA).

[9] The Defendant submitted that the use of the word “may” instead of “shall” in an arbitration agreement has been construed to mean that



when a dispute arises, a party is entitled to exercise its discretion to refer the dispute to arbitration and once he has done so, it is mandatory for the dispute to be determined by arbitration. On the other hand, if both parties agree not to refer the dispute to arbitration, the arbitration agreement is not mandatory.

[10] There is nothing unconscionable for the Defendant to reassert its contractual rights based on the Arbitration Clause to arbitrate the disputes by letter dated 11-11-2015. The doctrine of *estoppel* based on the letter dated 9.12.2014 is without merits and not applicable. In fact the Defendant did not obtain any advantage from the letter dated 9-12-2014 because at that time, the Plaintiff was still insisting on the disputes being determined by arbitration *albeit* in a non-existent arbitration centre.

D. GROUNDS OF OBJECTION

[11] The Plaintiff submitted that the Court have jurisdiction to hear and dispose of this action and that it is the onus on the Defendant to show that it falls within the terms of the arbitration agreement. The Defendant, by its own conduct, abandoned the said arbitration clause and is now *estopped* from rely the same in the Stay Application. Based on the letter dated 9.12.2014, the Defendant has already taken the stand to submit the disputes between parties to the jurisdiction of Malaysian courts instead of insisting to refer the disputes to arbitration. There was no reply to the letter because the Plaintiff has never agreed to submit the disputes to KLRCA and as such, the parties are “agreeable to have the dispute heard at the Malaysian courts” The Defendant should not be allowed to reassert its rights to go for arbitration since it has elected to submit to the jurisdictions of the Malaysian courts.

[12] The Plaintiff submits that the Clause 5.12.2 (a) of the Agreement states that the arbitration shall be held in Malaysia in accordance with the MIAC Rules for the time being in force, which rules are deemed to be incorporated by reference to this section. The Clause 5.12.2 (b) has taken out parties' right to choose their own arbitrator and provides for as the arbitration tribunal shall be presided by one arbitrator appointed by the chairman of the MIAC. Since the party that shall appoint the arbitration is not available, it falls under the category of "incapable of being performed" where the party to appoint the arbitrator is not in existence / not available, the arbitration agreement or clause is incapable of being performed as there is no alternative mechanism for such appointment of arbitrator.

E. FINDING OF THE COURT

[13] The Court is mindful that under Section 10 (1) of the Arbitration Act, 2005 that it has to grant a stay save and except for the exceptions set out therein.

Section 10(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"

[14] In *Linde Gas Malaysia Sdn Bhd v. Pasifik Utama Sdn Bhd & Anor* [2011] 5 CLJ 40, the Court of Appeal states that:

"The power to stay court proceedings is premised on the existence of an agreement to arbitrate and the disputes therein contemplated. The exercise of such discretion is conditional

*upon the application being made before any steps are taken in that proceedings. That same position is in fact maintained in the Arbitration Act 2005 except that **the new s. 10(1) now makes it mandatory to order a stay of court proceedings upon application being made, other conditions remaining but specifically prescribed**". (emphasis is mine)*

[15] It is evident that Section 10(1) Arbitration Act, 2005 is now mandatory on the court to grant stay where the matter before it is the subject of an arbitration agreement unless the arbitration agreement is, in the words of the statute, "null and void, inoperative or incapable of being performed". Further Section 8 Arbitration Act, 2005 provides that "no court shall intervene in matters governed by this Act, except where so provided in this Act". It is clear that from the reading the Section 8 and 10 in conjunction, it is the mandatory requirement for stay of proceedings before the court where the matter is the subject of an arbitration agreement.

[16] From the letter dated 8.11.2014, the Plaintiff wrote to the Defendant and agreed that the dispute should be referred to arbitration.

"Therefore, we shall negotiate amicably first, if we fail to meet a reasonably solution then we shall submit the dispute to MIAC. SO even if we fail to negotiate, I think we shall submit the dispute to MIAC, not Kuala Lumpur Regional Centre for arbitration (KLRC)..."

[17] It was argued by the Plaintiff since the party that shall appoint the arbitration is not available, it falls under the category of "incapable of being performed" under the exception of Section 10(1) Arbitration Act 2005. In relation to the meaning of the phrase "incapable of being performed", the Court of Appeal referred to **JB**

Casey, International and Domestic Commercial Arbitration (Carswell, 1993) at pp. 4-14 which stated:

“According to Mustill & Boyd, “incapable of being performed” connotes something more than mere difficulty or inconvenience or delay in performing the arbitration. For example, it is not sufficient to say it is incapable of being performed where one party could not or would not come up with the deposit necessary to pay the arbitrator. The incapacity must come from something beyond the control of the parties; for example, where the arbitration agreement specifies a particular arbitrator must hear the matter, but he or she is not available”.

[18] However in the present case, I am of the considered view that it does not fall within the ambit of “incapable of being performed” since section 10(1) and terms of this arbitration agreement requires the parties to refer their disputes to arbitration; and not to arbitrators. It was not disputed that the intended MIAC are not in existence in Malaysia and the only applicable rules for arbitration in Malaysia at all material time is KLRCA In fact in Malaysia, the only arbitration centre is none other than the KLRCA. Thus, the incapacity is not something beyond the control of the parties because that misnaming of the arbitration institution or arbitral rules is not a proper ground for finding that the arbitration agreement is incapable of being performed. Further, the non-existence of the stipulated “*Rules of the Malaysia International Arbitration Centre*” ... *for the time being in force*” for the arbitration does not render the arbitration clause null and void, inoperative or incapable of being performed. In any case, having regard to the whole agreement in which this arbitration agreement is housed, it is quite apparent from the beginning that the parties had intended to resolve their dispute or difference through a process other than recourse to the court.



[19] I also noted the Plaintiff had contended that the Defendant is *estopped* from referring the dispute to arbitration since the Defendant has taken a clear and unequivocal position *via* the letter dated 9.12.2014 from the Defendant's former solicitors, Messrs Arianti Dipendra to the Plaintiff's former solicitors:

“In the event your client (the Plaintiff) is not agreeable to refer the dispute to the KLRCA pursuant to the Contract, our client (the Defendant) will then have the dispute determined at the Malaysian civil courts under the applicable laws of Malaysia pursuant to Clause 5.12.13 of the Contract. In the circumstances, please revert to us in respect of your client (the Plaintiff)’s agreement to refer this to arbitration within seven (7) days of hereof, failing which we shall deem that your client (the Plaintiff) is agreeable to have the dispute heard at the Malaysian courts.”

[20] In this present case, I am unable to accept the Plaintiff's contention as there was no reply to the letter dated 9.12.2014. The Plaintiff's silence cannot be deemed as acceptance to the Defendant's offer since prior to this letter, the Plaintiff's conduct had demonstrated that it had insisted and intended to refer the dispute to arbitration. The deeming provision in the said letter cannot be taken as consent to abandon the arbitration agreement and have the dispute be determined by the Court.

[21] Having said the above, I find that the disputes are within the scope of the arbitration agreement and it is fit and proper matters to be referred to Arbitration centre in Malaysia which is none other the KLRCA. Order in term for prayer [1] and [2] of the Defendant's Application at Enclosure 4. Costs RM3000.00.



[2016] 1 LNS 1263

Legal Network Series

(ROZANA ALI YUSOFF)
JUDICIAL COMMISSIONER
SHAH ALAM HIGH COURT

Dated: 15 SEPTEMBER 2016

COUNSEL:

For the plaintiff - T/n Douglas Yee

No. 31, 1st floor

Jalan 21/1

46300 Petaling Jaya

For the defendant - T/n Cheah Teh & Su

L-3-1, No. 2 Jalan Solaris

Solaris Mont Kiara

50480 Kuala Lumpur

Case(s) referred to:

Linde Gas Malaysia Sdn Bhd v. Pasifik Utama Sdn Bhd & Anor
[2011] 5 CLJ 40

Legislation referred to:

Arbitration Act, 2005, ss. 8, 10 (1)